

VERMONT LABOR RELATIONS BOARD

AFSCME, LOCAL 490

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DOCKET NO. 87-45

)

AND

)

TOWN OF BENNINGTON

)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 23, 1987, AFSCME, Local 490 ("Union") filed a Petition for Election of Collective Bargaining Representative. Therein, the Union requested that the present bargaining unit of members of the Bennington Police Department represented by the Union be expanded to include captains, lieutenants, dispatchers, parking meter clerks, meter officers, clerk dispatchers and secretaries.

On October 15, 1987, the Town of Bennington ("Town") filed a response to the petition. The Town asserted that the proposed bargaining unit would be inappropriate because it would consist of supervisory employees, confidential employees, part-time employees and temporary employees.

A hearing was held in the Labor Relations Board hearing room on January 21, 1988, before Board Members Dinah Yessne, Acting Chair; Catherine Frank and Louis Toepfer. Attorney Alan Biederman represented the Union. Attorney Joseph McNeil represented the Town.

At the hearing, the parties narrowed the issues before the Board through stipulation. According to the terms of the stipulation, the Union withdrew its petition to have the positions of captain and lieutenant, as well as the position of secretary to the chief of police, included within the bargaining unit. The withdrawal with

respect to the position of lieutenant was made on the basis of the current situation in the Bennington Police Department, and was agreed to be without prejudice to the right of the Union to resubmit a petition concerning that position at a later time. The Town withdrew its opposition to the inclusion of the dispatchers within the bargaining unit. The parties further agreed that if employees in the positions of file clerk and parking meter clerk worked more than 20 hours per week, then those positions could also be included within the bargaining unit.

Due to the above stipulation, the dispute between the Union and the Town was reduced to two issues. The Union requests the inclusion of Police Department sergeants within the bargaining unit, and the Town objects on the grounds that they are supervisory. The Union also requests the inclusion of the ~~payroll~~ clerk within the bargaining unit, and the Town objects on the grounds that such position is one held by a confidential employee.

Memoranda of Law were filed by the Town and the Union on January 29 and February 2, respectively.

FINDINGS OF FACT

1. The Town Police Department includes, under normal circumstances, the following officers: a chief, a captain, a lieutenant, three sergeants, and eighteen patrol officers. The sergeants report to the lieutenant or the captain, who in turn report to the chief, who in turn reports to the town manager.

2. The chief, the captain and the lieutenant work five-day weeks on the day shift. The other officers are divided into

three shifts; day shift (7:00 a.m. - 3:00 p.m.); evening shift (3:00 p.m. - 11:00 p.m.); and night shift (11:00 p.m. - 7:00 a.m.).

3. The patrol officers and sergeants work five shifts per week. The shifts are staffed seven days per week. On all shifts in which a sergeants works, the sergeant is the highest ranked individual who is performing patrol duties. On each shift there generally are four to five officers (including sergeants if there is one on duty) performing patrol duties. Generally, patrol is accomplished either in police cruisers or foot beat.

4. For most of the evening shift on weekdays, the officer in charge generally is a sergeant. This same situation prevails throughout the week on the night shift, on holidays and on the two full days of each weekend.

5. On at least six shifts per week, there is no sergeant on duty. The Town has elected not to assign a fourth sergeant to fill the time when other sergeants are on days off or vacation. In the absence of a sergeant, patrol officers act as officer in charge and perform the same duties as sergeants.

6. The patrol of the town is divided by Town policy into three patrol zones. If there are four officers on duty during a shift, which is generally the case, the sergeant on duty performs patrol duty as a roving patrol, circulating in all zones.

7. The sergeant on each shift assigns personnel to zone duties. Each sergeant has his own method of assigning zones. One sergeant assigns officers on a rotating basis. Another sergeant makes such assignments based on an assessment of the capabilities of the patrol officers on the shift.

8. The sergeants determine when patrol officers may leave their patrol zones, under what circumstances backup assistance is to be provided, whether a high speed chase should continue, and when arrests should be made. There is an unwritten Department policy that the officer in charge should be called before an arrest is made.

9. Patrol officers generally perform their duties on a shift with little contact with the sergeant acting as officer in charge.

10. On a normal shift, a sergeant will spend approximately five and one half hours per day working on patrol, performing the same duties as patrol officers. During the remaining time on the shift, a sergeant will review reports from the previous shift to learn what occurred on that shift, assign zone work and review reports filed by patrol officers on that shift.

11. There generally is one dispatcher assigned to each shift. Dispatchers will move patrol officers from zone to zone, in effect, by relaying incoming calls for assistance to them.

12. Sergeants establish procedures on their shifts relating to areas such as firearms use and use of emergency warning lights and sirens. The procedures established are generally consistent with those learned by officers at the Vermont Police Academy.

13. Sergeants review for completeness all written reports prepared by patrol-officers during each shift. Sergeants send the reports to the captain.

14. Sergeants counsel employees concerning observed performance deficiencies and measures to be taken to correct the deficiencies. In so counseling employees, sergeants are not reprimanding them.

15. Sergeants, as well as patrol officers, are expected to bring to the attention of their supervisors the fact that an employee is not following appropriate procedures (Town Exhibit 1).

16. Sergeants have the authority to relieve a patrol officer from duty for the balance of a particular shift if the officer is impaired due to alcohol or drug use.

17. The term discipline is defined in the collective bargaining contract between the Union and Town as including step discipline in the form of oral reprimand, written reprimand, suspension, and discharge. The contract specifies that discipline may only be imposed by the chief of police with the approval of the town manager. There was no evidence that any Department employee had ever been disciplined by a sergeant or that a sergeant had ever effectively recommended discipline (Union Exhibit 1, Article XVIII).

18. The first step of the grievance procedure directs grievances to the chief of police. Sergeants are not involved in the grievance procedure and have no authority with respect to grievances (Union Exhibit 1, Article XIX).

19. The police chief resigned in November, 1987, and the captain resigned shortly thereafter. Presently, the lieutenant is serving as the acting chief. During his tenure, the former chief wished to be called by the officer in charge concerning anything occurring out of the ordinary. The chief would direct the officer in charge on how to deal with other than ordinary circumstances.

20. Sergeants have no authority with respect to the hiring or promotion of employees.

21. For at least the past fourteen years, no employees of the Police Department have been laid off or recalled.

22. If patrol officers wish time off, they initiate such requests through their sergeants. If the sergeant determines time off should not be granted, the patrol officer's request will proceed no further up the chain of command and will be denied. If the sergeant approves of such leave, the request proceeds up the chain of command until, ultimately, the town manager determines whether time off should be granted. There have been occasions when a sergeant has approved such a request and it has been rejected by the town manager.

23. Sergeants are more highly compensated than the patrol officers.

24. The payroll clerk employed by the Police Department performs the following duties: payroll preparation, certain budgetary tasks, typing (especially for the lieutenant and captain), filing, recording, dispatching and miscellaneous duties.

25. The payroll clerk assists in the preparation of the Police Department budget.

26. The town manager and the assistant town manager prepare bargaining proposals for contract negotiations, and perform the economic analysis required for the Town's economic proposals. In performing such tasks, they have consulted with the payroll clerk concerning what reserves may exist in the Police Department budget to apply toward economic items of negotiations. The payroll clerk would know and be able to inform Union representatives concerning sources of revenue and location of budgetary opportunities about which they would not know without this "insider" information.

27. The payroll clerk types confidential internal affairs investigation reports for the lieutenant and captain. These reports can result in disciplinary action being taken against Police Department employees (Town Exhibit 4).

28. The Union and Employer have agreed that the secretary to the police chief is a confidential employee.

29. The payroll clerk is not in the chief's office, nor in the chief's secretary's office. The payroll clerk has unlimited access to the chief's files.

OPINION

The first issue before us is whether the three sergeants of the Bennington Police Department are supervisors and, thus, ineligible to belong to a bargaining unit 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 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.

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 or her; 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.

It is clear from the evidence presented that the sergeants do not have authority to hire, transfer, lay off, recall, promote, discharge, or reward employees, or to adjust their grievances, or to effectively recommend such action. It is also evident the sergeants lack authority to discipline employees. Any disciplinary authority is limited to sending an employee home for the remainder of the shift. Such limited authority, standing by itself, does not make an employee a supervisor. Brattleboro, supra, at 351.

The Town contends that the sergeants have the authority to assign and responsibly direct the patrol officers working below them in the chain of command, and that such authority requires the use of independent judgment. Although it is a close question, we conclude that the assigning and directing responsibilities of the sergeants do not rise to the level necessary to make them supervisors.

The responsibility of the sergeants to assign patrol officers to zones constitutes an insignificant part of duties. Such assignments do not result in supervisor status. Brattleboro, supra.

The sergeants may be called upon during a shift to make determinations concerning when patrol officers may leave their patrol zones, under what circumstances backup assistance is to be provided, whether a high speed chase should continue and when arrests would be made. In performing such functions, however, it is evident that sergeants are

simply applying the procedures and policies established in such matters through practice in the Department. They are not exercising independent judgment. Further, non-sergeant officers in charge make the same determinations.

Similarly, in establishing procedures on their shifts relating to firearms use and use of emergency warning lights and sirens, the sergeants are establishing procedures consistent with those learned by officers at the Vermont Police Academy. Again, sergeants are not exercising independent judgment in this regard.

In other areas as well, such as counseling employees and reviewing patrol officers' reports for completeness, sergeants are acting more to ensure adherence to established Department procedures and practices than to exercise independent judgment.

In sum, sergeants are more highly skilled individuals who generally perform the same duties as patrol officers but who, because of their experience and skill, ensure that officers on their shift adhere to established policies, procedures and practices. Such direction lacks use of independent judgment and does not rise to the level of constituting exercise of supervisory authority. City of Winooski and Winooski Police Employees Association, 9 VLRB 85, 92 (1986).

In concluding that sergeants are not supervisory under the existing structure in the Police Department, it is of particular significance to us that the police chief expected to be called by sergeants on anything occurring out of the ordinary, that sergeants spend most of their shift on patrol performing the same duties as

patrol officers, that patrol officers generally perform their duties on a shift with little contact with the sergeant, and that patrol officers serve as officer in charge on at least six shifts per week in the absence of sergeants and, in so doing, have the same authority as sergeants. These facts lead us to believe that supervisory authority in the Police Department resides only with the chief, captain and lieutenant.

The remaining issue is whether the payroll clerk is a confidential employee and, thus, excluded from eligibility to belong to the bargaining unit under 21 VSA §1722(12)(d). The term confidential employee is defined in 21 VSA §1722(6) as:

an employee whose responsibility or knowledge or access to information relating to collective bargaining, personnel administration, or budgetary matters would make membership in or representation by an employee organization incompatible with his official duties.

A finding that a person assists or acts in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations is a necessary element under the labor-nexus rule if an employee is to be classified as a confidential employee. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). Employers are entitled to rely upon employees who are not subject to divided loyalties, and employees should not be in a position where they must choose between their obligations to a union and to their employer. Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 68 (1982).

In previous cases interpreting this language, we have ruled that employees who have access to confidential information as part of their regular duties meet this definition, American Federation of Teachers,

Local 3333 and Washington Central Supervisory Union, 1 VLRB 288 (1978); Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978); but that employees whose duties require only occasional access to confidential material which the employer could reassign or employees who occasionally substitute for confidential employees do not meet the definition of "confidential" employee. Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979).

We conclude that the responsibilities of the payroll clerk, with respect to discussing with Town managers the Police Department budget in reference to pending contract negotiations and typing internal investigation reports for Department supervisors which may result in disciplinary action, mean that she assists in a confidential capacity to persons who have management duties in labor relations. In performing these duties, she has responsibilities relating to collective bargaining, personnel administration and budgetary matters which would make representation by the Union incompatible with her official duties. The payroll clerk would be subject to divided loyalties were she placed in the bargaining unit.

We note that if her confidential duties consisted only of typing of investigation reports, we would be inclined to not find her confidential since it is evident it would not place an undue burden on management to have the chief's secretary, a confidential employee, type such letters. However, it is apparent her confidential duties relating to the Department budget cannot be reassigned feasibly. Thus, she still would be performing confidential duties.

ORDER

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

1. The sergeants of the Bennington Police Department are not supervisory employees as defined in 21 VSA §1502(13) and are appropriately included in the Police Department bargaining unit represented by Local 490, AFSCME;

2. The payroll clerk of the Bennington Police Department is a confidential employee as defined in 21 VSA §1722(6) and thus is ineligible to be included in a bargaining unit pursuant to 21 VSA §1722(12);

3. Pursuant to stipulation of the parties, the dispatchers, parking meter clerk and file clerk whom work more than 20 hours per week are appropriately included in the above bargaining unit; and

4. a representation election shall be conducted by the Labor Relations Board among the sergeants, dispatchers, parking meter clerk and file clerk whom work more than 20 hours per week to determine whether they wish to be represented by Local 490, AFSCME or no union.

Dated the 9th day of April, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Dinah Yessne
Dinah Yessne, Acting Chair

Catherine L. Frank
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Louis A. Toepfer
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