

VERMONT LABOR RELATIONS BOARD

CITY OF RUTLAND)	
)	
and)	DOCKET NO. 14-41
)	
AFSCME COUNCIL 93, LOCAL 1201)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 6, 2014, the City of Rutland (“City”) filed a unit clarification petition to exclude the payroll administrator from the bargaining unit represented by AFSCME Council 93, Local 1201 (“Union”) as a confidential employee. The Union filed a response on May 22, 2014, in opposition to the petition, contending that the payroll administrator is not a confidential employee.

The Labor Relations Board held a hearing on July 24, 2014, in the Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Alan Willard and Edward Clark. Rutland City Attorney Charles Romeo represented the City. Staff Representative Michael Blair represented the Union. The Union and the City filed post-hearing briefs on August 7 and 8, 2014, respectively.

FINDINGS OF FACT

1. The City has approximately 200 employees. The Labor Relations Board issued an order on November 1, 1996, certifying the Union as the exclusive bargaining representative of certain City Hall employees and Department of Public Works Engineering Division employees, and adding these employees to the existing bargaining unit of Department of Public Works employees represented by the Union. Included among the employees added to the unit were account clerks working in the Treasurer’s

Office. The account clerks have been covered by the collective bargaining agreements negotiated by the Union and Employer since then, including the current agreement in effect from July 1, 2013 to June 30, 2016 (City Exhibit 1).

2. In addition to the bargaining unit of City Hall and Department of Public Works employees, there are two other bargaining units of City employees represented by two other unions. Employees of the police department are represented by a union. Fire fighters are included in a third bargaining unit represented by another union.

3. Wendy Wilton was first elected City Treasurer in 2007. She has continued to serve as Treasurer since then. In addition to the Treasurer, the Treasurer's Office also has included at all times relevant the Assistant Treasurer, account clerks and a part-time auditor.

4. Until the spring of 2014, there were four account clerks in the Treasurer's Office who were in the bargaining unit represented by the Union. Although the account clerks were cross-trained to perform various duties of the office, each of them was assigned duties in one of the following specific areas: 1) payroll, 2) accounts payable, 3) accounts receivable, and 4) tax collection and utility billing collection. Also, clerks that have been cross-trained to perform payroll functions have not been cross-trained in accounts payable duties. Conversely, clerks cross-trained in accounts payable functions are not cross-trained to perform payroll duties. The job description for the account clerks lists the following "specific duties and responsibilities":

Maintenance and operation of programs and procedures associated with the collection of all city taxes and fees, including, but not limited to, the maintenance of the business vendor list, posting payments, updating information, assigning account numbers, tracking and collecting delinquencies. This includes accurate reporting and working with other departments as necessary.

Ability to perform all payroll procedures including FICA, Federal and Vermont taxes, employee deductions for pension, insurance, tax shelters and other miscellaneous deductions. Assist employees with paperwork for benefits and wage information. Assist with the reconciliation of bank statements associated with payroll as required by the City Treasurer.

Responsible for the processing of accounts payable, including data entry, processing and distribution of checks and associated budget and financial reports as required.

Assist in the overall operation of data processing, including but not limited to the processing of tax bills, water meter bills, general bills, grand lists, 1099's, W-2's, rooms & meals tax monthly, quarterly reports and year-end reports.

Assist Treasurer, Assistant Treasurer and the IT/HR person in overall operation of the Treasurer's office, as required by the City Treasurer and his/her designee.

(Union Exhibit 1)

5. The City uses the NEMRC accounting system. NEMRC is an integrated accounting system used by many Vermont municipalities. NEMRC contains modules that perform specific accounting functions. The City uses modules for Payroll, Accounts Payable, Accounts Receivable, and the General Ledger. NEMRC representatives provide system maintenance, upgrade implementation, training, and custom program development upon client request.

6. Wilton has implemented a system of internal controls which regulates the levels at which employees have the ability to access, edit and report financial and employee data within the NEMRC modules and employee maintenance screen. The internal controls are designed to safeguard against theft and fraud. The City experienced problems with internal controls before Wilton became Treasurer. Wilton determines the levels at which employees have the ability to access, edit and report data in the NEMRC system.

7. Wilton authorizes the City payroll to be run but is otherwise not directly involved in its administration because it is a conflict under the City's internal control policies for the person who authorizes payroll to also input weekly data and maintain the employee files in the system. Wilton also administers access to the City's NEMRC system. She restricts access of employees to portions of the system, including restricting her own access, due to internal control policies.

8. In the spring of 2014, the account clerk who was assigned payroll duties took another job with the City Clerk. Wilton decided to not fill the vacant position in the Treasurer's Office, but instead to create a new 30 hour per week Payroll Administrator position and a 20 hour per week counter clerk position. The City prepared a job description for the Payroll Administrator position which provides in pertinent part:

This position will support the activities of the Treasurer's office as the primary payroll administrator processing all aspects of payroll and tax compliance related to payroll. The Payroll Administrator will also assist Human Resources, the Mayor's Office and Treasurer's Office.

Primary Duties

- Ability to process weekly payroll accurately including data entry from timesheets, ensuring timesheets are correctly authorized, prepare information for department reviews, print checks and advices, upload ACH data for payments of wages and payroll taxes, and printing of reports associated with each payroll run.
- Ensuring documents are correctly executed and authorized for new employee entry into the payroll system or for changes to existing employee's rates of pay, longevity, health care, pension, and other benefit contributions, accrual adjustments and other deductions.
- Managing updates to the payroll system when global changes occur such as wage or contribution changes/increases by contract or Board decisions.
- Tax reporting: manage the payroll tax payment and reporting functions for weekly, monthly, quarterly and annual W-2 reporting on time and obtain signatures of the Treasurer on 941 and state tax returns. Execute quarterly reporting for VMERS. Manage archiving and storage of payroll records according to state laws.
- Maintain the City census for the pension for both the School and the City for preparation of the annual valuation at Jan. 1 each year and update

pension files for participants of the City pension. Assist pension participants with completion of pension forms at termination or retirement and obtain the Treasurer's signature for processing.

- Works with the departments to facilitate final payouts of accruals for terminations and retirees.
- Responds to all incoming employment and payroll verification requests.
- Responds to inquiries from employees and department supervisors/managers regarding payroll questions.
- Create confidential reports for management including information that may be used to develop benefit strategies, data points used in collective bargaining negotiations and/or annual salaries for the City annual report.

Other Duties:

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- Assist the Mayor (and departments), Treasurer, and Human Resources Director in their duties . . . regarding payroll information. May assist Human Resources with benefits reconciliation & clerical administration.

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Educational Requirements: BA, preferably in business or accounting, or 3 years of payroll or AP experience. May be required to attend training and workshops outside the office to stay current on compliance issues.

Other Required Skills: Ability to work as a team member to solve payroll & payroll system issues is a must. Previous experience with an HRIS system or payroll/timekeeping software required. The Payroll Administrator will act as a lead on advancing the technology used in the payroll process. Must have project management skills. . .

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(City Exhibits 3, 4)

9. The City has not hired a Payroll Administrator pending the outcome of this matter. One of the three remaining account clerks performs the payroll functions for the City. The payroll account clerk has unlimited access to employee data including rates of pay, time accruals, benefits deductions, insurance information, wage garnishments and retirement information. The payroll account clerk has regular access to this information and can modify entries through the NEMRC payroll module and employee maintenance screen. These duties will be assumed by the Payroll Administrator when that position is filled.

10. Due to internal controls implemented within the Treasurer's Office, only Wilton and the payroll account clerk have access to the employee maintenance screen within the payroll module. Wilton's access is limited in that she does not have access authority to change information on the employee maintenance screen.

11. The collective bargaining agreements covering employees in three separate bargaining units have become increasingly complex. There are more than one hundred pay types in the City as a result of differences in occupations, working hours, overtime codes and other conditions of employment. These differences are embedded in the employee maintenance screen maintained by the payroll account clerk. As a result, the work of the payroll account clerk involves complex and difficult data.

12. The payroll account clerk answers employees' questions about payroll-related matters. The payroll account clerk also interacts directly with department heads to review the weekly payroll and discuss matters such as rates of pay, overtime and leave accrual. These duties will be assumed by the Payroll Administrator when that position is filled.

13. One of the primary duties in the Payroll Administrator job description is to "(c)reate confidential reports for management including information that may be used to develop benefit strategies, data points used in collective bargaining negotiations and/or annual salaries for the City annual report." The payroll account clerk is not performing these duties. The payroll account clerk is generally performing the other primary duties set forth in the Payroll Administrator job description.

14. Once the City hires a Payroll Administrator, the City anticipates that a City employee not represented by a union or a NEMRC representative will perform the duties of the Payroll Administrator as necessary in the Payroll Administrator's absence.

15. The City has had a full-time Human Resources Director, Jody Breault, since October 2013. Prior to becoming full-time, Breault performed human resources duties for the City on a part-time basis. The Human Resources Director guides and manages the overall provision of human resources services, policies and programs for the City. Breault is responsible for reviewing and making recommendations to City management for improvement of City policies, procedures and practices on human resource matters. She provides analysis and assists City management in the review, preparation and administration of the City's benefit plan offerings, compensation, benefits and staffing levels. Once Breault became full-time, she gained more input in collective bargaining negotiations engaged in by the City with the unions representing City employees, particularly with respect to wages and benefits (Union Exhibit 3).

16. Breault has access to create reports from the NEMRC payroll module with respect to employee wage and benefit information, but due to the internal controls implemented in the Treasurer's office does not have access to the detailed individual employee information entered by the payroll account clerk on the employee maintenance screen. The quality of the reports which Breault can produce also is adversely affected by not working with the payroll module on a regular basis. As a result, Breault is not able to provide complete wage and benefits calculations to City management during negotiations or the budget development process. She can develop close estimates but is hindered by not having full access to information.

17. The City Mayor is an elected official and is the chief executive officer of the City responsible for ensuring monies are appropriately collected and spent. The Mayor is charged with drafting the City budget and submitting it for approval to the Board of Aldermen which can only make cuts to the budget, not additions to it. The Mayor also is integrally involved in collective bargaining negotiations with the three unions representing City employees. The Mayor must agree to a collective bargaining agreement before it goes to the Board of Aldermen for approval. Christopher Louras has been City Mayor since 2007.

18. Mayor Louras only has access to pay and benefit information on City employees that is available to the public. He does not have access to the payroll module or the employee maintenance screen, and cannot access employee data directly. During the budget development process and collective bargaining negotiations, he bases his compensation and benefits projections on a model or theoretical employees because he does not have exact numbers based on actual employees. He can obtain only partial information on compensation and benefits from the Human Resources Director as it relates to budgeting or “what if” scenarios in negotiations due to the limitations of her access to, and work on, such information. Mayor Louras has not requested employee compensation and benefit data directly from the payroll account clerk because of a concern that it would compromise the City’s position in negotiations and during the budget development process to seek such information from an employee represented by the Union. Also, he has not requested such data directly from the Treasurer due to a concern that the Treasurer is an independent elected official who may have a different agenda and may use the data to unduly influence his collective bargaining strategy.

MAJORITY OPINION

At issue is whether the Labor Relations Board should grant the unit clarification petition filed by the City to exclude the Payroll Administrator from the bargaining unit represented by the Union as a confidential employee. Under the Municipal Employee Relations Act, individuals who meet the statutory definition of "confidential employee" are ineligible to be included in a bargaining unit. The term "confidential employee" is defined as "an employee whose responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters would make membership in or representation by an employee organization incompatible with . . . official duties". 21 V.S.A. §1722(6).

A finding that a person assists or acts in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations is a necessary element under the labor nexus rule if an employee is to be classified as a confidential employee. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). The essential issue is whether challenged employees have such a close relation to the employer's management of labor relations that the employer would be prejudiced by their inclusion in a bargaining unit with other employees. Harwood Union High School District and Harwood Education Association, 172 Vt. 167, 176 (2001). Employers are entitled to rely upon employees who are not subject to divided loyalties, and employees should not be in a position where they must choose between their obligations to a union and to their employer. Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 68 (1982).

Employees who do not have access to confidential information as part of their regular duties do not meet these tests. Employees whose duties require only occasional access to confidential material and which could be reassigned, or employees who occasionally substitute for confidential employees, do not meet the definition of confidential employee. Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). American Federation of Teachers, Local 333 and Washington Central Supervisory Union, 1 VLRB 288 (1978). Further, an employer must demonstrate not only access to confidential information, but that such access would adversely impact on the employer's conduct of its labor relations policies if employees are included in a bargaining unit. Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 78 (1989).

The City contends that the Payroll Administrator, which is an evolution of the payroll account clerk position, should be excluded from the bargaining unit as a confidential employee because of performing key human resource functions and serving in a confidential capacity to City management. The City asserts that it has avoided working directly with the payroll account clerk to date during collective bargaining negotiations and the budget development process because the account clerk is represented by the Union. The City maintains that, if the Payroll Administrator - the successor to the payroll account clerk - is excluded from the bargaining unit, the City will be able to obtain complete and accurate information on employee compensation and benefit data to assist it in collective bargaining negotiations and the budget development process.

The Union contends to the contrary that the City presented insufficient evidence warranting the removal of the payroll administration duties from the bargaining unit, and that the unit clarification petition requesting recognition of the Payroll Administrator as a confidential employee should be denied. The Union asserts that, if the City needs to get compensation and benefit data during collective bargaining negotiations, the Human Resources Director, the Treasurer or the Assistant Treasurer could access the NEMRC payroll module without compromising any confidentiality issues. The Union maintains that to the extent there are deficiencies in the quality of the information these individuals can obtain from NEMRC, this can be cured by authorizing access to NEMRC information as necessary. The Union contends that the City did not present evidence justifying denying such access on internal controls grounds. Accordingly, the Union asserts that the City has not produced evidence warranting the removal of the employee performing payroll administration duties from the bargaining unit as a confidential employee.

The Board has frequently examined for confidential status employees serving in a fiscal role, such as bookkeepers, accountants, financial analysts, payroll clerks or accounts payable clerks. In many cases, the Board has concluded that the employees were privy to confidential information as part of their regular duties, which information was not available to the public and the union, which would make membership in, or representation by, a union incompatible with their duties. United Steelworkers of America, AFL-CIO and Town of Barre, 27 VLRB 229 (2004). Colchester, *supra*. Washington South District Teachers' Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989). Orange Southwest

Supervisory Union, et al and Orange Southwest Teachers' Association, 11 VLRB 285 (1988). AFSCME Local 490 and Town of Bennington, 11 VLRB 89 (1988). Personnel Designation Dispute of Calderara, 10 VLRB 261 (1987). Vermont Federation of Teachers, AFT, AFL-CIO and Vermont State Colleges, 7 VLRB 6, 21-22 (1984). United Steelworkers of America, Local 8774 and City of Barre, 5 VLRB 3 (1982). Rutland City School Department, *supra*. However, employees with fiscal duties who need only occasional access to confidential materials, which duties can be feasibly reassigned, have been held not to be confidential employees. Village of Essex Junction and Local 1343, AFSCME, 12 VLRB 211 (1989). Colchester, *supra*. Orange Southwest, *supra*.

We are persuaded that the Payroll Administrator will be privy to confidential information as part of regular duties, which information will not be available to the public and the union, which would make membership in, or representation by, the Union incompatible with duties. The City has presented sufficient evidence for us to conclude by a preponderance of the evidence that circumstances have changed sufficiently to warrant excluding the Payroll Administrator from the bargaining unit as a confidential employee.

It is evident that the City has been hindered to some extent during collective bargaining negotiations and the budget development process by not requesting employee compensation and benefit data directly from the payroll account clerk. This has resulted from a concern that it would compromise the City's position in negotiations and during the budget development process to seek such information from an employee represented by the Union. If the Payroll Administrator - the successor to the payroll account clerk - is excluded from the bargaining unit, the City will be able to obtain complete and accurate

information on employee compensation and benefit data from the Payroll Administrator to assist it in collective bargaining negotiations and the budget development process without a concern of premature Union knowledge of confidential information. In performing such duties, the Payroll Administrator would be assisting or acting in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations. It is evident that the Payroll Administrator will act in this capacity particularly with respect to the Mayor and the Human Resources Director.

It is apparent that the Payroll Administrator will have such a close relation to the City's management of labor relations that the City would be prejudiced by the Payroll Administrator's inclusion in a bargaining unit with other employees. At present, the Human Resources Director is not able to provide complete wage and benefit calculations to City management during negotiations or the budget development process. She can develop close estimates but is hindered by not having full access to information. Similarly, the Mayor bases his compensation and benefits projections during the budget development process and collective bargaining negotiations on a model or theoretical employees because he does not have exact numbers based on actual employees. He can obtain only partial information on compensation and benefits from the Human Resources Director as it relates to budgeting or "what if" scenarios in negotiations due to the limitations of her access to, and work on, such information. It is reasonable for the City to have a confidential employee to rely on to correct these deficiencies, and the City has demonstrated it would be adversely harmed if the Payroll Administrator was not excluded from the bargaining unit as a confidential employee.

We disagree with the Union that any confidential duties which the City intends to assign to the Payroll Administrator can instead be performed by the Human Resources Director, Treasurer or Assistant Treasurer by authorizing their access to NEMRC information as necessary. It is apparent that these duties cannot be feasibly reassigned. The evidence indicates that the creation of confidential reports for management during collective bargaining negotiations or the budget development process is best performed by the employee working with the payroll module and employee maintenance screen on a regular basis. This will be the Payroll Administrator, not the other individuals identified by the Union.

Further, authorizing additional NEMRC access as necessary to these individuals would be contrary to internal controls established by the City to prevent theft and fraud. Providing for internal controls is an important and complex task. We conclude that the City has sufficiently demonstrated that reorganizing duties may significantly diminish the effectiveness of the planned internal controls.

We recognize that the Payroll Administrator position has yet to be filled and confidential duties have yet to be performed. Nonetheless, this does not preclude the granting of the City's unit clarification petition. In past cases, the Board has excluded employees from bargaining units as confidential employees even though they had yet to perform confidential duties where the Board was persuaded that the employees would be performing confidential duties on a regular basis once they engaged in full performance of their duties. Washington South District Teachers' Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989). Personnel Designation Dispute of Calderara, supra. City of Burlington and Local 1343,

AFSCME, 9 VLRB 116 (1986). The Board determined that it would be unreasonable and prejudicial to the employer to allow an employee to remain in the bargaining unit until the full performance of their duties included work of a confidential nature. Calderara, 10 VLRB at 266. In so ruling, the Board added the qualifier that a unit clarification petition could be filed if actual experience demonstrated that the employees were not performing confidential duties. Washington South, 12 VLRB at 28. Calderara, 10 VLRB at 266-67.

In sum, we conclude that the Payroll Administrator should be excluded from the bargaining unit as a confidential employee because of duties relating to collective bargaining, personnel administration and budgetary matters which would make membership in, or representation by, an employee organization incompatible with official duties. We qualify this holding with a proviso that the Union may file a unit clarification petition to place the Payroll Administrator in the bargaining unit represented by the Union, pursuant to Article 34 of Board Rules of Practice, if actual experience demonstrates that the Payroll Administrator is not performing confidential duties.

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard

DISSENTING OPINION

I disagree with my colleagues and conclude that the City has not demonstrated by a preponderance of the evidence that circumstances have changed sufficiently to warrant

excluding the Payroll Administrator from the bargaining unit as a confidential employee. The Vermont Supreme Court has indicated that much evidence must be produced to exclude an employee from a bargaining unit as a confidential employee. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). The City has not presented sufficient evidence here.

I disagree with the Majority Opinion that the confidential duties which the City intends to assign to the Payroll Administrator cannot be feasibly reassigned. The major argument made by the City in this regard is based on the new and advanced technology represented by the NEMRC system. However, the NEMRC system allows for easy generation of reports and for easy segmentation and segregation of confidential information and analysis. Given these circumstances, the City Treasurer, who has full control of the system, can with a few keystrokes provide necessary access to NEMRC to the Mayor, Assistant Treasurer and/or the Human Resources Director.

The four cross-trained Account Clerk positions in the Treasurer's Office have been part of the collective bargaining unit for 17 years. These positions have existed for seven years under the administration of the current Mayor and Treasurer. A vacancy in one of these bargaining unit positions should not allow the City to change one job title (and little else) in order to diminish the size of the unit. The job descriptions for the current and proposed position are nearly identical. The City provided no specific evidence that collective bargaining or "internal controls" have in any way been compromised by having all four Account Clerk positions in the bargaining unit during the past 17 years.

During the hearing, Treasurer Wilton indicated that she controlled access to the NEMRC system and to all its data and reports. In her words, she had “the keys to the kingdom”. Mayor Louras was asked during the hearing about his role in collective bargaining. He agreed he was “the decider”. He was asked why he simply could not go to the Treasurer to obtain reports needed for collective bargaining. He responded that the Treasurer was a very strong personality and there would be a fear that she would try to influence his collective bargaining style and strategy, and that what he would get might not be what he was asking for, but rather what others wanted him to have.

In my view, the problem of getting bad information from the Treasurer’s Office will not be solved by creating a “new” position in the Treasurer’s Office as the employee in that position will report to and be supervised by that very same Treasurer. This problem and the problem of the Mayor’s fear of not being able to resist the persuasive wiles of the Treasurer cannot be solved by eliminating the bargaining unit position in question.

I agree with the Union that the City did not present evidence justifying denying such access on internal controls grounds. The prevention of theft and fraud obviously is a worthy goal, but the City has not presented specific evidence demonstrating that this goal can only be met by its internal control policies that are presently in place. The City in my view is using technology and internal control policies as an inappropriate excuse for diminishing the bargaining unit represented by the Union.

In sum, it is apparent that any confidential duties which the City has identified for the Payroll Administrator will be provided only on an occasional basis and these duties can be feasibly reassigned. Thus, the Payroll Administrator will not be acting in a

confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations. The Payroll Administrator will not have such a close relation to the City's management of labor relations that the City would be prejudiced by this employee's inclusion in a bargaining unit with other employees.

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unit clarification petition filed by the City of Rutland is granted and the Payroll Administrator is excluded from the bargaining unit represented by AFSCME Council 93, Local 1201, as a confidential employee.

Dated this 15th day of September, 2014, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard