VERMONT LABOR RELATIONS BOARD

CITY OF ST. ALBANS	)	
	)	
-and-	)	DOCKET NO. 83-59
	)	
LOCAL 1343, AFSCME, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 23, 1983, the City of St. Albans ("City") filed a petition with the Vermont Labor Relations Board, requesting the Board to remove the position of Foreman, Public Works Department, from the bargaining unit represented by Local 1343, AFSCME, AFL-CIO ("Union"). The City contends the Foreman is a supervisor within the meaning of 21 VSA §1502 and, thus, is ineligible to belong to the bargaining unit.

A hearing was held before the full Board on January 19, 1984. The City was represented by Robert S. Babcock, Jr. Union President Lindol Atkins, Jr., represented the Union. At the hearing, Mr. Atkins claimed the Board had no jurisdiction to resolve the dispute because the collective bargaining agreement between the parties places the position in the unit and the only way the City can remove the position from the unit is to negotiate the issue with the Union. The Board deferred a ruling on the jurisdictional question and heard evidence on the issue of whether the Foreman is a supervisor. The parties waived the filing of Requested Findings of Fact and Memoranda of Law.

FINDINGS OF FACT

1. At all times relevant herein, the Union was the bargaining representative for the collective bargaining unit consisting of all employees of the Public Works, Police and Fire Department with the exception of administrative, engineering and supervisory employees. Presently, there are 36 employees in the bargaining unit.

2. On October 11, 1973, the State Labor Relations Board determined the Foreman of the Public Works Department at that time, Stanley Kubas, was not a supervisory employee and included him in the bargaining unit represented by the Union (City Exhibit #1).

3. Kubas remained Public Works Department Foreman until November, 1982, at which time he retired. The Foreman position was not filled at the time Kubas retired and remains vacant at present.

4. During the period Kubas was Foreman, the job description for the position contained the following under "Examples of Work Performed":

> Supervises in the maintenance of water system, highways, culverts, parking areas, and the sewer system.
>
> Supervises the plowing, sanding and salting of roads.
>
> Oversees work crews assigned to retreatment and resurfacing operations.
>
> Maintains time and attendance records and reports of activities.
>
> Operates heavy and light equipment.
>
> Supervises the care and maintenance of equipment.
>
> Inspects the work of employees for compliance with specifications, safety standards and laws.
>
> (City Exhibit #2)

5. When Kubas was foreman, he worked under the direct supervision of the Director of Public Works. The Director of Public Works reported directly to the City Manager.

6. By charter, the City has a "strong city manager" type of government. The City Manager has the right to hire, fire, transfer, suspend, layoff, recall, promote, assign, reward and discipline employees and to adjust their grievances.

7. The City Manager delegates some of these powers to all department heads, including the Director of Public Works. The Director of Public Works has the authority to suspend and assign employees. The Director of Public Works cannot hire, transfer, layoff, recall, promote, discharge or reward employees, but may make recommendations in these areas to the City Manager. The City Manager does not always follow these recommendations, although he does at times.

8. Fourteen employees presently work in the Public Works Department. Two of the employees, the Director of Public Works and the Supervisor of Sewer and Water Plants, are excluded from the bargaining unit as supervisory employees. The remaining 12 employees are in the bargaining unit.

9. Five of the 12 employees are Plant Operators; two are Water Installers, two are Laborers, one is a Heavy Equipment Operator, one is an Animal Control Officer, and one is a Mechanic. The Plant Operators generally work under the supervision of the Supervisor of Sewer and Water Plants. The Animal Control Operator works directly under the City Manager and the Mechanic generally works by himself without supervision. The remaining five employees - the Highway Equipment Operator, the Water Installers and the Laborers - generally work on the highways (i.e., maintenance, repair and installation of roads and plowing).

10. While employees of the Public Works Department have job tasks in specific areas (i.e., highway, sewer, water, animal control, mechanics), they are all involved in a multitude of projects (eg., plowing, repairing water leaks).

11. When Kubas was Public Works Department Foreman, he generally worked with the five employees assigned to the highway crew.

12. When Kubas was Foreman, it was the normal daily routine of the Director of Public Works to call in the Foreman in the morning and discuss with him the work that had to be done that day on the highways. The Foreman then assigned employees to do the work, although the Director of Public Works suggested at times which employees should be assigned to particular projects. On occasion, the Director of Public Works inspected the employees' work but the Foreman generally was responsible for the completion of a project.

13. Assignment of overtime to employees who worked on the highway crew was made by the Director of Public Works when Kubas was Foreman.

14. If an employee on the highway crew claimed he was not properly compensated for overtime worked when Kubas was Foreman, the Director of Public Works would make the decision whether the employee was entitled to the claimed overtime compensation, not Kubas.

15. If an employee on the highway crew was late for work or was lax in work when Kubas was Foreman, Kubas did not have authority to discipline the employee. That authority lay with the Director of Public Works.

16. When Kubas was Foreman, he at times filled in for the Director of Public Works in the Director's absence, performed the duties of the Director's position and was paid accordingly.

17. When Kubas was Foreman, he was given responsibility to report disciplinary matters. He normally did so orally. Oral reports were sufficient to enable management to respond appropriately to any work problems. If the City Manager and the Director of Public Works instructed him to make written reports as an aid in imposing discipline, he refused. The City Manager and Director of Public Works attributed this refusal to Kubas being part of the bargaining unit. Although we cannot find on the evidence whether this refusal was because of a conflict because Kubas was a member of the bargaining unit or was an individual idiocyncrasy, we cannot conclude it was a conflict because the Director of Public Works could have disciplined Kubas for his refusals but chose not to impose discipline.

18. When Kubas was Foreman, he was required to perform the same duties as other employees of the highway crew.

19. When Kubas was Foreman, if employees of the highway crew had problems on the job they at times went to Kubas to have their problems resolved.

20. When Kubas retired in Novmeber, 1982, the City Manager, James Pignona, decided not to immediately fill the Foreman position because of budget constraints, a desire to hire only a qualified person and because of Pignona's belief that the Foreman position should be taken out of the bargaining unit. Pignona informed the Union Steward of his intention not to fill the position at that time.

21. In July, 1983, the City rewrote the Foreman's job description (City Exhibit #4), and informed the Union of such change (City Exhibit #5). The new job description contained, in substance, the same "Examples of

Work Performed" as the previous job description (See Finding #4) with the following examples added:

> ...performs analysis of job problems, determines priorities and distributes the workload.
>
> ...[A]djusts minor disputes or disagreements.
>
> ...Trains employees in the proper equipment operation and material usage.
>
> Recommends employees to Director for promotion, training period assignments, reward or discipline or other personnel actions as appropriate.

22. The present collective bargaining agreement between the City and Union provides in pertinent part:

> Article 16 Foreman Selection
>
> 1. The position of foreman shall remain as part of the bargaining unit...
>
> Article 20, Grievance and Arbitration Procedures
>
> ... 3. Informal Procedures: Nothing contained within this grievance procedure shall be construed as limiting the right of any member of the Union to discuss a dispute or disagreement informally with his supervisor before filing the matter as a formal grievance and having the dispute adjusted without the intervention of the Union, provided such adjustments are not inconsistent with the terms of this contract. Should such informal process fail to resolve the grievance, then a formal filing of grievance shall be made in accordance with the procedure hereinafter set forth.
>
> ... 6. Procedure:
>
> a. Step I: The grievant, his representative, or a representative of the Union acting on his behalf, shall file with the City Manager a written grievance setting forth the specific issue or problems being grieved and stating the redress sought. ...The City Manager shall, within seven (7) days of his receipt of the grievance, render a decision in writing...
>
> Article 32. Duration of Agreement:
>
> 1. This Agreement shall be effective as of the first day of January, 1982, and shall remain in full force and effect until the 31st day of December, 1983.

> 2. It shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing ninety (90) days prior to the expiration date of this Agreement that it desires to modify this Agreement... This Agreement shall remain in full force and be effective during the period of negotiations and until a successor agreement is signed by all parties.

OPINION

Board Jurisdiction

The Union claims the Board has no jurisdiction over this dispute. It argues the collective bargaining agreement places the position of Public Works Department Foreman in the bargaining unit and hence it can only be removed by negotiations.

The existing Agreement between the parties provides in Article 16 that the position of Foreman shall remain a part of the bargaining unit and Article 32 provides the Agreement shall remain in full force and effect during the period of negotiations until a successor agreement is signed by the parties. At present, the parties have not negotiated a successor agreement.

Normally, a contract provision placing a position in the bargaining unit does not prohibit management from petitioning the Board to remove the position from the bargaining unit at the expiration of the Contract. 21 VSA §1724(a) provides a "petition may be filed with the board... by the employer alleging... that the presently-certified bargaining unit is no longer appropriate under board criteria". This is a statutory recognition that circumstances may change in the duties of a position which would warrant that position being removed from a bargaining unit. such as a position becoming supervisory and thus ineligible to be in a bargaining unit pursuant to 21 VSA §1722(12)(B). §1724(a) gives

employers an avenue to adjudicate that issue. To rule that a contractual provision placing a position in the bargaining unit barred an employer from petitioning the Board to remove any allegedly ineligible position from the bargaining unit at the expiration of the contract would be to frustrate the evident intent of the legislature that the Board maintain ultimate control of the composition of the bargaining unit to ensure ineligible employees do not remain in the bargaining unit. AFSCME v. Town of Bennington, 6 VLRB 88 (1983).

However, the provisions of Article 32 present the issue whether the City has waived the right to come before the Board at the expiration of the Agreement to resolve a unit dispute. In our view, the general provision of Article 32 is not sufficiently precise for us to conclude the parties waived their right to employ the specific statutory scheme found in §1724 to settle bargaining unit issues outside of negotiations. It is evident Article 32 is meant to apply to provisions which are normally subjects of negotiations but we cannot conclude it also is extended to apply to unit eligibility questions over which the Board has statutory jurisdiction. We hold the parties must explicitly waive such a fundamental statutory right. Accordingly, Article 32 does not prevent the City from coming to the Board to exercise the statutory right to resolve a unit dispute during the course of negotiations.

Merits

The issue on the merits is whether the Foreman of the City Public Works Department is a supervisor and, thus, ineligible to belong to the bargaining unit consisting of the employees of the Town Public Works, Fire, and Police Departments 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 responsibility 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).

It is clear by the evidence that when Stanley Kubas was Foreman, he did not in the normal course of his duties have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward of discipline employees, or effectively recommend such action.

The City argues, however, that changes in the Foreman's job description in July, 1983, gave the position effective authority to recommend discipline of employees to the Director of Public Works. When Stanley Kubas was Foreman, he did not have such power. Theoretical or paper power will not make one a supervisor, Brattleboro, supra, and a mere paper change in job descriptions is insufficient to convince us the position is supervisory. We believe that actual authority to discipline will remain with the City Manager regardless of job description changes. Moreover, the table of organization and the nature of the work will remain the

same. We are not persuaded the foreman's actual supervisory authority will change.

The City's other apparent contentions are the incumbent Foreman had supervisory authority in assigning and responsibly directing employees and adjusting their grievances, and so will the new position.

The evidence indicates the prior Foreman daily assigned employees who worked on the highway crew to work on particular projects after discussing the work that was required to be done that day with the Director of Public Works. However, no evidence before us indicates the assigning of work required the use of independent judgment on the Foreman's part. We presume the Director, given that he was the Foreman's supervisor, determined work priorities when he discussed the daily work to be done with the Foreman. The assigning of work by the Foreman after work priorities are established by the Director leads us to believe the exercise of such authority is merely routine. Also, that the Foreman did not have effective authority to assign is indicated by the practice of the Director at times to suggest which employees should be assigned to particular projects.

We similarly conclude the Foreman did not responsibly direct employees. The City apparently contends the Foreman had the power to responsibly direct employees because the Director of Public Works was not normally present at worksites of the highway crew where the Foreman was responsible for ensuring projects were completed. However, no evidence before us indicates the Foreman had the authority to make anything but routine decisions in this regard. We find the Foreman's authority to direct did not "require the use of independent judgment".

With regard to adjusting grievances, the Foreman was called upon at times to resolve problems brought to him by the work crew which came up on the job. However, we do not believe this constituted anything but resolving routine problems which occurred and did not "require use of independent judgment" to "adjust grievances". It is apparent effective supervisory authority to adjust grievances lay with the Director of Public Works since when grievable issues arose they were decided by the Director, not the Foreman. A further indication of the Foreman's lack of supervisory authority in this regard is that the collective bargaining agreement does not include the Foreman as a step in the grievance procedure.

It is evident effective supervisory authority over employees of the highway crew presently resides in the Director of Public Works, and the situation was no different when the Foreman position was filled. As made clear by our Supreme Court's decision in In re Local 1201, AFSCME, Rutland Department of Public Works, ___ Vt. ___ (November 1, 1983), a considerable amount of evidence must be advanced to exempt an employee from inclusion in a bargaining unit. The City has not presented such evidence here.

Finally, we think it not decisive that the Foreman filled in for the Director in the Director's absence, performed his duties and was paid accordingly. An employee does not acquire a supervisor's status by reason of temporarily taking over the supervisor's duties in his absence. Brattleboro, supra, at 351.

ORDER

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

The position of Foreman of the City of St. Albans Public Works Department is not a supervisory employee as defined in 21 VSA §1502(13) and shall remain a member of the bargaining unit represented by Local 1343, AFL-CIO.

Dated this 1 day of February, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson