

VERMONT LABOR RELATIONS BOARD

CHITTENDEN SOUTH EDUCATION
ASSOCIATION, VERMONT-NEA

and

SHELBURNE BOARD OF
SCHOOL DIRECTORS

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Docket No. 89-29

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 30, 1989, the Chittenden South Education Association, Vermont-NEA ("Association") filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board seeking an election to certify the Association as representative of all non-certified, non-supervisory support staff employees employed by the Shelburne Board of School Directors ("Employer"), including bus drivers, aides, custodians, cafeteria staff and secretaries", but excluding the secretary to the principal at Shelburne Village School, the secretary to the principal at Shelburne Middle School, the cafeteria supervisor, the custodial supervisor at Shelburne Village School and the custodian supervisor at Shelburne Middle School.

In response to the Petition, the Employer raised the following issues of unit determination:

- a) the confidential status of Theresa Carey, secretary;
- b) the confidential status of Pat Smith, secretary;
- c) the part-time status of one cafeteria worker, one custodian, four aides, and eight bus drivers; and
- d) the supervisory and confidential status of Cherrie Willette, bus driver supervisor.

On September 21, 1989, a Stipulation was entered into by the parties in which three of the issues of unit determination were resolved: a) it was agreed that Theresa Carey, secretary, was excluded from the bargaining unit as a confidential employee; b) it was agreed that Pat Smith, secretary, was excluded from the bargaining unit as a confidential employee; and c) it was agreed that one cafeteria worker, one custodian, four aides and eight bus drivers were excluded from the bargaining unit as part-time employees. No stipulated agreement was reached between the Association and the Employer on the confidential and supervisory status of Cherrie Willette. The Employer contends that Willette should be excluded from the bargaining unit on the joint grounds that, in connection with her duties as bus driver supervisor, she is both a confidential and a supervisory employee.

A hearing on this issue was held on September 21, 1989 before Vermont Labor Relations Board Members Charles McHugh, Chairman; Louis Toepfer; and Catherine Frank. Attorney Nicholas DiGiovanni, Jr. represented the Employer. Vermont-NEA Organizer Ellen David Friedman represented the Association.

Briefs were filed by the Association and the Employer on September 28 and October 2, 1989, respectively.

FINDINGS OF FACT

1. The Shelburne School District is one of five districts included within the Chittenden South Supervisory Union. All five districts are under the administration of one Superintendent of Schools and one Director of Personnel. The Director of Personnel, James Rice, coordinates labor relations among the five districts.

2. Teachers in each of the five school districts are represented by the Chittenden South Education Association, Vermont NEA ("Association") for purposes of collective bargaining. There are currently no non teaching support staff in any of the school districts represented by an employee organization for collective bargaining purposes.

3. The Shelburne School District is a kindergarten through eighth grade system. There are two schools within the district, the Shelburne Middle School covering grades five through eight and the Village School covering K through four. The Association is seeking to represent eligible non-teaching support staff employed by the Employer, including aides, custodians, cafeteria staff and secretarial employees.

4. Cherrie Willette is employed full-time at the Shelburne Village School, and works in two capacities: as a special education aide, and as a bus driver supervisor. In each of her capacities, Willette works more than 20 hours per week. During the 1988-89 school year, she averaged approximately 25 working hours per week as an aide. During the same school year, she averaged approximately 20 working hours per week as a bus driver supervisor. For the current 1989-90 school year, Willette has contracted with the school board to work 25 hours per week as an aide and 22 and one-half hours per week as a bus driver supervisor (Employer Exhibit A, Association Exhibit 1).

5. Willette has been immediate supervisor of the bus drivers since 1981. Willette is supervised by Gus Mercaldo, Principal of the Shelburne Village School.

6. Willette's responsibilities with regard to the hiring of bus drivers involve determining whether new drivers are needed, conducting the initial interview, making hiring recommendations to the school principal which are usually followed, and determining the starting position of new drivers on the established pay scale in accordance with their years of experience. She does not have authority to hire drivers on her own initiative.

7. Willette assigns and supervises the drivers' daily work, including daily routes and field trips. She is responsible for finding substitutes when drivers call in sick. She assigns overtime, may approve or deny time off, and collects and approves time cards.

8. Willette has authority to issue oral and written reprimands to the bus drivers. In the past, she has discussed parents' complaints with the bus drivers and has issued disciplinary warnings. Willette also has been involved in discussions concerning potential disciplinary action to be taken against bus drivers with Principal Mercaldo and Personnel Director Rice. Willette does not have independent authority to discharge the drivers or to undertake other serious disciplinary action on her own.

9. Willette does not now perform written evaluations on the bus drivers, and has not done so since 1985.

10. Willette maintains personnel files on the bus drivers which may contain the job application, a copy of the driver's license and driving record, physical exam information, and notes made by Willette. Additional personnel files on the bus drivers are maintained by Mercaldo in his office.

11. Willette participates in preliminary discussions of the transportation budget with Mercaldo, and makes recommendations on

supplies, equipment purchases and needed repairs. Willette's recommendations in these areas are often accepted by Mercaldo and included in his proposed budget. In the past, Mercaldo on occasion has discussed proposed salary increases of bus drivers with Willette during preliminary budget preparations. Willette has no effective authority to recommend salary increases and there is no indication that such information is necessary to the performance of Willette's job. Willette does not have advance knowledge of bus drivers' approved annual pay increases. She first learns of the approved salary schedule for bus drivers at the beginning of the corresponding school year. Historically, bus drivers generally have received the same salary increases as other non-teaching staff.

12. Willette once recommended that a bus driver receive a merit increase, which recommendation was not approved.

13. Nine bus drivers are currently employed by the District and supervised by Willette. Each driver averages approximately ten hours per week in actual working time.

14. Two of the bus drivers work additional hours for the school district in the capacity of part-time custodian, and as such are included in the bargaining unit which the Association seeks to represent in this matter.

15. The parties have agreed that all bus drivers as such are to be excluded from the proposed bargaining unit on the ground that none constitute "employees eligible to be included in the bargaining unit" within the meaning of 21 VSA §1722(12)(c).

OPINION

At issue is whether Cherrie Willette should be excluded from the proposed bargaining unit as a supervisory and confidential employee due to her responsibilities as a bus driver supervisor.

We first address whether Willette is a supervisory employee 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 evident that Willette possesses authority in the interest of the Employer to assign and responsibly direct bus drivers, and to effectively recommend the hiring of drivers. Ordinarily, this

determination would end our inquiry and we would conclude that Willette possesses a number of the listed powers in the statutory definition and, thus, is a supervisor.

However, the Association contends that, because all of the bus drivers supervised by Willette have been excluded from the bargaining unit due to the fact that they work less than 20 hours per week, Willette's supervisory authority is not an issue since she does not supervise any member of the proposed bargaining unit.

By applying a strict and technical construction of the statutory definition of supervisor, we could conclude that an employee would not be considered a supervisor if he/she supervised only part-time employees. The statutory definition of supervisor provides that an individual must possess any one of the listed supervisory powers over "employees". 21 VSA §1502(13). "Employee" means a municipal employee as defined in §1722 of the Municipal Employee Relations Act, 21 VSA §1721, et seq. ("MERA"). 21 VSA §1722(7). "Municipal Employee" is defined in pertinent part as "any employee of a municipal employer... except... individuals who have been employed on a... part-time basis. 'Part-time' means 20 hours per week or less". 21 VSA §1722(12)(C). Thus, since part-time employees are not "employees" within the meaning of MERA, we could strictly and technically construe §1502(13) to provide that supervision of part-time employees does not make an individual a supervisor. We note that this strict and technical construction nonetheless could result in our conclusion that Willette is a supervisor within the meaning of §1502(13) because two of the bus drivers are "employees" under MERA, albeit in their role as custodians and not bus drivers.

However, we conclude that a broader interpretation of the statute makes better sense. It is evident that the fundamental concept behind the supervisory exclusion is the individual's authority to act as an arm of management in supervising their employees. If an employer expects an individual to carry out significant supervisory functions over employees in a major component of the employer's operation, then we believe that individual meets the statutory definition of supervisor regardless of whether the employees supervised are part-time. Willette carries out such significant supervisory functions for the Employer in supervising the part-time bus drivers. Thus, we conclude that she is a supervisory employee.

We turn to discussing whether Willette is a confidential employee. 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).

Employees who do not have access to confidential information as part of their regular duties do not meet these tests. Employees whose duties require only occasional access to confidential material and which could be reassigned, or employees who occasionally substitute for confidential employees do not meet the definition of "confidential" employee. American Federation of Teachers, Local 333 and Washington Central Supervisory Union, 1 VLRB 288 (1978). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979).

Further, an employer must demonstrate not only access to confidential information, but that such access would adversely impact on the employer's conduct of its labor relations policies if employees are included in a bargaining unit. Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 78 (1989).

The only access to confidential information which Willette has which potentially could make membership in or representation by an employee organization incompatible with her official duties is the school principal discussing proposed salary increases of bus drivers with Willette during preliminary budget preparations. Knowledge of this confidential information by Willette could adversely impact on the employer's conduct of its labor relations policies with other non-teaching staff since, historically, all non-teaching staff generally have received the same wage increases. However, the Employer has not demonstrated that Willette needs access to such

information to perform her job. The Employer would not be adversely affected if such information was no longer provided to her and, thus, we conclude that Willette is not a confidential employee.

ORDER

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

1. Cherrie Willette is not a confidential employee but is a supervisory employee and, thus, is ineligible to be included in a bargaining unit represented by the Chittenden South Education Association, Vermont-NEA ("Association"); and

2. A representation election shall be conducted by the Labor Relations Board among all non-certified, non-supervisory support staff employed by the Shelburne Board of School Directors, who work more than 20 hours per week, including aides, custodians, cafeteria staff and secretaries, but excluding the secretary to the principal at Shelburne Village School, the secretary to the principal at Shelburne Middle School, the cafeteria supervisor, the custodian supervisor at Shelburne Village School, the custodian supervisor at Shelburne Middle School, the bus driver supervisor at Shelburne Middle School, and secretaries Theresa Carey and Pat Smith, to determine whether the employees wish to be represented by the Association or no union.

Dated this 2nd day of November 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh
Charles H. McHugh, Chairman

Catherine L. Frank
Catherine L. Frank

Louis A. Toepfer
Louis A. Toepfer