VERMONT LABOR RELATIONS BOARD

LOCAL 1369, AFSCME AFL-CIO	)	
	)	
-and-	)	DOCKET NO. 83-56
	)	
CITY OF BARRE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 15, 1983, Local 1369, AFSCME, AFL-CIO ("Union") filed a petition with the Labor Relations Board, requesting that the Labor Relations Board direct that the position of Water Plant Operator, Dix Reservoir, City of Barre, be declared as part of the Department of Public Works bargaining unit represented by the Union. On September 6, 1983, the City of Barre ("City") filed an Answer to the request and a Motion to Dismiss.

Subsequently, the Board directed Timothy Noonan, Board Executive Diector, to meet with the parties in an attempt to determine the relevant facts of the dispute and to then make recommendations as to its resolution. Mr. Noonan met with the parties on October 26, 1983. Present at the meeting were: Mr. Noonan, Steve Bailey, Union Representative; John Hutchinson, Union President; Richard Raymond, Union Steward; David Perez, Water Plant Operator; Henry Vanetti, City Attorney; Richard Cate, City Manager; Reginald Abare, Director of Public Works for the City; and Peter O'Grady, past Union President.

On November 16, 1983, Mr. Noonan made findings of fact and recommendations for the resolution of the matter. In his recommendations,

Mr. Noonan concluded that while the Water Supply Operator position had a sufficient community of interest with employees in the Public Works bargaining unit, the position should not be added to the bargaining unit without the Water Supply Operator voting in an election that he wished to be represented by the Union since the Union had historically agreed to exclude the position from the bargaining unit through contract negotiations

On December 16, 1983, the Union informed the Board it accepted the Findings of Fact made by Mr. Noonan but disagreed with his conclusions. The Union requested the full Board to resolve the matter. The Union waived an evidentiary hearing and the filing of briefs. On December 30, 1983, the City informed the Board that it did not object to submitting the case to the Board for its determination without a hearing or the submission of legal briefs, if the Board felt it had sufficient information to make its determination without a hearing and if the Board believed briefs would not be necessary or helpful in rendering its decision.

The Board has reviewed the Findings of Fact and Conclusions made by Mr. Noonan, and the material on file with the Board, and has concluded there is no need for an evidentiary hearing or the submission of briefs. The Board accepts the Findings of Fact made by Mr. Noonan and incorporates them herein, and modifies Mr. Noonan's recommendations.

FINDINGS OF FACT

1. At all times relevant, the Department of Public Works bargaining unit consisted of employees of the Street Department, Water Department, Sewer Department and the Cemetery Department. At all times relevant, the Union has been the collective bargaining representative of all the employees in the Public Works bargaining unit.

2. Prior to the collective bargaining agreement effective July 1, 1981 - July 30, 1983, collective bargaining agreements covering Public Works bargaining unit employees included the position of Assistant Foreman (Reservoir) in the Water Department under their coverage.

3. At some point in 1978, but prior to May 1, 1978, the City became aware that the incumbent of the Assistant Foreman (Reservoir) position, John Farnham, was retiring from that position.

4. As Assistant Foreman (Reservoir), Farnham was responsible for the maintenance and operation of watershed areas and equipment. As such, Farnham maintained the water reservoir building and changed chlorine cylinders but did no water testing. Water testing was done by Reginald Abare.

5. At the time Farnham was retiring, the City was in the initial stages of complying with the Clean Water Act, which imposed new and more stringent requirements regarding sampling, monitoring and documenting the operations of municipal water systems.

6. As a replacement for Farnham, the City sought to hire a person who could perform water testing and fulfill the sampling, monitoring and documenting requirements of the Clean Water Act in addition to the duties performed by Farnham.

7. On March 27, 1978, the City placed an ad in the newspaper providing:

> Barre is looking for a certified (minimum - Operator 4th Class) Treatment Plant Operator. Applicants must be familiar with testing and sampling procedures involving, but not limited to: chlorine and fluoride residuals, pH, turbidity and bacteriological examination. The individual must have recordkeeping ability and the potential to attain higher certification as may be required by the State of Vermont.

8. David Perez was hired to fill the position of Water Supply Operator, effective May 1, 1978. When Perez was interviewed for the position, the person doing the interviewing informed him it was a non-union position.

9. On Perez' first day of work, a Union member told Perez he had to join the Union. Perez did not join the Union at that time, and the Union did not pursue the issue any further.

10. At the time Perez was hired, there was no union security clause in the collective bargaining agreement providing employees covered by the Agreement had to be members of the Union.

11. At all times relevant since his hire, Perez has performed the same duties as Farnham had while assuming the additional duties of water testing and sampling which previously had been done by Reginald Abare.

12. Perez successfully completed a training course in basic Water Works Operation, conducted from October to December, 1978, by the New England Water Works Association. Perez was certified as a Water System Operator of the 4th Class by the State of Vermont on January 12, 1979.

13. The collective bargaining agreements effective July 1, 1978 - June 30, 1980 and July 1, 1980 - June 30, 1981, included the position of Assistant Foreman (Reservoir) under their coverage.

14. The July 1, 1980 - June 30, 1981, collective bargaining agreement contained the following union security clause in Article II, Section 2:

> It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain in good standing.

> It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall, on or after the 30th day following the beginning of such employment, become and remain members in good standing of the Union.

15. This provision was the first union security clause ever negotiated by the Union and the City. The identical provision is contained in the July 1, 1983 - June 3, 1984, Contract between the Union and the City.

16. On June 29, 1981, the City and the Union executed a Memorandum of Agreement certifying that agreement had been reached on a two-year contract covering the period July 1, 1981 to June 30, 1983. One of the terms agreed to provided:

> Delete the classification of Assistant Foreman (Reservoir) from Water Department Classification.

17. The collective bargaining agreements effective from July 1, 1981 - June 30, 1983, and from July 1, 1983 - June 30, 1984, list only the following Water Department positions as covered by the Agreement:

Foreman
Water Works Man A
Water Works Man B
Public Works Man A
Public Works Man B
Laborer

18. The 1981-83 and 1983-84 Agreements contain the following description of the Water Works Man A position:

> Must be qualified to change chlorine cylinders, lay water pipe, use pipe locator, have knowledge of location of all important valves and hydrants, operate various tools and possess various trade skills.

19. Employees occupying the position of Water Works Man A for the Water Department perform all the above duties except that they do not presently change chlorine cylinders although they used to perform that task.

20. Perez is not qualified to lay water pipe or use a pipe locator and does not have knowledge of the locations of all important valves and hydrants. He does change chlorine cylinders and operates various tools and possesses various trade skills.

21. If Perez is absent from work, George Wilds fills in for him. Wilds is a Highway Equipment Operator for the Street Department, and is a member of the bargaining unit. Wilds performs approximately 25 percent of Perez' duties. He changes chlorine cylinders but he does not perform any water testing or sampling. Wilds does not spend an entire work day performing Perez' duties. After finishing those duties, he performs those of his own position.

22. On July 29, 1983, City Manager Paul Hermann informed John Hutchinson, Union President: "This is to advise you that the following personnel will receive a 43 cent per hour increase in wages effective July 1, 1983, in accordance with the new pay scale between the (City and the Union)". One of the persons included in the list of employees was David Perez.

23. Article XI, Section 1 of the July 1, 1981 - June 30, 1983 and July 1, 1983 - June 30, 1984 collective bargaining agreements provide:

> ...The normal work week shall commence at 7:00 a.m. Monday morning and continue through 4:00 p.m. Friday, for a period of forty (40) hours made up of five (5) normal work days. A normal work day shall consist of eight (8) hours commencing at 7:00 a.m. and ending at 4:00 p.m. Monday through Friday. With the mutual consent of the Union, the normal work week may be adjusted.

24. Perez' hourly schedule provides that he works 7 1/2 hours daily, Monday through Wednesday, and 7 hours daily Thursday and Friday.

All hours are between the time of 8:00 a.m. and 4:00 p.m. In addition, Perez works two hours overtime on both Saturday and Sunday as part of his normal schedule.

25. There is no evidence to indicate the Union consented to this work schedule.

26. The City does not contend Perez is either a confidential employee as defined in 21 VSA §1722(c) or a supervisory employee as defined in 21 VSA §1502(13). In its Answer, the City states that Perez may be a professional employee. However, after the meeting Mr. Noonan had with the parties, the City dropped this claim.

27. Perez punches in and out at the time clock at the City Garage at the beginning and end of the work day, as do members of the Public Works bargaining unit.

OPINION

The Union requests the Board direct the position of Water Supply Operator be included in the Department of Public Works bargaining unit represented by the Union. We treat this as a unit clarification petition, since the Union is asking we add the position to the bargaining unit without an election.

The Union contends the position of Water Supply Operator is covered under the provisions of the present collective bargaining agreement. The City argues to the contrary; maintaining that the position of Water Supply Operator was not included in the bargaining unit under any collective bargaining agreement between the Union and the City, including the Agreement presently in effect.

Based on the present state of the evidence, it is unclear whether the Water Supply Operator position was considered by the parties to be included in the bargaining unit and covered under the terms of the applicable contract when it was created in 1978. The evidence indicates no actual negotiations between the parties in 1978 as to the inclusion of the position in the bargaining unit or its exclusion. Furthermore, the parties did not submit the issue to the Labor Relations Board for resolution.

However, while it is unclear whether the Water Supply Operator position was covered under the terms of the Contract when created, it is clear the parties excluded the position from coverage of the Contract when they negotiated the 1981-83 Contract. The parties agreed to delete the Assistant Foreman (Reservoir) position from the coverage of the Contract. The Water Supply Operator position had been created as a replacement for the Assistant Foreman (Reservoir) position in 1978 when the Assistant Foreman (Reservoir) position became vacant. When hired, the Water Supply Operator assumed the duties performed by the Assistant Foreman (Reservoir) and, in addition, performed new duties. Once the parties explicitly deleted the Assistant Foreman (Reservoir) position from the coverage of the 1981-83 Contract, it became a clear indication of their intent to exclude the Water Supply Operator position from the coverage of the Contract absent any explicit provision to include that position. The listing of Water Department classifications covered under the Contract does not include the Water Supply Operator position.

The Union argues the Water Supply Operator position fits the description of Water Works Man A, which position is included under

coverage of the Contract. However, as the facts demonstrate, the Water Supply Operator does not perform most of the duties under the description of a Water Works Man A.

A further indication the position was not covered under the 1981-83 Contract is that the "normal work week" of the position includes work on Saturdays and Sundays, which days are outside the "normal work week" as provided in the Contract. No evidence indicates the Union consented to the Saturday and Sunday work as part of the normal work week which would have been required for positions covered under the Contract.

Accordingly, we conclude the parties intended to exclude the position of Water Supply Operator from coverage of the 1981-83 Contract. We reach the same conclusion under the present Contract, effective July 1, 1983 - June 30, 1984, since the applicable contract provisions are the same.

We turn now to consider whether the Board should add the Water Supply Operator position to the bargaining unit even though the parties have excluded it from coverage of the Contract. The Union requests that the position be added to the bargaining unit without a representation election. The City maintains the Water Supply Operator has an insufficient community of interest with other employees in the bargaining unit and, thus, it would be inappropriate to add the position to the bargaining unit pursuant to 21 VSA §1724(c).

We disagree with the City that there is an insufficient community of interest between the Water Supply Operator position and other positions in the bargaining unit. The Public Works bargaining unit presently includes

all employees of the Water Department who are not supervisory employees or confidential employees except the Water Supply Operator. The City agrees the Water Supply Operator is neither a supervisor as defined in 21 VSA §1502(13) nor a confidential employee as defined in 21 VSA §1722(6) and, thus, the position cannot be excluded from the bargaining unit on those grounds. Also, the City does not contend the Water Supply Operator is a professional employee entitled to a vote before being included in a unit with other municipal employees pursuant to 21 VSA §1724(c)(1). The City does not point to a group of employees the Water Supply Operator has greater community of interest with than the employees of his own Department and we conclude he has a community of interest with those employees.

This does not in and of itself mean the position should be added to the existing bargaining unit without an election. In a previous unit clarification case before the Board, Local 1343, AFSCME, Burlington Area Public Employees Union, 4 VLRB 391 (1981), the union requested the Board add waste water employees to an existing bargaining unit which included water employees without an election. In deciding that issue, the Board determined the democratic rights of the waste water employees to determine whether they wished to be represented by the unit outweighed any negative effect of leaving them out of the unit.

However, the circumstances existing in Burlington, supra, were substantially different than this case. In Burlington, the employees the Union sought to add to the unit, waste water employees, were a distinct group of 10 employees who had been historically excluded from the existing bargaining unit for nearly 13 years when the petition to

include them in the unit was filed, and the petition developed because of the union's desire to gain an advantage for water employees in job openings. Here, one position is involved which had clearly been excluded from the existing bargaining unit for a period of just over two years when the petition before us was filed.

In unit clarification cases, we are concerned with balancing the competing interests of management's rights, the right and duties of unions to achieve gains for its members, self-determination rights of the involved employee(s), harmonious labor relations and the protection of orderly bargaining in the public sector to ensure the continuity of public services, Burlington, supra. In weighing those interests here, we believe productive and harmonious labor relations are threatened if the Water Supply Operator is left out of a bargaining unit in which all other eligible employees of his department are included, particularly in a case such as this where there is a union shop provision, since the Water Supply Operator may receive the same (or greater) benefits as Union members without paying union dues and thus enjoy a "free ride". We believe the democratic rights of the Water Supply Operator to determine whether he wishes to be represented by the Union are outweighed in this instance by the promotion of labor harmony.

The Union is bound by its present contractual agreement to exclude the position from the bargaining unit until the expiration of that contract on June 30, 1984. However, the position of Water Supply Operator shall be added to the bargaining unit without an election upon expiration of that Contract unless the City files a petition pursuant to 21 VSA §1724 demonstrating by objective considerations that it has reasonable grounds

for believing that, with the addition of the Water Supply Operator to the bargaining unit, the Union no longer represents the majority of employees in the bargaining unit. Town of Wethersfield and AFSCME, 6 VLRB 147 (1983).

ORDER

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

The Petition of Local 1369, AFSCME, AFL-CIO to add the position of Water Supply Operator, Water Department, City of Barre, to the Department of Public Works bargaining unit represented by the Union without an election is GRANTED to the extent the position shall be added to the bargaining unit upon expiration of the July 1, 1983 - June 30, 1984, collective bargaining agreement between the Union and the City of Barre, unless the City of Barre files a petition pursuant to 21 VSA §1724 demonstrating by objective considerations it has reasonable grounds for believing that with the addition of the Water Supply Operator to the bargaining unit the Union no longer represents the majority of employees in the bargaining unit.

Dated this 20th day of February, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson