

VERMONT LABOR RELATIONS BOARD

LOCAL #1343, AFSCME, BURLINGTON)
AREA PUBLIC EMPLOYEES UNION)

DOCKET NO. #81-36

FINDINGS OF FACT, OPINION, AND ORDER

On July 29, 1981, Local #1343, AFSCME, Burlington Area Public Employees Union ("AFSCME") filed a unit clarification petition with the Vermont Labor Relations Board. Therein, the Union contended the merger of the non-union Sewage Disposal Department with the unionized Water Department into the Burlington Water Resources Department required the non-union positions to come under the jurisdiction of the existing bargaining unit. The City of Burlington ("City") opposed the petition.

The parties stipulated to the facts in this matter and waived an evidentiary hearing before the Board. The parties argued their respective positions orally before the full Board on November 5, 1981, at the Board hearing room in Montpelier, Vermont. William Sorrell, City Attorney, represented the City. AFSCME was represented by its President, Lindol Atkins. The parties waived the filing of briefs.

FINDINGS OF FACT

1. On August 28, 1968, the parties filed with the Board a stipulation for a consent election of collective bargaining representative for a bargaining unit consisting of custodians and the non-supervisory employees of the Water Department, Park Department, Street Department, Cemetery Department, and Traffic Commission, of the City.
2. AFSCME won the election and was certified by the Board on October 24, 1968, as the bargaining unit representative.

3. At the time of the certifying election the members of the City's Sewage Disposal Department were not included in the proposed unit and were not asked by those seeking AFSCME certification to take part in the election.

4. In 1972, all the non-managerial Library Department employees signed expression of interest cards requesting to become part of the above-mentioned bargaining unit. The City voluntarily recognized AFSCME as the exclusive bargaining agent for Library Department employees. The employees were placed in the above-mentioned bargaining unit.

5. During 1976, all civilian Police Department employees signed expression of interest cards requesting to be represented by AFSCME and thereafter the City voluntarily recognized AFSCME as the exclusive bargaining agent for such employees. The employees were placed in the above-mentioned bargaining unit.

6. From prior to 1968 through April, 1980, the Water Department was responsible for the provision of water to City residents.

7. From prior to 1968 through April, 1980, the Sewage Disposal Department was responsible for the treatment of the City's sewage.

8. Under the Burlington City Charter, each major department operates under the supervision of a Department head who is appointed by and in turn supervised by a commission.

9. From pre-1968 through April, 1980, the City's Street Commissioners served in a dual capacity as not only Street Department Commissioners but also Sewage Disposal Department Commissioners.

10. At present there are approximately 10⁴ positions within the AFSCME City bargaining unit.

11. Exclusive of the Burlington School Department, there are approximately 485 individuals employed by the City of Burlington.

12. During May, 1980, the Sewage Disposal Department was merged with the Water Department and the resulting department was named the Water Resources Department.

13. The former Board of Water Commissioners assumed the title and duties of a Board of Water Resources Commissioners.

14. The Water Resources Department operates under the direction of Superintendent James Howley. The Department is thereafter divided into a waste water division and a water division, each with its own manager. The members of the waste water division are the former employees of the Sewage Disposal Department. The members of the water division are the former employees of the Water Department (Exhibit A).

15. The merger has brought about no change in the duties or the location of performance of duties of the water and waste water division employees from the situation that existed prior to the merger.

16. Water division employees are assigned to work in 1) the meter shop where their work includes the repair and reading of water meters, 2) the filter plant which purifies water for drinking, 3) the reservoir, or 4) on the construction crew which is responsible for the laying and maintenance of water lines.

17. Waste water division employees work at either of three waste water pumping stations. They are not responsible for metering, or the laying or maintenance of sewer lines. The Street Department continues to be responsible for the laying and maintenance of sewer lines.

18. Waste water plant operators assist the Chief Operator in the daily operation and maintenance of the waste water treatment plant by performing skilled and unskilled tasks to control physical, chemical, and biological processes (Exhibit B).

19. Water plant operators are responsible for manual and technical work of ordinary difficulty and responsibility in connection with water treatment or water pumping operations (Exhibit B).

* 20. Different pay practices exist between waste water and water plant operators. Water operators, through collective bargaining, are paid the same regardless of seniority. Waste water operators are granted periodic step increases over time. Thus, more senior waste water operators are paid more than their junior counterparts. These different pay practices result in water operators being paid more than waste water operators with the same seniority for the first few years of employment. After this period, waste water operators are paid more. Because most waste water plant operators have six years or more seniority, they are paid more than water plant operators (Exhibit A).

21. Subsequent to the merger, the only times that waste water and water division employees have worked together were two less than half-day periods when two waste water division employees were assigned to help repair a pump at the reservoir.

22. The water division is a continuous operation in that plant operators are on duty 24 hours each day. Most water division employees work a regular day shift.

23. All waste water division employees work a regular day shift.

* This fact was not stipulated to, but is found by the Board based on Exhibit A submitted by the parties and the representations made by the parties at oral argument.

24. Twenty-nine employees of the water division are in the AFSOME bargaining unit.

25. Ten employees of the waste water division holding the positions of assistant mechanic, plant operator or secretary/bookkeeper are potentially eligible for membership in the AFSOME unit.

26. No employee of the waste water division has requested Lindol Atkins, Union President, to take steps to include waste water division employees in the AFSOME unit.

27. Lindol Atkins has not contacted any waste water division employees to ascertain whether there is interest in being represented by the Union.

OPINION

By filing a unit clarification petition, AFSOME has framed the issue before us as whether we should order the waste water employees into the unit without an election.

AFSOME argues the Board should place the waste water employees in the unit since the 1980 merger put the employees in the same department and under the same management as the water employees, who are now part of the bargaining unit, and because the duties of the waste water and water employees are similar.

The City argues the Board should not place the employees in the unit since they have indicated no interest in being represented by AFSOME, they have not been approached by AFSOME, and at the time the unit was formed in 1968 the waste water employees were omitted from the unit. Further, the City claims, there has been no change in duties of the waste water employees as a result of the 1980 merger, and their interchange with unit members remains extremely limited.

There is no union shop here so the waste water employees would not be required to join AFSCME, but AFSCME would be the exclusive representative of such employees if the Board placed them in the unit.

We have looked to the experience of the National Labor Relations Board in handling similar issues. The NLRB has consistently ruled in unit clarification cases that employees were entitled to a self-determination election before being added to the unit where: (1) the positions the employees held were in existence at the time the union was certified years earlier, (2) those positions were omitted from the unit at the time of certification, (3) contracts negotiated since certification excluded those positions, and (4) no question as to their inclusion in the unit was raised until years after certification. Sterilon Corp., LRRM 1216 (1964). Lufkin Foundry and Machine Co., 70 LRRM 1262 (1969). Desert Palace, Inc., 85 LRRM 1594 (1974). Apparently, the National Board, in essence, regards such "clarification" requests to be improper attempts to expand units by Board order; a result not obtainable by election years earlier.

In some cases, however, where there is an indication that harmonious labor relations can only be achieved by forced accretions to the unit, the National Board has ordered employees into a unit without an election. In Public Service Co., 77 LRRM 1129 (1971), the employer, a public utility company, formed a new operational district by combining two existing districts, each with five employees. One of the districts was represented by a union, the other was unrepresented. The two previously-existing operations were put under one roof when the new district was formed. The board found that since all the employees in the new district

had the same job classifications, skills, location, and working conditions, the previously-unrepresented employees were properly accreted to the existing unit. Undoubtedly, the foreseeable consequences of having non-unit members working side by side with unit members with different pay scales, grievance and other rights, convinced the board to sacrifice the free choice rights of some people in order to promote labor harmony.

In cases like the one before us, the NLRB has been principally concerned with balancing management's rights, the right and duties of unions to achieve gains for its members, and the self-determination rights of employees. We too are concerned with these factors, but must also protect the procedures for orderly bargaining in the public sector to ensure the continuity of public services. Orderly bargaining is promoted, we believe, by avoiding fragmented units. See Champlain Valley, 3 VLRB 426 (1980).

In view of the national precedent and what we regard as our unique task, the following considerations are relevant here:

- 1) The employees of the waste water division have never been given an opportunity to vote on whether they wish to be represented by the union despite the existence of their positions since prior to union certification in 1968.
- 2) There is no historical evidence of labor difficulties arising between the waste water employees and the City.
- 3) There is no evidence the historical exclusion of waste water employees from the bargaining unit has impacted adversely on management efficiency or collective bargaining between the City and AFSCME.

4) The 1980 merger created a difference in the form of management but not its substance. The waste water and water employees continue to operate in separate divisions from each other under different managers. It is true they now have a common superintendent whereas previously they had separate superintendents. However, there is no evidence to indicate this more centralized control has substantially affected their working conditions or working relationships.

5) The 1980 merger has resulted in no greater degree of interchange between the waste water and water employees; they continue to work in different locations.

6) The evidence presented to us on job similarity of waste water and water employees is insufficient for us to make a determination whether job duties are similar. We do recognize the employees are working at generally the same economic level, and their jobs require comparable education and background. In any event, job similarity is not an important factor here since our principal concern is orderly public sector labor relations.

7) The petition before us has developed because of AFSCME's desire to gain an advantage for water employees in job openings. If waste water employees were put in the bargaining unit and included under the collective bargaining agreement, water employees apparently would have preferred-status in bidding for job openings in the waste water division which they do not have now.

Given these considerations, the democratic rights of the waste water employees to determine whether they wish to be represented by AFSCME outweigh any negative effect of leaving them out of the unit.

Their historical exclusion from the unit has not hurt the efficiency of management's operation or the productive nature of collective bargaining between the City and AFSCME, and a historical tradition of harmonious and mutually beneficial relations between the employer and its employees is a factor of considerable force which should not be tampered with for insubstantial reasons. The objective of AFSCME to gain increased benefits for its unit members, water employees, is simply not as substantial an interest to be protected as are the democratic rights of the waste water employees.

Accordingly, we dismiss the unit clarification petition filed by AFSCME. However, we recognize the potential exists for the waste water employees to form their own bargaining unit, and we believe allowing them to form their own unit would result in fragmentation producing an adverse effect on the Employer's operation. The employer would be required to administer another collective bargaining agreement and may have to deal with the problems of balkanization of employee groups and whip-sawing which may occur with overfragmentation of units, especially within the same department. Mr. Cheney concludes from this analysis that if waste water employees desire to be represented by a union, they should be included within the existing AFSCME unit. Mr. Gilson, however, would hold only that it is desirable not mandatory that these employees be included in the AFSCME unit.

The issue is not before us today since no election petition has been filed. Accordingly, no final ruling is necessary here.

The proper procedure for obtaining their inclusion in the existing unit is an election petition pursuant to 21 VSA §1724. An election among only the waste water employees would provide an opportunity for these employees to express whether or not they desire to be represented without our disrupting the long-standing bargaining relationship developed by the parties.

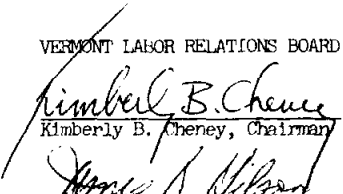
ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

the unit clarification petition filed by Local 1343
AFSCME, Burlington Area Public Employees Union is
Dismissed.

Dated this 23rd day of December, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


James S. Gilson

DISSENTING OPINION

I concur with AFSCME's position in this matter as I believe the 1980 merger has created a situation whereby the waste water employees should be placed in the existing AFSCME unit without an election. These employees were merged with a department that was already within the bargaining unit. I disagree with the apparent majority view that placing the employees in the unit would disturb harmonious labor relations between the parties. On the contrary, this merger has increased the likelihood of tension and fractionalization occurring between the two employee groups. As a result of the merger, both waste water and water employees are now supervised by a common superintendent, instead of two separate superintendents as was the case prior to the merger. With such centralized control, the potential exists for management to play one group of employees off against the other. The Board has not anticipated the potential problems of leaving one group of employees unrepresented while the others are represented. Not to place the waste water employees in the bargaining unit is to encourage labor relations discord and possible interruption of City services the Board has sought to avoid as a policy matter. See Champlain Valley, 3 VLRB 426 (1980).

Admittedly, the waste water employees would not be accorded the opportunity to vote on whether they seek to be represented by AFSCME if the Board placed them in the unit without an election, but these employees would not be forced to join AFSCME as no union shop agreement exists, and would be in no different position than many employees find themselves in when they are hired into a place where a union represents employees.

The situation before us is analogous to one where management adds positions to a department. If the Water Resources Department added a new position that was unlike any other in the existing unit due, for instance, to technological advancements, we would not hesitate to add that position to the existing unit. So should we place the waste water positions, newly-brought into the Department as a result of the merger, in the bargaining unit. Are we to claim that while one individual job if brought into a department would be placed into a bargaining unit but that this should not be done in the case of 10 jobs?

I further disagree with the Chairman's opinion in the restriction he would place on the waste water employees' freedom in selecting a bargaining representative. For the Board to rule "if waste water employees desire to be represented by a union, they are to be included within the AFSCME unit" is to deny those employees the right to seek as their bargaining representative any other union. This, I believe, is a violation of 21 VSA §1721 and §1724. On the one hand the Chairman espouses the democratic rights of employees to determine whether they wish to be represented by a union, and on the other hand effectively restricts these rights by limiting whom they can select as their representative. Such a position seems inconsistent.

The majority opinion has not placed weight on the similarity of job duties of the waste water and water employees, but at the oral argument on this matter the parties discussed similarity of duties to defend their respective positions, so I would like to comment on that issue. What difference does it make if the jobs are similar or not? Employees of the Library Department and Police Department employees are currently

in the AFSCME unit. What is the similarity between a police dispatcher and a librarian? Job similarity should not be a factor in this (or any other) case.

The majority is of the impression that water employees would apparently be accorded preferred status in bidding for job openings in the waste water division if the waste water employees were put in the existing bargaining unit and included under the collective bargaining agreement. I reject this view. The union has a duty of fair representation and we must presume AFSCME would do a good job for all employees it represents, as it has to date by all indications. We must assume all employees would have equal rights governed only by the agreed-upon rules of seniority.

My opinion in this matter is based on the fundamental belief that in a situation like the one before us where three-fourths of the employees in a department are in the bargaining unit, and there is every indication the union is doing a good job for employees in that unit, we should meet the issue head-on and include the remaining one-fourth of the employees in the department, who have been added to the department by merger, in the unit to avoid the inevitable friction that will result if the employees are left out of the unit.


William G. Kensley, Sr.