

VERMONT LABOR RELATIONS BOARD

VILLAGE OF ESSEX JUNCTION)	
)	
and)	DOCKET NO. 89-21
)	
LOCAL 1343, AMERICAN FEDERATION OF)	
STATE, COUNTY AND MUNICIPAL)	
EMPLOYEES)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 13, 1989, the Village of Essex Junction ("Village") filed a petition to clarify the bargaining unit of Village employees represented by the American Federation of State, County and Municipal Employees, Local No. 1343 ("Union"). The Village sought to exclude the following three Village positions from the bargaining unit represented by the Union on the grounds that they are held by confidential employees as defined in 21 VSA §1722(6): Accountant/Data Processing Manager, Clerk/Treasurer, and the Administrative Secretary to the Village Manager.

A hearing was held before Board Members Charles H. McHugh, Chairman; Catherine L. Frank and Louis A. Toepfer on May 11, 1989, in the Board hearing room. Attorney Steven Stitzel represented the Village. Lindol Atkins Jr., President of the Union, represented the Union.

The Village filed Proposed Findings of Fact, Opinion and Order on May 25, 1989. The Union filed a memorandum on May 29, 1989. The Union's brief has not been considered by the Board because it was filed late.

FINDINGS OF FACT

1. The Village is a municipal employer as that term is defined in 21 VSA §1722(13). All legislative powers of the Village are vested in the Village Trustees. The Trustees provide for the exercise of these powers and for the performance of all duties and obligations imposed on the Village by law (Village Exhibit 1).

2. The Village Manager is the chief administrative officer of the Village. The Manager has the power to appoint, suspend or remove all Village employees. In addition, the Manager directs and supervises the administration of all Village departments and reports to the Village Trustees on these matters. The Manager's responsibilities to the Trustees also include reporting on budgetary matters, personnel matters and making recommendations as to the future needs of the Village (Village Exhibit 1).

3. There are five departments in the Village: Public Works, Waste Water Treatment, Library, Administration and the Volunteer Fire Department. Each department is controlled by a department head. The department heads are not in the bargaining unit represented by the Union.

4. On December 1, 1975, subsequent to the determination of the appropriate bargaining unit by the Labor Relations Board and the conducting of a representation election by the Board, the Labor Relations Board certified the Union as the exclusive collective bargaining representative of the Street Department and Sewer Department employees, police dispatchers, maintenance workers and clerical workers of the Village. The Treasurer/Clerk, Accountant/Data Processing Manager and Administrative Secretary to the Manager

employed by the Village were not included in the bargaining unit.

5. During the summer of 1988, the Union contacted the Village and requested that the Treasurer/Clerk, Accountant/Data Processing Manager and Administrative Secretary to the Manager employed by the Village be included in the bargaining unit represented by the Union. The Village agreed to the inclusion of the employees in the bargaining unit, and these employees began paying Union dues in September 1988.

6. These three positions are in the Administration Department of the Village, which is directly supervised by the Village Manager, along with two other full-time employees, the Zoning Administrator and the Planning and Zoning Secretary. The Zoning Administrator and Planning and Zoning Secretary are in the bargaining unit represented by the Union.

7. The Accountant/Data Processing Manager oversees all Village accounting and data processing systems, and provides general assistance to the Village Treasurer and Village Manager in other areas of financial management (Village Exhibit 4).

8. The Accountant/Data Processing Manager operates the computer to which only he and the Clerk/Treasurer have access. The Village maintains employee financial records relating to salary and other benefits on the computer. The Accountant/Data Processing Manager uses these records to gather data on employee salaries, benefits and deductions. In addition, he uses the computer to disburse the payroll on a weekly basis and compiles vacation leave, sick leave and other benefit summaries. He also monitors budget expenditures, including personnel costs. These records are public records (Village Exhibit 4).

9. In the course of contract negotiations between the Union and the Village, the Village Manager has requested the Accountant/Data Processing Manager to calculate the estimated cost to the Village of alternative salary and benefit increases considered by the Village Trustees before such alternatives are presented to the Union in negotiations. During negotiations conducted during the Fall of 1988, the Accountant/Data Processing Manager performed this function for the Village. He was a member of the Union negotiations team for those negotiations. At one point during negotiations, two Union members told the Accountant/Data Processing Manager that they felt uncomfortable because he was advising Village Trustees that they were "getting too deep in water".

10. Bimonthly meetings of the department heads are held after the Village Trustees' meetings. The Accountant/Data Processing Manager attends these meetings due to his duties relating to Village finances. At these meetings, the possible elimination of Village employee positions and the contracting out of services performed has been discussed. The Accountant/Data Processing Manager has prepared for these meetings the respective cost projections of employee services versus contracting out those services.

11. The Clerk/Treasurer is appointed by the Village Manager, subject to the approval of the Village Trustees (Village Exhibit 1, page 5).

12. The Clerk/Treasurer is the custodian of all official records of the Village, including keeping records of all monies received and expended by the Village. The Clerk/Treasurer records and maintains proceedings of Village meetings. This includes the minutes of Village

Trustees' meetings, including those portions in executive session attended only by the Village Trustees and Village Manager at which confidential personnel and collective bargaining matters are discussed. The Clerk/Treasurer signs all checks issued by the Village, including employees' wages, worker's compensation payments and employee expenses. The Clerk/Treasurer is required to verify approval for payment prior to signing (Village Exhibit 3).

13. The Clerk/Treasurer has access to employee personnel files in order to perform her duties.

14. The Clerk/Treasurer attends the bimonthly department head meetings because financial matters are discussed there.

15. The Administrative Secretary is the Village Manager's personal secretary. The Administrative Secretary's duties and responsibilities include typing all documents relating to personnel matters for the Village Manager and department heads, including employee grievances and disciplinary matters (Village Exhibit 5).

16. In the course of performing the above duties and responsibilities, the Administrative Secretary has unlimited access to employee personnel files which contain confidential personnel information. She routinely prepares personnel documents which she files in the personnel files.

17. The Administrative Secretary is responsible for typing memoranda to the Village Trustees from the Village Manager regarding collective bargaining matters, as well as typing, collating and mailing material from the Village Manager to the Trustees before each of their bimonthly meetings. The Administrative Secretary opens the Village Manager's mail and regularly has access to opinions of the

Village Attorney. No one else is available to perform the duties and responsibilities of the Administrative Secretary.

OPINION

We first address the Union's apparent contention that the unit clarification petition filed by the Village to exclude three employees, as confidential employees, from the bargaining unit represented by the Union is untimely because the Village voluntarily agreed just last Fall to add the three positions in dispute to the bargaining unit, and the job duties of the involved employees have not changed.

No specific timeframe has been established by the provisions of the Municipal Employee Relations Act ("MERA") or the Board Rules of Practice to limit the right of employers to petition for the removal of employees from a bargaining unit as confidential. However, §1724(a)(2) of MERA does limit the type of petition employers can file in providing that an employer must allege "that the presently certified bargaining unit is no longer appropriate under board criteria".

Generally, we interpret this provision to mean that a unit clarification petition filed by an employer is barred unless an employer is alleging that there have been changes in an employee's job responsibilities since the employee was included in an approved bargaining unit. Orange Southwest Supervisory Union, et al. and Orange Southwest Teachers Association, 11 VLRB 285, 294 (1988). Here, the Village is not alleging that there have been any changes in employees' job responsibilities.

However, we conclude that this petition is timely filed. Under the circumstances, the Village is not required to allege changed job responsibilities because that requirement only applies under §1724(a)(2) when an employer is seeking to change a "presently certified bargaining unit." In fact, the bargaining unit presently certified by the Board does not include the three positions at issue. Those positions were added voluntarily by the Village without using Board processes. Given the lack of Board involvement in the addition of the three positions to the bargaining unit, and given the evident intent of the legislature that the Board maintain ultimate control of the composition of the bargaining unit to ensure that ineligible employees do not remain in the bargaining unit, City of St. Albans and Local 1343, AFSCME, AFL-CIO, 7 VLRB 48, 55 (1984), AFSCME v. Town of Bennington, 6 VLRB 88 (1983), we conclude that the Village's petition is appropriately filed.

We turn to addressing the merits. At issue is whether the Accountant/Data Processing Manager, Clerk/Treasurer and Administrative Secretary to the Village Manager should be excluded from the bargaining unit represented by the Union as confidential employees. 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 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).

We conclude that the Administrative Secretary to the Village Manager and the Clerk/Treasurer meet the tests for confidential employees, but that the Accountant/Data Processing Manager is not a confidential employee.

The Administrative Secretary assists or acts in a confidential capacity to the Village Manager, who formulates, determines and effectuates management labor relations policies. Her regular duties as the first-line secretary to the Village's chief administrator include typing documents relating to employee grievances and disciplinary matters, typing and distributing materials to the Village Trustees from the Village Manager regarding collective bargaining and other matters, and filing personnel documents in employees' personnel files. These are confidential matters relating to collective bargaining and personnel administration within the meaning of the statutory definition of confidential employee. City of Burlington and Local 1343, AFSCME, 9 VLRB 116, 121 (1986). The Administrative Secretary's access to confidential information as part of her regular duties would adversely impact on the Village's conduct of its labor relations policies if she is included in the bargaining unit. Colchester, supra, at 78.

The Clerk/Treasurer also is a confidential employee. She is responsible for recording and maintaining the Minutes of executive session meetings attended only by the Village Trustees and Village Manager at which confidential personnel and collective bargaining matters are discussed. She also has unlimited access in the regular course of her duties to personnel files containing confidential personnel information. The performance of these regular duties means the Clerk/Treasurer acts in a confidential capacity to Village management. Her inclusion in the bargaining unit would adversely impact on the Village's conduct of its labor relations policies. Colchester, supra, at 78.

Conversely, we conclude that the inclusion of the Accountant/Data Processing Manager in the bargaining unit would not adversely impact on the Village's conduct of its labor relations policies. It is evident that the bulk of the duties of the Accountant/Data Processing Manager involve dealing with financial data which are public records. We recognize that his duties also include "costing out" the possible contracting out of services and alternative salary and benefit increases during contract negotiations with the Union, and that in the past we have excluded employees from bargaining units as confidential because they regularly performed such duties. Washington South District Teachers Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989). Personnel Designation Dispute of Calderara, 10 VLRB 261 (1987), Vermont Federation of Teachers, AFT, AFL-CIO and Vermont State Colleges, 8 VLRB 6, 21-22 (1985). United Steelworkers of America, Local 8774, Barre and City of Barre, 5 VLRB 3 (1982).

However, in each of these cases, the involved employees were relied on by management to perform confidential duties as part of their regular duties. In this case, the Accountant/Data Processing Manager performs confidential duties only occasionally or intermittently. The infrequency with which the Accountant/Data Processing Manager performs these duties leads us to conclude that Village management would not be adversely affected in a significant way if they had to develop an alternative means to gather this confidential information. If this proves not to be feasible, the Village has the right to petition the Board in the future, pursuant to Article 34 of the Board's Rules of Practice, to exclude the Accountant/Data Processing Manager as a confidential employee.

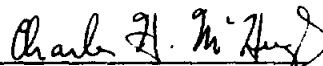
ORDER

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

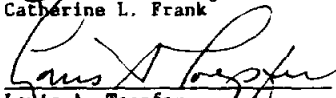
1. The Administrative Secretary to the Village of Essex Junction Manager and the Clerk/Treasurer of the Village are confidential employees and, thus, are ineligible to be included in the bargaining unit represented by Local 1343, American Federation of State, County and Municipal Employees; and
2. The Accountant/Data Processing Manager of the Village is not a confidential employee and, thus, is eligible to be included in the bargaining unit represented by Local 1343, American Federation of State, County and Municipal Employees.

Dated this 22nd day of September, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer