

VERMONT LABOR RELATIONS BOARD

RUTLAND NE PARAEDUCATOR)	
AND BUS DRIVERS UNIT/)	
VERMONT-NEA)	
)	
AND)	DOCKET NO. 23-39
)	
RUTLAND NORTHEAST SUPERVISORY)	
UNION AND)	
OTTER VALLEY UNIFIED UNION)	
SCHOOL DISTRICT)	

FINDINGS OF FACT, OPINION, AND ORDER

The Rutland Northeast Paraeducator and Bus Driver Unit of the Vermont/NEA (“NEA” “Union”), filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board (“Board”) on October 16, 2023, seeking the inclusion of bus monitors and custodians into the existing unit. On October 23, 2023, the Rutland Northeast Supervisory Union (“RNESU”) and Otter Valley Unified Union School Districts (“OVUUSD”) (collectively “Employers”) filed a response agreeing to a consent election. On November 9, 2023, the Board issued a Second Amended Notice of Election that provided for mail ballot election with a ballot count on December 12, 2023. Thereafter, the Employers provided a list of employees to be included in the unit. The Union challenged the names asserting that certain bus monitors and employees holding the position of Head Custodian were incorrectly excluded from the list. To avoid a delay in the vote count, the parties agreed to send out ballots to the disputed names provisionally, and to hold a hearing before the Board to resolve the challenge to the inclusion of the Head Custodians and the challenged bus monitors. The parties jointly agreed on a hearing date of December 7, 2023. Before the hearing date, the parties stipulated on the bus monitors to be included and eligible to vote and requested the Board resolve whether the Head Custodian

position is a supervisor 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 7, 2023, the Board held a hearing with the following Board Members present in the hearing room at 6 Baldwin Street, Robert Greemore, Chairperson, Alan Willard, and Roger Donegan. The parties appeared remotely through Microsoft Teams. Employers were represented by Marilyn Mahusky, Esq. The Union was represented by Kelly Everhart, Esq.

FINDINGS OF FACT

1. The Petition seeks to add the positions of bus monitors and custodians to an existing unit of paraeducators and bus drivers.
2. Under Act 46, Rutland Northeast Supervisory Union is comprised of two school districts, Barstow Unified Union School District and Otter Valley Unified Union School District (“OVUUSD”), and one supervisory union, Rutland Northeast Supervisory Union (“RNESU”). The Supervisory Union provides essential functions and food service to all the schools.
3. Two of the three Head Custodians, Michael Davis Jr. and Fred LaPlant, work in the elementary schools for RNESU. The third Head Custodian works for the OVUUSD.
4. Michael Davis oversees two custodians at Neshobe Elementary School. Fred LaPlant oversees two custodians at the Lothrop Elementary School.
5. Jordan Tolar works in the Otter Valley Union Middle and High School. He started his employment as Head Custodian in August 2021. There are five custodians that work with Mr. Tolar who have the job description of custodian.
6. Mr. Tolar works during the day with one other custodian who works for five hours as a custodian. The other custodians work at night. The custodians have assigned work areas

throughout the building that were designated or assigned to them before Mr. Tolar began working at OVUUSD. He copied what had been done before regarding designated work areas.

7. During his workday, Mr. Tolar spends one and one-half to two hours cleaning and attending to his designated area. The rest of the time, he orders supplies, checks on and ensures the heating is operating properly, the snow is being removed, and addresses issues that “pop up.” If there are spills or unexpected custodial needs throughout the day, he attempts to collaborate with the custodians on who should address the need. In the end, however, he is responsible for ensuring that the custodial needs of the school are met and assigning a custodian to a task or performing the needed function himself. Mr. Tolar is notified if a custodian needs to leave a shift early.
8. Mr. Tolar makes sure everything is ready for the night crew in terms of supplies and assigns custodians to handle activities or events at the school or special projects. For example, Mr. Tolar assigns custodians to set up and break down rooms and move desks or furniture for meetings or events. Recently he was responsible for moving classrooms and directed custodians to remove the desks, furniture, and other items in the classroom to their new location.
9. Mr. Tolar performs work after hours, approximately two to five hours each week. He works with outside vendors servicing the facility and has compiled a list of vendors. Mr. Tolar does not hire or fire staff, but has offered his opinion to his Supervisor, Richard Vigue, the Supervisor of Facilities and Transportation.
10. Jordan Tolar encourages the custodians at Otter Valley to resolve issues among themselves. If they cannot resolve an issue, he helps them resolve it or he resolves the

issue. Larger issues that cannot be resolved are elevated to Mr. Vigue. Mr. Tolar has provided his opinion on potential employees.

11. Mr. Tolar trains new employees in the job duties and expectations of the custodian position and has provided tours to new employees. Mr. Tolar does not discipline employees but provides input to Mr. Vigue on discipline issues. Mr. Tolar does not have the responsibility or authority to hire or fire employees.
12. Richard Vigue holds monthly meetings with the three Head Custodians but does not have daily or regular contact with the Head Custodians. He also drives a bus every day during the school year.
13. David Kenyon is the Custodian for Elementary Maintenance and serves as Mr. Vigue's backup or "left hand." Although he is on the same level as Mr. Tolar and the other Head Custodians, Mr. Tolar calls him if he is unable to reach Mr. Vigue or has a maintenance issue.
14. In the absence of Mr. Vigue, Mr. Tolar makes the best judgment or decision he can.
15. The RNESU has issued Job Descriptions for its employees, which the parties have filed as Joint Exhibits. The "Custodian Job Description" contains Essential Functions that acknowledge that the work of the Custodian is or may be assigned by the Head Custodian. The Essential Functions of the Custodian recognize that "[w]ork areas and/or tasks will be assigned by the Head custodian in a manner which best serves the needs of the school; Other duties may be assigned by Building Principal and/or Head Custodian as needed." Joint Exhibit 1.
16. The Head Custodian- Job Description for both the Elementary and Otter Valley positions include the following tasks that are not included as Essential Functions for Custodians:

- Perform and oversee cleanliness, repair and maintenance of all equipment, buildings and grounds of the school.
- Recommend to the Principal and Facilities Manager the purchase and replacement of maintenance equipment and custodial supplies.
- Oversee management of onsite hazardous materials
- Make weekly inspections of all buildings and grounds.
- Schedule, supervise and evaluate custodial personnel.
- Assist in recruitment, employment, assignment, transfer, promotion, demotion, or dismissal of custodial and maintenance personnel.
- Maintain necessary records regarding work orders, supplies, time and attendance records etc.
- Coordinate building custodial vacation schedules.
- Responsible for securing building or creating a schedule/system for securing the building.
- Understand and implement safety procedures as required by the school.

17. The Job Summary for the Head Custodian @ Otter Valley provides the following:

The Head Custodian is responsible for the overall maintenance and cleanliness of the school's facilities. It is the responsibility of the Head Custodian to ensure that the facilities are maintained in a condition of operating excellence, cleanliness, and safety. The Head Custodian will have some supervisory responsibility over the other custodians including seasonal custodial employees. Safety, cleanliness and continued efficiency of operation shall be a major goal at all times.

18. The Head Custodian -Elementary Job Description describes the position occupied by Mr.

LaPlant and Mr. Davis. The Job Summary is similar to the above-described Job

Summary for the Head Custodian@ OV, except for the supervisory description. "The Head Custodian has supervisory responsibility over the other custodians including seasonal custodial employees."

19. The Job Descriptions for the Head Custodian- Elementary and Head Custodian @ Otter

Vally, share the following essential functions as the Job Description contained in the Custodian position: routine manual work involving custodial housekeeping care of school buildings and grounds, snow removal, and maintain custodial storage areas in a clean and orderly fashion.

20. The Head Custodian-Elementary Job Description also contains the following two essential functions: Assign work schedules for school custodial staff and direct the work of custodial staff.
21. The Head Custodian @ OV Job Description describes these functions as “[h]elp with assigning work schedules for school custodial staff” and “[c]oordinate with Facilities Manager the work of custodial staff.” The testimony of Mr. Tolar demonstrates that he independently assigns and directs the custodians at Otter Valley.
22. During the summer months, the Head Custodian assigns custodians to set up classrooms, the gymnasium, library, and other areas for the activities scheduled during the summer.
23. The RNESU Staff Chain of Command Policy “delineate[s] authority, reporting relationships and communication with Rutland Northeast Supervisory Union.” The purpose of the Policy is to “require[] that all employees adhere to their established chain of command when performing their assigned duties.” Joint Exhibit 5.
24. The Chain of Command is “[t]he line of authority and reporting obligation which employees are required to follow.” For matters involving facilities, grounds or buildings, the Head Custodian is the first link or line in the chain of command.
25. Head Custodians do not conduct performance evaluations. In fact, performance evaluations are not conducted for custodians.
26. Brenda Fleming, the Director of Business and Finance, at RNESU, testified about the chain of command. She also testified that Head Custodians are responsible for training custodians, scheduling staff, approving leave time, approving timesheets, making sure there is coverage when an employee leaves or is sick. Head Custodians are responsible for making sure the work gets done to the standard for the building. The actual duties for

the Head Custodian at Otter Valley involve assigning and directing the custodians and supervision of custodians.

OPINION

The issue before the Board is whether the position of Head Custodian is a supervisory position and therefore excluded from the bargaining unit. 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, 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 ensure established policies and procedures are followed. Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987).

Exercise of independent judgment in assigning and directing employees must occur on a more than infrequent basis or be significant in comparison with overall duties to make one a supervisor. Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991); AFSCME Local 490 and Town of Bennington, 153 Vt. 318 (1989). 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 Employers maintain that the Head Custodian position is supervisory because it advises or directs the custodians working in their buildings or areas, and exercise independent judgment when doing so. The Employers also claim that the Head Custodians recommend hiring or firing decisions. The Union asserts the Head Custodians do not have the authority or responsibility to direct or assign custodians and that they do not exercise independent judgment, they merely ensure that established procedures are being followed. It also argues that the Head Custodians do not have authority to hire, fire, or discipline custodians.

The Board finds that the Head Custodian does not have the authority to hire, fire, or terminate custodians, or the responsibility to direct such action. Jordan Tolar testified that he does not hire or fire custodians. Although he has offered his opinion on potential hires or disciplinary issues, he does not have the authority to hire, fire, or discipline, nor the responsibility to recommend such action.

The Board finds, however, that the Employers have sustained their burden of proving that the Head Custodian has the authority to assign or direct the custodians working with them. Although Mr. Tolar testified that he performs custodial functions similar to the other custodians at Otter Valley, he only spends one and one half to two hours of his day engaged in these custodial tasks. During the remainder of his day, he is responsible for ordering supplies, checking on the heating for the buildings, and ensuring the other custodians do their jobs and the work gets done. Mr. Tolar concedes that he deals with issues throughout the day that “pop up” and is responsible for addressing those issues himself or assigning other custodians. Mr. Tolar is also responsible for assigning custodial staff to set up and break down rooms for activities, events, and during the summer break. Mr. Tolar also provides tours of the buildings for new employees and provides training on the basic principles of cleanliness of the building and the expectations of the custodian position.

The Head Custodian-Elementary Job Description specifies that the position has “supervisory responsibility over the other custodians including seasonal custodial staff.” The description also includes the essential functions of assigning the work schedules and directing the work of custodial staff. Although the Head Custodian @ OV Job Description includes less specific language, the testimony of Mr. Tolar and Ms. Fleming demonstrates that Mr. Tolar has the actual power or authority to assign or direct his custodial staff. He exercises independent judgment when deciding how many and which custodians to assign to cover an area, event, or activity. He checks on the work of custodians and evaluates whether it adheres to the cleanliness standards for the school.

Although Mr. Tolar said he deferred to the input or decisions of his supervisor, Rich Vigue, Mr. Vigue lives in Roxbury, is not on site, and does not interact with Mr. Tolar on a

regular basis. Mr. Vigue is not readily available to Mr. Tolar or the other Head Custodians. Mr. Tolar acknowledges that he makes decisions to the best of his judgment, without the input of Mr. Vigue.

The Chain of Command Policy and the Job Description for Custodians provide further support for our conclusion that the Head Custodian position is supervisory and should not be included in the unit or eligible to vote in the upcoming election. The Head Custodian is the first point of contact for issues related to Facilities, Grounds, or Buildings. Employees are required to “adhere to their chain of command when performing their assigned duties.” The Custodian Job Description, provides that their duties and work areas “will be assigned by the Head Custodian in a manner that best serves the needs of the school.” Deciding whether and how to assign custodians tasks to best serve the needs of the school requires the exercise of independent judgment.

The Employers have demonstrated by a preponderance of the evidence that the three Head Custodians exercise independent judgment in directing or assigning custodians.

ORDER

Based on the foregoing facts and reasoning, it is ordered:

The Head Custodians are supervisory employees as defined in the Municipal Employee Labor Relations Act and are thereby excluded from the bargaining unit and are not eligible to vote or have their vote counted in the election.

Dated this 11th day of December 2023, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Chairperson

/s/ Roger Donegan

Roger Donegan

/s/ Alan Willard

Alan Willard