

VERMONT LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES)
and~)
TOWN OF WINDSOR)

DOCKET NO. 83-37

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 7, 1983, the American Federation of State, County and Municipal Employees ("Union") filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board pursuant to 21 VSA §1724. The petition requested an election among all employees of the Town of Windsor ("Town") Highway Department, including the Working Foreman. On June 21, 1983, Harold Sanders, Town Manager, informed the Board the Town was contesting the inclusion of two employees in the bargaining unit on the grounds they were supervisory employees.

A hearing was held before the full Board on July 14, 1983. The Union was represented by Edward Ryan. Attorney Thomas Rounds represented the Town. At the hearing, the Town withdrew its assertion the Highway Department Mechanic was a supervisory employee and agreed the sole issue before the Board was whether the Working Foreman was a supervisor. The Town also stated it agreed to a consent election. Both parties waived the filing of briefs.

FINDINGS OF FACT

1. The Town Highway Department has seven employees: six truck drivers or laborers and a Working Foreman.

2. Richard Vivian is, and has been since June, 1981, the Working Foreman. When Vivian became Working Foreman, he received a 4 percent pay increase.

3. Vivian operates a Grader and performs a variety of skilled tasks in the maintenance, repair and construction of roads and public facilities.

4. Duane Bandy is, and has been since January, 1980, the Town Public Works Director. Bandy's duties include supervision of the Water and Sewer Department and the Highway Department. As supervisor of the Highway Department, Bandy makes specific job assignments, lays out jobs and checks work in progress and on completion. Bandy makes periodic inspections of the Highway crew's work but is not regularly present while the crew is working on a specific job.

5. Harold Sanders is, and has been since April 25, 1983, the Town Manager. He is responsible for the total Town government, including the responsibility for ensuring road work is efficiently done by the Highway Department.

6. Any dismissals or other disciplinary action taken against Highway Department employees and the hiring of Highway Department employees are done by Sanders with Bandy having authority to make recommendations in those areas. Vivian does not have the authority to effectively recommend disciplinary action or the hiring of employees in the presence of Bandy, and only has

such authority if Bandy is absent from work. Vivian has never recommended the hiring of an individual for the Highway crew or the firing or imposition of other disciplinary action against a Highway employee.

7. Specific job assignments for the Highway Department and determination on how work is to be done are made by Sanders or Bandy. Normally, Bandy will give Vivian specific instructions on performing specific projects and Vivian will relay those instructions to the rest of the Highway crew.

8. Bandy and Vivian are able to maintain radio contact with each other and with the truck drivers on the Highway crew. At times, Bandy relays instructions and orders to Vivian by radio.

9. While the Highway crew is working on a specific project, Vivian has authority to make routine decisions on the work and direct the work crew in accomplishing these routine matters.

10. Vivian has made specific recommendations on work to be done. For instance, in the preparation of the Town swim area this year, Vivian made recommendations to Sanders regarding the removal of a dead tree and the most efficient way to prepare the swim area. Also, Vivian has recommended that certain roads be shimmed (i.e. putting base coat on road before putting on blacktop).

11. In Bandy's absence from work (e.g. sick leave, vacation), Sanders has delegated authority to Vivian to plan the work of the Highway crew and take the sole responsibility for ensuring the work is done properly.

12. Bandy and Vivian discussed the hiring of two employees in the past year. In one case, the discussion concerned whether the employee would take

orders from Bandy or Vivian. In the other case, Bandy asked Vivian if Vivian could work with the person being considered for hire. In neither case did Bandy ask Vivian for a recommendation as to actually hiring the individual.

13. If Highway crew members have a grievance, they would first go to Vivian who is able to settle a grievance if an agreement can be worked out. If the grievance cannot be worked out at the first step, employees will then go to Bandy and finally to Sanders. The evidence indicates no specific grievances actually settled by Vivian since he has been Working Foreman. In a tardiness dispute which arose, Vivian asked Bandy how to handle employees being late and Bandy told him to tell the employees they would be disciplined if they did not come to work on time.

OPINION

The issue before us is whether the Working Foreman of the Town of Windsor Highway Department is a supervisor and, thus, ineligible to belong to the bargaining unit consisting of the employees of the Town Highway Department pursuant to 21 VSA §1722(12)(B).

Supervisor is defined in 21 VSA §1502(13) as:

An individual having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

In order to be considered a supervisor, an employee must pass two tests: 1) the possession of any one of the listed powers in the

statutory definition; and 2) the exercise of such powers "not of a merely routine or clerical nature but requiring the use of independent judgment". The statutory test is whether or not an individual can effectively exercise the authority granted him; theoretical or paper power will not make one a supervisor. Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 VT 347 (1980).

We do not believe the Working Foreman meets the statutory test for supervisory status. The authority to hire, fire or otherwise discipline the Highway employees lies with the Town Manager, and the authority to recommend such actions lies with the Public Works Director. The Working Foreman is able to recommend such actions only in the absence of the Public Works Director. An employee does not acquire a supervisor's status by reason of temporarily taking over the supervisor's duties in his absence. Brattleboro, supra. Furthermore, the evidence indicates the present Working Foreman has not made any such recommendations in the two years he has held that position.

No evidence was presented to indicate the Working Foreman was involved in questions concerning layoffs, promotions or recall of employees, so we assume he has no powers in those areas.

The assigning of work is done by either the Town Manager or the Public Works Director, who then give the Working Foreman specific instructions on performing specific projects. The Working Foreman, in turn, relays those instructions to the rest of the Highway crew. The mere relaying of instructions does not constitute assigning of work.

The Town apparently contends the Working Foreman has the power to responsibly direct employees because the Public Works Director is not normally present at worksites of the Highway crew and the Working Foreman directs the crew. However, the Working Foreman only has the authority to make routine decisions and direct the crew in accomplishing those routine matters. Furthermore, the Public Works Director is able to maintain radio contact with the Working Foreman and give specific instructions on performing projects. In our judgment, the Working Foreman's authority to direct is of a "merely routine... nature" and does not "require the use of independent judgment".

If the Public Works Director is absent from work, the Working Foreman may assign or direct employees using independent judgment since, in such situations, the Town Manager has delegated authority to him to plan the work of the Highway crew and take the sole responsibility for ensuring the work is done properly. However, as previously stated, an employee does not acquire a supervisor's status by reason of temporarily taking over the supervisor's duties in his absence. Brattleboro, supra.

The grievance procedure for Highway employees provides employees will first discuss grievances with the Working Foreman. However, this does not mean the Working Foreman has supervisory status by virtue of having authority to "adjust" employees' grievances. The evidence indicates no instances where he has actually settled grievances. Rare or infrequent supervisory acts do not change the status of an employee to a supervisor. Brattleboro, supra. In a tardiness dispute which did arise, the Working

Foreman asked the Public Works Director how to handle the problem. Given these circumstances, we conclude that if a grievance does arise the Working Foreman lacks effective authority to adjust grievances.


ORDER

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

Richard Vivian, the Working Foreman of the Town of Windsor Highway Department, is not a supervisor pursuant to 21 VSA §1502(13) and shall be included in the bargaining unit consisting of employees of the Town Highway Department.

Dated this 4th day of August, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson