

VERMONT LABOR RELATIONS BOARD

LOCAL 1201, AFSCME)	
)	
and)	DOCKET NO. 87-8
)	
CITY OF RUTLAND)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 21, 1987, Local 1201, AFSCME ("Union") filed a petition to enlarge the collective bargaining unit represented by the Union, consisting of certain employees of the City of Rutland Department of Public Works, to include the Laboratory Technician and Assistant Chief Operators employed in the Department's Sewage Treatment Plant. On February 6, 1987, the City of Rutland ("Employer") responded to the petition, contending that the petitioned-for employees were supervisors pursuant to 21 VSA §1502(13) and thus ineligible to be part of a collective bargaining unit under the Municipal Employee Relations Act ("MERA").

A hearing on this issue was held before Board Members Charles H. McHugh, Chairman; Louis A. Toepfer and Dinah Yessne on April 10, 1987. Attorney Alan Biederman represented the Union. City of Rutland Attorney Henry Brislin represented the Employer. Briefs were filed by the parties on April 21, 1987.

FINDINGS OF FACT

1. The Union is the recognized collective bargaining representative for certain employees within the City of Rutland Department of Public Works ("DPW").

2. The DPW is charged with operation and maintenance of a sewage treatment facility, which facility is staffed by employees of DPW.

3. Presently within the Sewage Treatment Division of DPW there are the following employees: the chief administrator, the chief operator, three assistant chief operators, five operators, three custodians, a lab director, a lab technician, a electrician, and a secretary.

4. The operators and custodians are currently included in the bargaining unit represented by the Union. By agreement of the parties, the lab technician will also be included in the unit upon the issuance of the Board order in this case. At issue herein is whether the assistant chief operators should be included in the unit or whether they should be excluded as supervisory employees. The Union does not seek the inclusion of the remaining sewage treatment employees in the unit.

5. Within the past few years, the Employer has constructed an extensive upgrade and expansion of the sewage treatment plant. The plant was upgraded from a primary to a secondary treatment process and the operation of the new plant is more complex. The number of employees and the number of stations increased due to the upgrade and expansion. Flow through the renovated and expanded plant started in October, 1986. The positions of chief operator and assistant chief operators did not exist in the old plant and have been created as a result of the upgrading of the sewage treatment facility. The old plant was headed by a superintendent. Operators and custodians were employed in the old plant, as well as being employed in the new plant.

6. The sewage treatment facility is highly regulated by the State of Vermont, pursuant to operator certification regulations promulgated by the State Agency of Environmental Conservation. The

State prepared and the Employer adopted an "O & M Manual", which incorporated the operator certification regulations, to govern operation of the facility. The O & M Manual described the functions of the various employees, and set minimum qualifications, certification criteria and training requirements.

7. The manual contains the following provisions with respect to the duties of the chief operator:

He will be responsible for the operation and maintenance of the Rutland plant. The Chief Operator's duties will include...

D) ensure that proper maintenance is carried out on the equipment.

E) Schedule work loads and be sure there is adequate staffing to accomplish the required work.

...He must be able to adjust to situations involving the direction and planning of activities of others.

...The Chief Operator will be responsible for overall operation and maintenance to keep the plant operating efficiently.

...Response to emergencies at times other than normal working hours will also fall under the Chief Operator's responsibilities.

(City Exhibit A, pages 2, 3, 5, 6)

8. The manual contains the following provisions with respect to the duties of the assistant chief operator:

The assistant chief operator's duties will include...

A) Carry out operations as directed by the treatment plant chief operator.

B) Ensure that routine maintenance and housekeeping as scheduled by the chief operator.

C) Operate the plant, as directed by the treatment plant chief operator, on scheduled shifts...

The assistant operator will aid the chief plant operator with the operation and maintenance of the facilities. The hours spent and time schedule will be set up by the chief operator and the Commissioner of Public Works. The assistant operator will discharge the

responsibilities delegated to him by the chief operator. These duties may include laboratory testing, directing the efforts of maintenance crews operating the plant during holidays or weekends, assisting the chief operator in the daily operation, or any other assignments the chief operator feels necessary. Duties of assistant operator may also include responding to emergencies at times other than normal working hours.

(City Exhibit A, pages 3,7)

9. The duties actually performed by the chief operator and assistant chief operator at the Rutland facility are consistent with these provisions in the manual, except that assistant chief operators do not work with maintenance crews and direct their efforts.

10. The sewage treatment facility is staffed 24 hours a day, seven days a week. The first shift commences at 11:30 p.m. and continues until 7:30 a.m. That shift is staffed solely by custodians. The custodians perform duties such as pipe and tank cleaning, general maintenance, repairs and groundskeeping. The custodians perform no operational duties at the plant. The assistant chief operator from the previous shift is on-call for emergencies. Assistant chief operators have no regular contact with custodians. (Joint Exhibit 1).

11. The second shift commences at 7:30 a.m. and continues until 3:30 p.m. On Monday through Friday, this shift is staffed by the chief operator, an assistant chief operator and two or three operators. On Saturdays and Sundays, the shift is staffed by an assistant chief operator and one operator (Joint Exhibit 1). The employees on this shift are starting the plant process after a night of relative inactivity. Operations are performed pursuant to a predetermined schedule combined with instructions.

12. The third shift commences at 3:30 p.m. and continues until 11:30 p.m. On Sunday, Monday, Friday and Saturday of each week, this

shift is staffed by an assistant chief operator and an operator. On other days, there is at least one assistant chief operator and two operators on duty. The employees on this shift generally continue the plant processes initiated by the second shift employees (Joint Exhibit 1).

13. On the second and third shifts, there is one assistant chief operator and one operator on duty on six of the 14 available shifts each week. On the remaining eight shifts, there is an assistant chief operator on duty, along with at least two operators. On five of those eight shifts, the chief operator is also on duty (i.e., second shift, Monday through Friday)(Joint Exhibit 1).

14. Employees at the Rutland facility who perform operating functions are required by the certification regulations of the State Agency of Environmental Conservation to be certified. Grade 5 is the highest level of certification and Grade 1 is the lowest. The chief operator is required to possess a Grade 5 certification, assistant chief operators are required to possess a Grade 3 certification, and operators possess either Grade 1 or Grade 2 certification (City Exhibit B).

15. Assistant chief operators neither perform nor effectively recommend the hiring, transfer, layoff, recall or reward of operators or custodians. An assistant chief operator was involved in the hiring of one employee. However, the evidence does not indicate the assistant chief operator effectively recommended the hiring of the employee.

16. Assistant chief operators do not have authority to adjust grievances or effectively recommend the adjustment of grievances. The

collective bargaining agreement between the Union and the Employer provides that grievances at the first step of the grievance procedure are submitted directly to the Commissioner of Public Works. There is no evidence to indicate that assistant chief operators are consulted with respect to grievances.

17. Discharge of employees can be performed only by the Rutland City Board of Civil Authority on recommendation of the Commissioner of Public Works. There is no evidence to indicate that an employee has ever been discharged based upon the recommendation of an assistant chief operator. With respect to suspension of employees, such power is vested in the Commissioner of Public Works. No employee has been suspended or reprimanded by an assistant chief operator or by the Commissioner of Public Works based upon effective recommendation of an assistant chief operator.

18. Pursuant to the collective bargaining agreement, when a job vacancy occurs in the City of Rutland Sewage Treatment Plant, employees in the bargaining unit may bid on such jobs based on seniority. The successful bidder is subject to a 60-day qualification period where the job is presumed awarded to the employee unless the employee is deemed unqualified by management. Under this provision, custodian Greg Casey was promoted to operator to fill a vacancy. At the conclusion of the 60-day qualification period served by Casey, the qualification period was extended by consent between the Union and the Employer. Extension of this period was recommended by an assistant chief operator to the chief operator. The chief operator then recommended extension of the period to the Commissioner of Public Works and the Commissioner negotiated an extension of the qualification period with the Union.

19. The Board conducted a hearing on this matter on March 18, 1987. Due to mechanical problems, no transcript of the hearing conducted on that date exists. The Board reheard this matter de novo on April 10, 1987, with the parties agreeing that a de novo hearing was appropriate. Two days after the March 18 hearing, the Employer changed its operating procedure with respect to duties of the chief operator and assistant chief operator. Prior to the change, the chief operator set forth the operating duties to be performed by employees each day. After the change, the office of the chief operator was moved physically within the water treatment facility and the assignment of operating duties was relayed to employees by assistant chief operators. The evidence does not indicate that the assignment of such duties requires the use of independent judgment and is anything more than assignments of a routine nature.

20. Both assistant chief operators and operators perform operational duties. Assistant chief operators often perform the same work done by operators. Assistant chief operators also perform more highly skilled work than operators. Assistant chief operators perform lab tests; operators do not perform such tests. As a result of such lab tests, assistant chief operators may make judgments as to the need to adjust plant processes. Assistant chief operators regularly monitor processes at the plant and make necessary adjustments themselves, direct operators to make necessary adjustments or work together with operators to make the adjustments. When assistant chief operators give directions to operators, this generally involves routine assignments or direction and does not require the use of independent judgment. Much of the work done at the plant is dictated

by the volume of flow coming into the plant. Plant procedures on how to handle this flow are largely established.

21. During the first months of the operations of the new plant, the chief operator was heavily involved in the daily operations of the plant to familiarize himself with the plant processes and to ensure employees were properly trained to operate the plant. During this period, he directly assigned tasks to operational employees, directed them in their work and in some instances performed routine tasks himself. During this period, any assignment of duties and directing of employees by assistant chief operators was strictly of a routine nature. Since March of this year, the chief operator has begun to remove himself more from the daily operations of the plant and assistant chief operators have assumed more responsibility in assigning work to operators and directing them in their work. At present, these assigning and directing tasks are generally of a routine nature and such tasks which require use of independent judgment are generally performed by the chief operator.

OPINION

At issue is whether the assistant chief operators are supervisors and thus ineligible to be members of the bargaining unit pursuant to 21 VSA §1722(12).

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

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 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". Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980).

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. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor. Brattleboro, supra, at 351.

Given these standards, it is clear the assistant chief operators lack effective supervisory authority in the areas of hiring, transferring, laying off, recalling, discharging, rewarding, disciplining or adjusting grievances of other employees, since the evidence indicates that assistant chief operators have never taken or effectively recommended such actions.

More extended discussion is necessary with respect to whether assistant chief operators have effective supervisory authority with respect to promoting employees or assigning or directing them.

The Employer contends that the assistant chief operators have authority to effectively recommend the promotion of employees since the qualifying period for an employee promoted from custodian to operator was extended subsequent to a recommendation by an assistant chief operator.

We conclude that this single incident is not sufficient to elevate assistant chief operators to the status of supervisors. We

doubt that this indicates effective authority to recommend promotions since the assistant chief operator had to relay his recommendation through the chief operator to the ultimate decision maker in the chain of command (i.e., the Commissioner of Public Works) and there is nothing to indicate that a similar recommendation from a non-supervisory operator to the chief operator may not have been similarly followed. Moreover, rare or infrequent supervisory acts like this single isolated incident do not make an employee a supervisor. Brattleboro, supra, at 351.

The closest question herein is whether the assistant chief operators have authority to responsibly direct employees and to assign them and to exercise independent judgment in this regard.

We have concluded that, under the present circumstances, assistant chief operators do assign and direct employees but that generally the exercise of such authority is of a routine nature or pursuant to established procedures. The assignment of routine duties, pursuant to directives and established procedures, does not make one a supervisor. Brattleboro, supra, at 352.

While there may be occasions at present where assistant chief operators exercise independent judgment in assigning and directing employees, insufficient evidence was presented by the Employer to indicate that this occurred on more than an infrequent basis. Such infrequent duties do not make an employee a supervisor. Id., at 351.

We recognize that, on eight shifts per week, an assistant chief operator is the senior employee in the chain of command on duty. In Colchester Police Officers Association and Town of Colchester, 5 VLRB 43, 49, the Board concluded that police sergeants were supervisors

when they were in total command of the shift in the absence of the shift supervisor. There we found on the evidence presented that shift command meant the sergeants responsibly directed subordinates, which required exercise of independent judgment other than of a routine nature. However, the circumstances herein do not lead to the same conclusion. On five of the eight shifts, there is only one operator on duty with the assistant chief operator. Supervisory authority over a single employee does not meet the definition of supervisory employee since the statutory language is in the plural, requiring supervisory authority over employees for an individual to be considered a supervisor. c.f. Health Department Personnel Designation Disputes, 5 VLRB 245, 247 (1982). This leaves only three shifts per week, out of 14 where an assistant chief operator is on duty, where an assistant chief operator is alone with more than one operator. Given the infrequent incidence of being in command of a shift with more than one other employee and the infrequent occasions when independent judgment actually may be exercised in directing and assigning employees at present, we conclude effective supervisory status does not exist.

Finally, we are aware that the sewage treatment facility is still in somewhat of a state of flux since it was expanded and that circumstances may change in the future to possibly make the assistant chief operators supervisory. Our decision today does not preclude the Employer from filing a petition in the future pursuant to 21 VSA §1724(a) to remove the position from the bargaining unit. 21 VSA §1724(a) provides that 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. City of St. Albans and Local 1343, AFSCME, AFL-CIO, 5 VLRB 48, 54 (1982).

In our decision today, we have simply concluded that the assistant chief operators are not supervisors under present circumstances. As made clear by the Vermont Supreme Court in Local 1201, AFSCME, Rutland Department of Public Works, 143 Vt. 512, a considerable amount of evidence must be advanced to exempt an employee from inclusion in a bargaining unit. Such evidence does not exist under the present circumstances.

ORDER

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

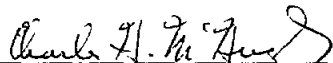
1. The assistant chief operators in the sewage treatment facility of the City of Rutland Department of Public Works are not supervisory employees as defined in 21 VSA §1502(13) and shall be included in the City of Rutland Department of Public Works bargaining unit represented by Local 1201, AFSCME, ("Union");

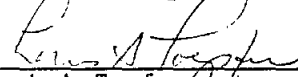
2. The laboratory technician in the sewage treatment facility shall also be included in the above bargaining unit pursuant to stipulation of the Union and the City of Rutland; and

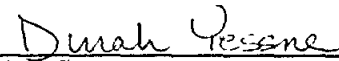
3. The Union is CERTIFIED as the exclusive bargaining representative of the assistant chief operators and the laboratory technician.

Dated this 10th day of June, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Louis A. Toepfer


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