

VERMONT LABOR RELATIONS BOARD

BURLINGTON FIREFIGHTERS)	
ASSOCIATION)	
)	
and)	DOCKET NO. 94-41
)	
CITY OF BURLINGTON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 25, 1994, the Burlington Firefighters Association ("Association") filed a unit clarification petition with the Vermont Labor Relations Board. *Therein, the Association requested that the Board add the lieutenants to the existing bargaining unit of all sworn firefighting personnel below the rank of lieutenant employed by the Burlington Fire Department, City of Burlington ("City"), represented by the Association.*

A hearing was held on November 17, 1994, in the Board's hearing room in Montpelier before Board Members Charles McHugh, *Chairman; Catherine Frank and Leslie Seaver.* Attorney James Dunn represented the Association. Attorney Paul Sutherland represented the City. The parties filed post-hearing briefs.

FINDINGS OF FACT

1. In 1977, the National Association of Government Employees, National Association of Firefighters ("NAGE") represented all firefighters below the rank of lieutenant employed by the Burlington Fire Department ("Department"). NAGE petitioned the Board in 1977 to add all lieutenants, captains and deputy chiefs to the existing bargaining unit. The Board made findings of fact related to the supervisory duties and responsibilities of lieutenants, captains and deputy chiefs employed by the Department.

On December 27, 1978, the Board determined that all three positions were supervisory and ineligible to be included in the proposed bargaining unit. NAGE AND City of Burlington, 1 VLRB 464 (1978).

2. Subsequent to the 1978 Board decision, all firefighting personnel below the rank of lieutenant have been represented by the Association. Since 1988, although not part of the recognized bargaining unit, lieutenants have paid dues to the Association and have held elective office. The Department has recognized the membership of the lieutenants in the Association in that it has deducted Association dues from paychecks of lieutenants.

3. Subsequent to the 1978 Board decision, the Department has undergone substantial changes, including two organizational changes and one operational change. One of the changes took place in 1985 when the Department adopted a set of comprehensive standard operating procedures ("SOP") for all stations. Prior to the adoption of such SOP's, there was no uniformity among the five stations of the Department in the manner in which they operated. The SOP's are still in effect and provide detailed procedures for a wide range of activities. Such procedures include, but are not limited to, activities relating to safety, dispatching, emergency medical service ("EMS"), responding to and fighting structural fires, and responding to and fighting nonstructural fires, such as dumpster fires. All ranks of firefighting personnel are trained to know and follow the Department SOP's.

4. In 1991, the Department underwent a management study by an independent consulting firm which made recommendations for further changes in the Department. The Department has been

implementing such recommendations since this 1991 study. As a result of the study, the Department has eliminated several positions at the higher levels of its organizational structure, including three battalion chief positions and the position of assistant fire chief.

5. The Department adopted a new organizational structure in July, 1994. The fire chief is at the top of the Department's organizational structure. Under the fire chief is the position of battalion chief. The battalion chief is a management staff position and has responsibility for all suppression forces. The suppression forces include all fire and emergency medical responses. Under the battalion chief are 6 captains, 14 lieutenants, and approximately 50 senior firefighters and firefighters.

6. There are five fire stations within the city, as there were in 1977: Stations 1, 2, 3, 4, 5. Each station operates on 24 hour shifts: shifts A, B, C. Firefighting personnel below the rank of battalion chief work one 24 hour shift and then are off duty for two consecutive 24 hour shifts.

7. A captain, designated as the "shift commander captain", is in charge of each shift and is in charge of all stations during each shift. The shift commander captain is always assigned to Station 1. He responds to the scene of a fire or emergency in his own car, car 12.

8. Each of the other four stations is under the control of a captain, called a station captain. The present exception is Station 2, where a lieutenant is temporarily assigned to the

captain position and will remain in such position until January, 1996, when the regularly assigned captain returns to that duty.

9. When the captain in charge of Stations 2, 3, 4, or 5 is not on duty, which is two out of three 24 hour shifts, a lieutenant is in charge of the station. If the station captain is unable to report for duty during his designated shift, a lieutenant may take the place of the station captain. If a lieutenant is unable to report for duty, a senior firefighter may take the place of the lieutenant. The Department has evolved such that the duties of senior firefighters and lieutenants are largely interchangeable. A lieutenant never substitutes for a shift commander captain; only another captain takes the place of a shift commander captain.

10. The station captains are responsible for the station, apparatus and personnel in their station. They are responsible for creating a maintenance schedule for their stations. Lieutenants do not have the authority to create this schedule. This maintenance schedule includes a detailed weekly cleaning schedule of the building and equipment, as well as personnel assignments. When a captain is not assigned to a shift, the officer in charge is responsible for seeing that the schedule is carried out. The officer in charge could be either a lieutenant or, in the absence of a lieutenant, a senior firefighter. Captains and lieutenants work next to, and with, senior firefighters and firefighters in carrying out the cleaning and maintenance schedule (Petitioner's Exhibit 1).

11. The Department has a safety inspection schedule, and the station captain is responsible for making sure that the schedule is carried out. In the absence of the station captain, the officer in

charge would be responsible for seeing that the schedule is carried out. The officer in charge could be either a lieutenant or, in the absence of a lieutenant, a senior firefighter.

12. There are detailed SOP's for firefighting personnel to follow, depending upon the type of fire to which they are responding: structural fires and nonstructural fires. Nonstructural fires are called "minor fires". Minor fires are smaller in size and are generally considered less complicated; minor fires include vehicle fires, dumpster fires and grass fires.

13. When the Department is alerted to a fire, it may not be certain whether the fire is structural or minor. If it is known that the fire is minor, only the station closest to the minor fire responds. There are detailed SOP's for the firefighters to follow, depending upon the type of fire, and the officer in charge ensures that the SOP's are followed. The officer in charge could be the station captain, a lieutenant or, in the absence of a lieutenant, a senior firefighter.

14. Approximately 80 percent of the time, the nature of a fire is not known, or the fire is a structural fire. In these situations, Department SOP's dictate a "full assignment" or "full response" to the alarm. The shift commander captain is always in command at the scene of a fire whenever there is a full response or a structural fire.

15. In practice, the shift commander captain may not be the first to arrive at the scene of a structural fire. The officer in charge of the station that arrives first is in command until the shift commander captain arrives. Depending upon the shift and the

station, the officer in charge could be the station captain, a lieutenant or, in the absence of a lieutenant, a senior firefighter. The shift commander captain may arrive at the scene within 8 to 10 minutes; however, on average, he arrives within 3.5 to 4 minutes.

16. It is undisputed that the first few minutes of a structural fire are critical and there are many critical decisions that have to be made by the shift commander captain, or by the officer in charge before the shift commander captain arrives. Such decisions include, but are not limited to, safety considerations for firefighting personnel and victims, whether to use ladders and whether to use safety tanks. If Station 2, 3, 4, or 5 is the first to arrive at the fire scene, the officer in charge often is on the telephone to the shift commander captain until he arrives.

17. The first step of the formal grievance procedure of the collective bargaining agreement between the City and the Association for the existing bargaining unit provides that a grievant submit his or her written grievance to the "Chief or his designee". The role of a lieutenant in resolving an employee's grievance is limited to receiving the grievance as the designee of the chief for filing purposes only (Petitioner's Exhibit 3).

18. Lieutenants do not adjust or resolve grievances. A lieutenant has never sent an employee home for disciplinary reasons.

19. Performance evaluations are completed by the immediate supervisor of an officer. Station 2 is considered a busy station because the EMS operates out of that facility. Probationary employees are assigned to Station 2 until they complete their probationary status. Lieutenants frequently supervise probationary

employees. As their supervisors, lieutenants may prepare performance evaluations for the probationary employees. Such evaluations are conducted every three months and are on a form provided by the Department. The evaluator of a probationary employee recommends that he or she either be granted permanent status, continued in a probationary period, or terminated. Although these evaluations carry some weight, there is no specific evidence as to the importance of such evaluations in the final decision as to whether the employee will be granted permanent status or the frequency with which such recommendations are followed. There is also no evidence as to the frequency with which lieutenants prepare performance evaluations for probationary employees.

20. Lieutenants also may be involved in the annual evaluation of firefighting personnel below the rank of lieutenant. These evaluations are on a form provided by the Department and include such grading options as "excellent", "satisfactory" or "unsatisfactory" and also provide a space for the evaluator to comment in a narrative manner on the officer's performance. There is no evidence that these evaluations have played any part in determining pay raises for employees. Also, there is no evidence that these evaluations have contributed to any adverse actions against employees, such as placement in a warning period. There have been no promotions from senior firefighter to lieutenant during the tenure of the present chief, Interim Chief Dayton Contois.

21. There is an applicant review board which makes recommendations to the chief with respect to hiring new firefighting

personnel. The applicant review board consists of the chief, a captain, a lieutenant and two firefighters.

22. Seven of the fourteen lieutenants have one firefighter regularly assigned under them.

23. Interim Chief Contois told the Fire Commission at a public meeting that including the lieutenants in the bargaining unit would not require the Department to make any operational changes.

24. It is undisputed that there is majority support among the 14 lieutenants for the unit clarification petition that the Association filed on August 24, 1994, with the Board.

OPINION

The Association filed a unit clarification petition with the Board requesting that the lieutenants of the Burlington Fire Department be added to the existing bargaining unit of all firefighting personnel below the rank of lieutenant employed by the Department. Under Section 34.1 of the Board Rules of Practice, a petition for clarification of an existing bargaining unit may be filed where "there is a dispute over the unit inclusion or exclusion of employee(s)" or where there has been a "reorganization of the workforce". The Association contends that there has been a change in the duties of the lieutenants, and they no longer performed supervisory duties as the Board previously had determined. NAGE and City of Burlington, 1 VLRB 464 (1978). The Association contends that a recently completed reorganization of the management structure in the Department has contributed to the lieutenants no longer performing supervisory duties.

The City responded to the petition and denied that the lieutenants no longer performed supervisory duties. The City requested that the Board not hold an evidentiary hearing on the matter, contending that the Association had not submitted "substantive evidence" that facts had changed since the Board's 1978 decision. The City relied on an earlier Board decision in which the Board had dismissed a petition by the Association because it had not submitted "substantive evidence" that facts had changed since the Board's 1978 decision. Burlington Fire Officers Association and City of Burlington, 9 VLRB 64 (1986).

The Association responded to this claim by submitting additional information to the Board. The Board reviewed the material and determined that there was substantive evidence that facts had changed with respect to the supervisory duties of the lieutenants, and that there was reasonable cause to believe that a question of unit determination existed as to whether the lieutenants remained supervisors. A hearing thus was held. At this stage of the proceedings, the burden is on the Association to demonstrate that circumstances have changed sufficiently with respect to the supervisory duties of lieutenants since the 1978 decision, and convince the Board by a preponderance of the evidence that the lieutenants are no longer supervisory employees. Burlington Fire Officers Association, 9 VLRB at 65.

With these considerations in mind, we turn to addressing the merits. At issue is whether the lieutenants are supervisors, and thus ineligible to belong to a bargaining unit pursuant to 21 V.S.A. Section 1502(13) and Section 1722(12).

Supervisor is defined in 21 V.S.A. Section 1502(13) as:

An individual having the 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, 351-352 (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. Id. at 351. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor. Id.

The existence of actual power, rather than the frequency of its use, determines supervisory status. AFSCME, Local 490 v. Town of Bennington, 153 Vt. 318, 320 (1989). However infrequently used, the power exercised must be genuine. Id. Also, the Board has the discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are unimportant or insignificant in comparison with the overall duties. Id. at 321-323. Otherwise, an employer could circumvent the very spirit and intent of the statute by creating de minimus supervisory duties for the sole purpose of excluding a class of employees from union representation. Id.

It is clear and undisputed that the lieutenants have no authority to hire, transfer, suspend, layoff, recall, discharge, adjust employee grievances, or to effectively recommend such action. The City contends that the lieutenants are supervisors because they have supervisory authority to: 1) reward, discipline and promote in their evaluation of probationary and non-probationary employees, and 2) assign and direct employees.

We address the City's first contention. There was no evidence concerning the authority of lieutenants to reward, discipline or promote employees except to the extent that lieutenants perform performance evaluations on probationary and non-probationary employees.

The City contends, with respect to probationary employees, that lieutenants are supervisors because they prepare performance evaluations on probationary employees and may recommend that a probationary employee attain permanent status. In order to be considered a supervisor in this regard, it must be demonstrated that an employee actually has effectively recommended the action. Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 149-150 (1987). It must also be demonstrated that such acts are not rare or infrequent. Id.

In applying these standards to the facts of this case, there was no evidence regarding the frequency with which lieutenants prepare performance evaluations on probationary employees. Further, although lieutenants may prepare performance evaluations on probationary employees, and through such evaluations may recommend the attainment of permanent status, there was no evidence as to the

process the Department uses in such situations, the weight given to recommendations, or the frequency with which such recommendations are followed. Thus, there is insufficient evidence for us to conclude that the lieutenants' preparation of performance evaluations on probationary employees rises to the level of a supervisory duty.

In addressing the issue of lieutenants preparing performance evaluations on non-probationary employees, we note that the Board has previously determined that employees who prepare performance evaluations are not supervisors where he or she is unable to take any adverse action against an employee being evaluated, such as placing an employee in a warning period, or where he or she is unable to reward an employee who receives exemplary performance evaluations. Department of Public Safety Personnel Designation Dispute (State Police Sergeants), 14 VLRB 176, 186 (1991).

There was no evidence that performance evaluations prepared by lieutenants on non-probationary employees resulted in any adverse actions being taken against employees; nor was there any evidence that employees received pay raises as a result of receiving outstanding performance evaluations. Thus, there is insufficient evidence for us to conclude that the preparation by lieutenants of performance evaluations on non-probationary employees rises to the level of a supervisory duty.

We turn to the City's contention that lieutenants are supervisors because they assign and direct employees. In determining whether the responsibility to assign and direct the work of employees rises to a level sufficient to make the lieutenants

supervisors, we look to our many previous cases focusing on the assigning and directing responsibilities of employees. The key determination in such cases has been whether the employee is exercising independent judgment, or is simply ensuring that standard operating procedures are followed. If an employee is simply relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor. AFSCME Council 93, Local 1201 and Rutland Housing Authority, 18 VLRB 1 (1995). Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). If an employee's duties go beyond simply ensuring that established policies and procedures are followed, and require the use of independent judgment in directing and assigning employees, then the employee generally meets the statutory definition of supervisor. Rutland, 18 VLRB at 11. South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332, 340 (1988). 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. Bennington 153 Vt. 318, 321-323 (1989).

It is clear that, outside of fire emergencies, lieutenants do not assign or direct employees within the meaning of the statutory definition. Assigning and directing employees to ensure that weekly cleaning, maintenance and inspection schedules are carried out in the absence of the station captain is of a routine nature and does not require the use of independent judgment. We are left to consider the City's contention that the lieutenants perform

supervisory duties in assigning and directing employees when they are the officers in charge at the scene of a fire.

The Board specifically addressed supervisory duties of firefighting personnel in South Burlington Career Firefighters Association and City of South Burlington, 15 VLRB 93, 103-104 (1992). The Board reviewed past decisions and stated that the general rule applied to firefighting departments has been that deputy chiefs, captains or lieutenants who direct firefighters at the scene of a fire are supervisors, but the Board also recognized exceptions or qualifications to this general rule. Id. Lieutenants or captains who performed some directing duties at the fire scene are not supervisors under the following circumstances:

- Captains or lieutenants directed fire fighting work only in the absence of a superior officer. Brattleboro, 1 VLRB 248 (1978). Springfield Firefighters Local #2750, IAFF, AFL-CIO and Town of Springfield, 3 VLRB 237 (1989).
- Lieutenant only directed one firefighter at minor or routine fire. Springfield, supra.
- Fire fighting members of the Department generally knew what duties they were supposed to perform at a fire, and non-supervisory employees also served as persons in charge of fire. Local 1343, AFSCME, AFL-CIO and City of St. Albans Fire Department, 10 VLRB 99 (1987).

In applying these precedents to the circumstances of this case, we conclude that the first and last exceptions to the general rule squarely exempt the lieutenants from supervisory status.

With respect to the first exception, it was undisputed that in the case of a structural fire, the shift commander captain is always dispatched as a matter of standard operating procedure and the shift commander captain is the officer in charge at the scene. If one of the other four stations arrives during a shift when a lieutenant is on duty, the lieutenant is the officer in charge at the scene only until the shift commander captain arrives. The evidence was that the average response time before the shift commander captain arrives is between 3.5 and 4 minutes. Although the first few minutes of a fire are critical minutes during which time the lieutenant is making critical decisions and using independent judgment in assigning and directing employees, the lieutenant is without dispute performing such duties only in the absence of the shift commander captain. An employee does not acquire the status of a supervisor by reason of temporarily taking over the duties of the supervisor in the absence of the supervisor. Brattleboro, 138 Vt. at 351.

With respect to the last exception, the evidence before the Board was that firefighters are educated and trained to follow the detailed SOP's of the Department, which cover a wide range of activities from routine maintenance to procedures at different types of fires. It is thus apparent that firefighters generally know what duties they are supposed to perform at a fire. In addition, there was no dispute that non-supervisory senior firefighters substitute for lieutenants and, in fact, the evidence was that senior firefighters and lieutenants have become interchangeable.

There was a limited amount of evidence presented with respect to the Board's second exception to the general rule regarding the

number of firefighters that a lieutenant may direct at a minor fire. The evidence before the Board was that the Department responds to known minor fires approximately 20 percent of the time. Depending upon the station and the shift, the officer in charge at the scene of the minor fire could be a captain, a lieutenant, or in the absence of a lieutenant, a senior firefighter. If a lieutenant is on duty, the lieutenant may direct only one firefighter approximately one-half of the time.

Thus, the lieutenants fall squarely within two of the three exceptions to the general rule set forth in South Burlington, *supra*, and they could fall within the other exception at least half of the time. Accordingly, we conclude that the Association has met the burden of demonstrating that circumstances have changed sufficiently since the 1978 Board decision so that the lieutenants are no longer supervisors.

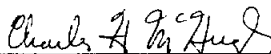
ORDER

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

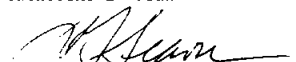
1. The lieutenants of the Burlington Fire Department are not supervisory employees as defined in 21 V.S.A. Section 1502(13); and
2. The lieutenants of the Burlington Fire Department are included in the Fire Department bargaining unit represented by the Burlington Firefighters' Association, and the Burlington Firefighters Association is certified as the representative of such employees.

Dated this 17th day of February, 1995, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Leslie G. Seaver