

VERMONT LABOR RELATIONS BOARD

NEW ENGLAND POLICE BENEVOLENT)	
ASSOCIATION,)	
)	
and)	DOCKET NO. 21-38
)	
)	
TOWN OF CHESTER)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The New England Police Benevolent Association (“NEPBA” “Union”) filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board (“Board”) on October 27, 2021. On November 4, 2021, the Town of Chester (“Town” “Employer”) filed a response agreeing to a consent election and objecting to the inclusion of the Sergeant position in the proposed unit. The parties jointly agreed on a hearing date of December 9, 2021, to determine the issue of whether the Sergeant position is a supervisory position, and therefore, excluded from the employees eligible for the unit under the Municipal Labor Relations Act, 21 V.S.A. §1722 (12).

On December 9, 2021, the Board held a hearing using Microsoft Teams before Board Members, Richard Park, Chairperson, Alan Willard, and Roger Donegan. The Town appeared and was represented by Constance Tyron Pell, Esq. The Union appeared and was represented by Thomas E. Horgan, Esq. After an objection was made to the last cross-examination question posed to the second and final witness of the hearing, the internet service in the Board building was terminated and the Board recessed the hearing. Thereafter, the Board consulted with counsel for the parties who agreed to continue the hearing using a telephone conference call. The parties filed post-hearing briefs on December 16, 2021.

FINDINGS OF FACT

1. The Petition seeks to create a bargaining unit consisting of all full-time and regularly scheduled part-time employees of the Chester Police Department (“CPD”), to include, but not limited to, Patrol Officers, Detectives, Corporals, Sergeants, Dispatchers, and Administrative Secretaries employed by the Town of Chester. Exhibit 1.
2. The CPD currently has nine positions. Five positions are full-time: Chief, Sergeant, Detective, two Patrol Officers, and one Administrative Assistant. The Department employs three part-time Patrol Officers, one of which is a regularly scheduled position, the remaining two cover shifts on an as needed basis.
3. The Town agrees to the inclusion of the following positions in the unit: all regularly scheduled part-time Patrol Officers, two Patrol Officers, the Detective, and the Administrative Assistant.
4. The Town objects to the inclusion of the Sergeant into the bargaining unit because it claims it is a supervisory position.
5. All Town employees are required to adhere to the Town Personnel Policies, Exhibit 2, which are administered by the Town Manager.
6. The CPD maintains written job descriptions for Police Officers, Patrol Sergeant, and the position of Detective, Detective Sergeant, and Detective Corporal. The Patrol Sergeant job description references a department Police Manual. “[T]he Sergeant is required to report any disciplinary measures(s) that were initiated by him/her commensurate with the authority set forth in the department Police Manual.” Exhibit 6, Patrol Sergeant job description.

7. There is no CPD Police Manual. Instead, the CPD applies or references the procedures outlined in guidance and policies from the Vermont League of Cities and Towns. The Vermont League of Cities and Town policies include use of force, vehicle pursuits, ride along, and domestic assaults. There are no policies specifically tailored to the CPD. None of these policies were introduced as evidence.
8. The Patrol Sergeant job description provides, inter alia, the following:

SUMMARY:

A Sergeant occupies the first level of supervision in the department, and shall be responsible for the proficiency, conduct, appearance and strict attention to duty of all subordinate personnel and is directly accountable to the Chief of Police.

The Sergeant is charged with ensuring compliance with the department's rules, regulations, orders, policies and procedures, and reports all violations thereof to the Chief of Police. Furthermore, the Sergeant is required to report any disciplinary measure(s) that were initiated by him/her commensurate with the authority set forth in the department Police Manual.

The Sergeant shall be thoroughly acquainted with the duties of subordinate personnel and shall assist and instruct such personnel in the proper discharge of their duties.

The Sergeant performs various functions relating to other administration or operation of the department as directed by the Chief of Police.

EXAMPLES OF JOB DUTIES

It is the duty and responsibility of a Sergeant to:

1. Be cognizant of the authority delegated to the position, taking special care to know the substance of the responsibilities of subordinate personnel. Understand that the rank of Sergeant is a management position.
2. Supervise personnel assigned to his/her Watch.
. . . .
5. Execute all orders from the Chief of Police, ensuring uniform interpretation and full compliance.

6. Review and evaluate the performance of subordinate personnel to determine whether they are properly, effectively, and consistently carrying out their duties in conformance to department standards.
7. Ensure that when the performance of a subordinate is unsatisfactory, measures are taken to upgrade his/her performance to meet department standards.
8. Submit a written report, through channels, to the Chief of Police whenever disciplinary action is taken commensurate with the authority. Included in such report the complete details of the misconduct, and of those corrective measures instituted.
9. Report in writing, through channels, to the Chief of Police any breach of department rules, regulations, orders, policies and/or procedures that have been observed or reported.

Exhibit 6.

9. Sergeant William Frank testified on behalf of the Union. Sergeant Frank has worked as a Sergeant for the CPD since his date of hire in 2017. He is the only Sergeant currently employed by the CPD.
10. Sergeant Frank works four ten-hour shifts. Monday 7 a.m. to 5 p.m., Tuesday and Wednesday 2 p.m. to midnight, and on Thursdays he works noon until 10 p.m.
11. The schedules submitted as Exhibits 8-13 represent the Sergeant's current work schedule. A new schedule will go into effect in January 2022.
12. Generally, the Sergeant works with only one other Patrol Officer per shift.
13. The only time the Sergeant works with more than one other person is when he is working on the day shift with the Detective and the Chief.
14. CPD Chief of Police Richard Cloud appeared and testified on behalf of the Town. Richard Cloud has been the Chief of the CPD for over nineteen years. In that time, two people have filled the position of Patrol Sergeant for the Town.

15. According to Chief Cloud, Exhibit 6 represents the accurate job description of the Patrol Sergeant position.
16. The CPD is a small Department. The Sergeant sometimes works by himself and sometimes works with other Patrol Officers.
17. The Sergeant is responsible for the day-to-day operation of the other Patrol Officers and serves as Officer in Charge (“OIC”) when the Chief is unavailable. When he is away from the office the Chief is available by cell phone.
18. In the past five years, Sergeant Frank has acted as OIC twice. Once when the Chief was on a cruise in Mexico and had no cell coverage for a week and one half, and once when the Chief was in the intensive care unit of the hospital for a week. The Chief has no plans to be away from the office and unavailable.
19. The CPD employs a Detective. The Detective and Sergeant share an office. The Detective works as a Detective three days a week and as a Patrol Officer two days a week. When he works as a Detective, he reports to the Chief and is under his control. When the Detective works as a Patrol Officer, he reports to the Sergeant and is under the direction and authority of Sergeant Frank.

Scheduling and shifts

20. The Chief develops the work schedule, including the shifts each Patrol Officer will work per week. The shift assignments, are determined by the seniority of the officer, how many years they have been with the CPD. The Chief then submits the schedule to the Sergeant and the Sergeant implements the schedule. The Sergeant submits the schedule to the Town Treasure for payroll processing.

21. The number of shifts remains consistent. There is a daytime shift and an evening shift.

The Sergeant's shift flexes and straddles both shifts and starts at noon or two, and one day he works a daytime shift.

22. The Town Personnel Policy outlines requirements for pay and vacation time. Vacation time is awarded based on seniority.

23. The Sergeant has a role in scheduling when people take vacation or sick time to adjust the seniority driven schedule to account for leave.

24. The Sergeant adjusts the schedule to fill vacant shift slots with other officers to work overtime or cover shifts. Where there is a conflict, he brings it to the attention of the Chief to coordinate a resolution.

25. To fill vacancies for vacations, the Sergeant puts up a sign-up sheet. He has never ordered a Patrol Officer to fill or cover a shift.

26. The Chief is scheduled to work Friday evenings. The Sergeant is off Friday-Sunday.

27. The Chief has implemented a minimum manning policy for Friday and Saturday nights that requires two officers to be on duty each night.

28. If someone calls in sick on Friday or Saturday, the Sergeant is responsible for filling the slot. To fill the slot, the Sergeant sends out emails asking for volunteers, or the Sergeant fills it himself.

29. The Sergeant has never ordered a Patrol Officer to fill the Friday or Saturday spot.

30. Special duty assignments, when they are awarded, are assigned off a rotating list. The rotating list is generated based on seniority. When special duty work becomes available, the officer who is first on the list, is offered that assignment.

31. The Town Personnel Policy provides that “[e]ach full time police officer may be required to be available for call back, subject to the discretion of the Police Chief.” Exhibit 2.

Employees that qualify for this benefit receive a lump sum of \$500 per year. Id.

32. Because every full time Patrol Officer is subject to being called back, each receives the \$500 per year benefit.

Reward and Discipline

33. The CPD employees in the proposed unit are currently at will employees.

34. CPD employees have no grievance process and there is no mechanism for employees to file or initiate a grievance.

35. The Town has a process for termination of Town employees that may involve a hearing before the Selectboard. Exhibit 2.

36. The Sergeant has the authority to suspend or take disciplinary action if something emergent occurs. In the short term, the Sergeant can send someone home on administrative leave without obtaining approval from the Chief, pending investigation. The final determination would involve the Chief and Town Manager, not the Sergeant.

37. During his tenure, the Chief has only once recommended that an officer be terminated, approximately 4-5 years ago. In that case, the Chief made a recommendation to the Town Manager that the person should be terminated.

38. Since the Sergeant has worked for the CPD, only one CPD employee, the Sergeant, has received discipline.

39. The Sergeant has never provided verbal counseling or discipline to another CPD officer.

40. The Sergeant has never placed a CPD employee on leave or administrative leave.

41. The CPD conducts performance evaluations of its officers on an annual basis. The Chief conducts the evaluations on forms prepared by the Town Manager.

42. Patrol Officers have overtime benefits which can be used if earned. Compensatory time must be approved by the Town Manager or Chief. Exhibit 2.

Hiring and Promotion

43. Since Sergeant Frank was hired, the CPD hired one Patrol Officer. Sergeant Frank did not have any involvement in the hiring of that officer. Because the Sergeant had previously worked with the candidate, the Chief did ask the Sergeant “what he knew” about the applicant. The Chief did not ask the Sergeant his opinion or recommendation on whether the candidate was qualified for the position or should be hired.

44. In the past five years, one Patrol Officer was promoted to the Detective position.

Sergeant Frank did not have any involvement in the promotion process.

45. Patrol Officers select where they wish to patrol in the small town, or the Chief will issue a directive to focus patrolling on a specific area. Otherwise, they patrol in various locations in the Town at their discretion.

46. The Patrol Officers are expected to inspect their cruisers on Sundays. Periodically the Chief may notify the Sergeant that inspection forms had not been provided to the Chief.

In response to this direction from the Chief, the Sergeant follows up with the Patrol Officer to complete the inspection reports.

47. Sergeant Frank does not recall seeing the Patrol Officer job description, Exhibit 6, before preparing for the hearing.

CONCLUSIONS OF LAW

The issue before the Board is whether the position of Sergeant is a supervisory position. Under the Municipal Employees Labor Relations Act, 21 V.S.A. § 1722 (12) (B), supervisors are not included as municipal employees.

“Supervisor” means an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, 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.

21 V.S.A. § 1502 (13)

To establish that an employee is a supervisor, both parts of the statutory definition must be present. First, the possession of at least one of the enumerated powers, and second, the exercise of such powers must not be “of a merely routine or clerical nature but requiring the use of independent judgment.” Id.; Firefighters of Brattleboro Local 2628 v. Brattleboro Fire Dep’t, Town of Brattleboro, 138 Vt. 347, 352 (1980). The statutory test depends on whether an individual can effectively exercise the authority granted to him or her; theoretical or paper power will not render one a supervisor. Id. The existence of actual or genuine power determines supervisory status. See AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 320 (1989). When assessing whether an employee exercises independent judgment, the employee must do more than simply relay instructions from a supervisor or ensuring established policies and procedures are followed. Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 149 (1987).

The Board has discretion to conclude supervisory status does not exist where technically supervisory duties are performed if such duties are insignificant in comparison with overall duties. New England Police Benevolent Association and City of Rutland, 34 VLRB 244 (2018).

Absent this discretion, “an employer could circumvent the very spirit and intent of the statute by creating de minimus supervisory duties for the sole purpose of excluding classes of employees from union representation.” AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 320.

The Town maintains that the Sergeant is a supervisor because he is required to exercise independent judgment, is in “total command” when the Chief is absent, assigns employee work shifts and directs employees, and has the authority to take disciplinary action or effectively recommend specific disciplinary action. Evaluation of the Town’s position requires a review of the facts and the actual responsibilities of the Sergeant. The Town offers the list of duties and responsibilities outlined in the Patrol Sergeant job description as evidence of his role as supervisor. When evaluated against the actual role of the Sergeant, the job description appears more aspirational than descriptive of the Sergeant’s duties.

The Chief testified that when he is away from the CPD or on vacation, he is available by cell phone. In the last five years, there have been only two occasions, for a total of two- and one-half weeks, when he was unavailable, and Sergeant Frank acted as the Officer in Charge. The Chief did not describe the duties or responsibilities of the Officer in Charge, nor did the Town offer any other evidence on the scope of authority for the Officer in Charge, nor the extent to which it had been exercised.

The Town has failed to demonstrate that the two brief occasions when the Sergeant acted as Officer in Charge render him a supervisor ineligible for inclusion in the proposed unit. His elevation to and service as Officer in Charge is too fleeting and insignificant in comparison to his overall duties to make him a supervisor. See AFSMCE, 153 Vt 320-321; Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991). Most of the time, the Sergeant performs the same duties as Patrol Officers.

The facts do not support the Town's claim that the Sergeant exercises independent judgment in assigning or directing employees. Sergeant Frank does not direct or assign where or how Patrol Officers perform their duties on shifts. Patrol Officers themselves decide where they will patrol, or the Chief directs them to cover a specific target area. The Chief notifies the Sergeant when officers have failed to submit reports on inspecting their cruisers. In response to this direction and notification, the Sergeant follows-up with the officers and asks them to submit their reports. The Chief, not the Sergeant, assigns the schedule and relies primarily on the seniority system when doing so. If nobody takes time off through sick time or vacation, the Sergeant has no role in scheduling. The Sergeant's involvement is limited to filling in the personnel gaps to cover vacations and time-off. When that occurs, he asks for volunteers. That the Sergeant solicits volunteers to fill shifts vacated by absences or leaves does not elevate the Sergeant to a supervisor and disqualify him from the unit. When a conflict occurs in adjusting the schedule for vacation or leave time, rather than exercise independent judgment, the Sergeant brings the conflict to the attention of the Chief to resolve. The Town has not demonstrated that the Sergeant has the authority to assign officers, and that he exercises independent judgment in doing so.

The Town next argues that the Sergeant has the power to discipline subordinates. The Town maintains that although Sergeant Frank has never exercised this power, it is within his authority to discipline employees, and therefore, he is a supervisor. In advancing this position, the Town relies on New England Police Benevolent Association and City of Rutland, 34 VLRB 244, 286 (2018). This case is procedurally and factually distinct from the present action, however, and does not support the Town's claim that the Sergeant is a supervisor. In City of Rutland, the parties had previously agreed that Sergeants should be excluded from the bargaining

unit as supervisors. The Board held that because the exclusion resulted from an agreement, and not a decision of the Board, the burden was on the Union to demonstrate by a preponderance of the evidence that the circumstances had changed and that the Sergeants were no longer supervisory employees. Id. There is no such prior agreement here, and the burden is on the Town to demonstrate by a preponderance of the evidence that the Sergeant is a supervisor and should be excluded from the unit.

The facts are also distinguishable here and fail to demonstrate that Sergeant Frank has the authority to discipline or to recommend such action. Unlike the Sergeants in City of Rutland, Sergeant Frank has never disciplined any officers. Sergeant Frank has not provided a verbal warning or counseling or other forms of discipline. Although Chief Cloud testified that the Sergeant could remove an officer from a shift, he clarified that such removal would be temporary and subject to the investigation and final decision of the Town Manager. The CPD also has no grievance process and the decision to remove an officer from a shift does not display the level of authority attached to the iterative stages of a multi-step grievance process exercised by the City of Rutland Sergeants.

The limited power Sergeant Frank may have to remove or discipline officers is not sufficient to qualify him as a supervisor. See International Ass'n of Firefighters v. Town of Hartford, 146 Vt. 371, 373 (1985). Any decision the Sergeant makes is not final and is reviewable by the Town Manager. The power to send a Patrol Officer home pending investigation and final decision by another authority, the Town Manager, does not confer supervisory authority on the Sergeant. See Firefighters of Brattleboro, 138 Vt. 347, 351 (affirming Board finding that Fire Captains were not supervisors although they could send home

unfit personnel, because the decision is reviewable by the Chief and ultimately Town Manager, the power to discipline is limited and they cannot effectively discipline officers).

The Town has failed to demonstrate that Sergeant Frank has the authority to hire, promote, or reward other CPD officers. Sergeant Frank has never hired anyone during his tenure, and in the past five years, the CPD has hired only one new Patrol Officer. The Sergeant was not on a hiring panel or involved in the decision to hire the new Patrol Officer. The Chief engaged the Sergeant about the new officer only to ask Sergeant Frank what he knew of him because the Sergeant had worked with the candidate before. The Chief did not ask whether he was qualified or whether the candidate should be hired.

There was also no evidence that the Sergeant has any authority in the promotion of officers. The Sergeant was not involved in the promotion of the Patrol Officer to Detective position. The Town did not offer any evidence on whether the Sergeant had the authority to transfer employees. The Town failed to demonstrate that the Sergeant has the authority to recall or recommend recall of officers or CPD personnel.

The Town offered no evidence that the Sergeant has the authority to reward or recommend a reward for subordinate officers. Chief Cloud conducts annual performance evaluations on officers on forms prepared by the Town Manager. The Sergeant is not involved in this process. The Sergeant does not have the power to adjust grievances. Indeed, the Chief testified that there is no grievance procedure for the CPD.

The Town has failed to present any evidence that the Sergeant possesses any of the other enumerated powers in the definition of supervisor to exclude him from the unit under the Municipal Labor Relations Act, 21 V.S.A §1722 (12) (B). In reaching its decision, the Board need not rely on the cases cited by NEPBA regarding the threshold number of employees a

putative supervisor must oversee or manage to qualify as a supervisor. See, e.g., AFSCME and City of Rutland, City of Winooski, 10 VLRB 141 (1987). The facts in those cases do not resemble those found here where there is only one Sergeant who works with and supervises more than one employee throughout the week.

ORDER

Based on the foregoing findings of fact, and conclusions of law, it is hereby ORDERED:

The Sergeant of the Chester Police Department is not a supervisory employee as defined in 21 V.S.A. § 1722 (12)(B), and 1502 (13), and therefore, qualifies and is eligible to be included in the proposed bargaining unit for the Chester Police Department.

Pursuant to the agreement and stipulation of the parties, and the Order of the Board, the proposed unit for the Colchester Police Department shall be comprised of all full-time and regularly scheduled part-time employees of the Chester Police Department, to include but not limited to, Patrol Officers, Detectives, Sergeants, and Administrative Secretaries, employed by the Town of Chester, Vermont.

Dated this 23 day of December 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard Park

Richard W. Park, Chairperson

/s/ Roger Donegan

Roger Donegan

/s/ Alan Willard

Alan Willard