

VERMONT LABOR RELATIONS BOARD

CITY OF MONTPELIER)	
)	
and)	DOCKET NO. 94-55
)	
LOCAL 2287, INTERNATIONAL)	
ASSOCIATION OF FIREFIGHTERS)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 30, 1994, the City of Montpelier ("Employer") filed a unit clarification petition, contending that the assistant fire chiefs of the Fire Department of the Employer were supervisory employees, and requesting that the assistant chiefs be excluded from the bargaining unit of Fire Department employees represented by Local 2287, International Association of Firefighters, AFL-CIO, CLC ("Union"). On October 7, 1994, the Union filed a response to the petition, contending that the assistant fire chiefs were not supervisors and should remain in the bargaining unit represented by the Union.

A hearing was held on March 31, 1995, in the Labor Relations Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Carroll Comstock and Catherine Frank. Attorney Dennis Wells represented the Employer, and Attorney Patrick Biggam represented the Union. The Union filed a brief on April 13, 1995, and the Employer filed a brief on April 14, 1995.

FINDINGS OF FACT

1. Pursuant to an election conducted by the Labor Relations Board, the Union has represented employees in a bargaining unit consisting of the assistant

chiefs and firefighters since 1974. At the time the Union filed the petition in 1974 to represent the Fire Department employees, the Employer contended that the assistant chiefs were supervisory employees. The Labor Relations Board concluded that the assistant chiefs were not supervisory employees, and included them in the bargaining unit with other Fire Department employees excluding the chief. In the decision, the Board stated:

The authority of the Assistant Chiefs . . . is pretty much limited to carrying out the established rules and regulations for the conduct of firemen in the station and on and off duty. They, of course, have substantially greater authority at the scene of a fire but that is limited to the technical aspects of firefighting.

2. The Montpelier Fire Department has 18 full-time employees: a chief, four assistant chiefs, 12 firefighters, and one secretary. In addition, there are 20 “call firefighters” who work on an as-needed basis. The call firefighters only work when they are “called in” to replace full-time firefighters at the fire station after the full-time firefighters have responded to a call or when additional assistance is needed at the site of a fire to which the Department responds. The assistant chiefs determine when it is necessary to call in call firefighters.

3. The Department’s only fire station is located on Main Street in Montpelier. The Department’s equipment/apparatus consists of two pumper trucks, one ladder truck, two ambulances, and two auxiliary trucks.

4. The current fire chief, Chief Norman Lewis, was hired as chief on September 20, 1993, replacing Ernest Flanders who had been chief for many years.

5. The Department is staffed 24 hours a day, seven days a week, by four

shifts. Each shift is 24 hours long, and consists of an assistant chief and three firefighters.

6. The majority of time spent by assistant chiefs and firefighters is at the fire station. The assistant chiefs and firefighters are required to perform routine cleaning and maintenance duties on each shift. Each shift starts at 8:00 a.m., and begins with a brief vehicle inspection. Then, there is a staff meeting where the needs of the shift are discussed. The meeting is informal and each firefighter contributes to the discussion. The cleaning and maintenance schedule follows an established routine: detailed vehicle maintenance is done on Monday, Tuesday, and Wednesday; floors are cleaned on Thursday, Friday and Saturday, brass is cleaned on Thursday, and windows are cleaned on Friday. Each person has a regular area of responsibility and knows what tasks to perform. The assistant chief is responsible for ensuring that this routine work is carried out on schedule (Union Exhibits H - J).

7. The Department responds to fire emergencies in the City of Montpelier and, in addition, the Department provides an ambulance service in Montpelier and surrounding communities. There are other fire departments in Vermont which do not provide an ambulance service.

8. There are standard operating procedures for responding to emergency fire calls. The standard procedure for all structural or potentially structural fires is for two pumper trucks and the ladder truck to respond. Although the standard operating procedure is followed in most cases, there have been instances where the assistant chief has sent to a fire scene a different number of vehicles than provided by the procedures. In non-structural fires, the assistant chief exercises discretion in

determining what equipment and personnel to send to a scene. The assignment of firefighters to trucks responding to a fire is done by standard procedure: the senior firefighter takes the lead pumper truck, the middle firefighter takes the second pumper truck, and the junior firefighter takes the ladder truck (Union Exhibit E; Employer Exhibit 50).

9. The assistant fire chief is the officer in charge at the scene of a structural fire. Firefighters never act as officers in charge at the fire scene. At the fire scene, the assistant chief applies certain established procedures and practices. Each fire is unique, however, and the assistant chief may need to exercise judgment and discretion to direct firefighters in their efforts to bring the fire under control.

10. At the fire scene of a structural fire, the assistant chief “sizes up” the situation and directs the actions of firefighters and the use of apparatus accordingly. At serious structural fires, the assistant chief decides if mutual aid is needed, and whether additional equipment or personnel should be called to the scene. If necessary, the assistant chief decides evacuation procedures, arranges for treatment of injured persons, decides ventilation procedures and relieves firefighters. If arson is suspected in a structural fire, the assistant chief is responsible for contacting the state fire marshall. The assistant chief is responsible for the property until it is returned to its owner. The firefighters at the scene are required to follow the directions of the assistant chief. Assistant chief need to provide more direction at serious structural fires than at minor structural fires.

11. The rules and regulations governing the Fire Department provide that the “Chief of the department shall be in active command at all fires, and, in his

absence, the on duty Assistant Chief shall assume command until such time as he may be relieved by the Chief” (Employer’s Exhibit 46). Despite this provision, however, Chief Lewis does not routinely visit fire scenes and has been called to a fire scene only once during his tenure. In that case, the fire was under control and the assistant chief sought the chief’s guidance in determining whether to call in a state fire marshall. Chief Lewis has not assumed control at a fire scene during his tenure. He has assisted at some fire scenes by following the directives of the assistant chief.

12. The Fire Department has responded to the following number of total fire calls (i.e., structural, dumpster, brush, vehicle, etc.), which were not false alarms, during the past five years:

1990	66
1991	73
1992	54
1993	69
1994	145

(Employer Exhibits 47, 48, 49)

13. The breakdown as to the numbers of these calls which involved structural or potentially structural fires, including chimney fires, follows:

1990	25
1991	36
1992	32
1993	45
1994	91

(Employer Exhibits 47, 48, 49)

14. The Department responds to 3-4 major structural fires per year on average.

15. At dumpster fires, assistant chiefs may have to exercise independent

judgment in fighting a fire if the dumpster is near a building. At non-structural fires, such as dumpster or brush fires, the assistant chief sizes up the situation and directs employees accordingly. These fires generally are less complex and require less use of independent judgment by assistant chiefs than do structural fires.

16. The ambulance service provided by the Fire Department accounts for approximately 80 percent of all Department responses to emergency situations. In 1992, the Department had 1,671 calls to which it responded. 1,363 responses, or 81.6 percent, were ambulance responses. In 1993, the Department had 1,874 calls to which it responded. 1,562 responses, or 83.4 percent, were ambulance responses. In 1994, 1,680 of the 2,099 calls to which the Department responded, or 80 percent, were ambulance responses (Employer Exhibits 47, 48, 49).

17. When the Fire Department responds to an ambulance call, assistant chiefs seldom go to the scene. If the assistant chiefs do respond with an ambulance crew, they are not in charge at the scene. The firefighter with the highest level of emergency medical training ("EMT") is responsible for patient care. The highest rating presently in the Fire Department is EMT-D, and each shift has a firefighter at each level. None of the assistant chiefs are at the EMT-D level. When an assistant chief goes out on an ambulance response, the assistant chief takes directions from the EMT in charge.

18. The chief assigns assistant chiefs to work in specialized areas to improve Department functioning and procedures. Assistant chiefs serve as training coordinator, ambulance service officer, communications and fire prevention manager, facilities manager, and apparatus and equipment manager. In acting in these

capacities, the assistant chiefs have recommended the adoption of new policies and procedures. The chief has adopted many of these recommendations. The assistant chief serving as fire communications and fire prevention manager seeks volunteers from among the firefighters to perform these community outreach functions. One of the assistant chiefs services call boxes in Montpelier, and he assigns an off-duty firefighter to work overtime to assist him in maintaining the call boxes (Employer Exhibits 5 - 10).

19. During Chief Lewis' tenure, he has adopted recommendations made by assistant chiefs to reduce overtime expenditures, pay for uniform cleaning, revise training record sheets, adopt a carbon monoxide detector response plan, and revise the ambulance paperwork policy (Employer Exhibits 40-44).

20. Firefighters also work in specialized areas to improve Department functioning and procedures. One firefighter is appointed as Safety Officer, and in such capacity reports directly to the chief in recommending policy and procedure changes. Another firefighter heads the Call Force Committee, and also reports directly to the chief in recommending policy and procedure changes.

21. Assistant chiefs rarely have been involved in the disciplining of firefighters during the past 20 years. During that period, assistant chiefs have never been involved in the dismissal of employees. There have been three instances during that period in which assistant chiefs have been involved in situations where firefighters were suspended for the remainder of the shift. In one instance occurring many years ago, the decision of an assistant chief to send an employee home for the remainder of the shift was overruled by the chief the following day as being too

severe. In another instance, occurring recently, the decision of an assistant chief to suspend an employee for the remainder of the shift for behavior at a staff meeting was upheld in the subsequent grievance process. In the third case, the decision of a senior firefighter to relieve a firefighter for the remainder of the shift for failure to follow an order was overruled immediately by an assistant chief (Employer Exhibits 11 - 16).

22. Chief Lewis has developed and adopted a formal incident form for reporting minor discipline problems. There is no evidence that such forms have ever been used by an assistant chief (Employer Exhibit 39).

23. Article XXI of the collective bargaining agreement between the Employer and the Union provides for merit pay for firefighters. Merit pay is based upon the following three criteria: overall performance, certification levels in fire and ambulance, and physical fitness. The latter two criteria involve application of objective standards. An assistant chief administers the physical fitness test. Assistant chiefs evaluate the overall performance of firefighters, which involve both subjective and objective assessments. If a firefighter is not satisfied with an evaluation done by an assistant chief, the firefighter may pursue the issue through the grievance procedure. Chief Lewis has not modified any of the evaluations performed by the assistant chiefs (Employer Exhibits 1, 17, 20 -26, 28 - 33, 36; Union Exhibit A).

24. There is no evidence of the assistant chiefs being involved in hiring decisions, resolving grievances, promoting employees, or transferring employees. The first step of the grievance procedure, pursuant to Article 5 of the collective bargaining agreement, is a written grievance to the chief. Recently, Chief Lewis

unilaterally decided to reassign firefighters to different shifts . He did not inform two of the assistant chiefs of the decision in advance of the shift changes (Employer Exhibit 1).

OPINION

The issue before us is whether the four assistant chiefs of the Montpelier Fire Department are supervisors and, thus, ineligible to belong to a bargaining unit pursuant to 21 V.S.A. Sections 1502(13) and 1722(12)(b).

Under the Municipal Employees Relations Act, 21 V.S.A. Section 1721 et seq. ("MERA"), a supervisor is defined 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 responsibility 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". 21 V.S.A. §1502(13).

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 an individual can effectively exercise the authority granted him or her; theoretical or paper power will not make one a supervisor. Id. at 351. Rare or infrequent supervisory acts do not change the status of an employee to a supervisor. Id. at 351. The existence of actual power, rather than the frequency of its use,

determines supervisory status. AFSCME Local 490 and Town of Bennington, 153 Vt. 318 (1989). Also, the Board has discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are insignificant in comparison with overall duties. Id.

Many of the listed supervisory powers in the statutory definition can be quickly addressed. In the areas of hiring, promoting, laying off, recalling and transferring employees, it must be demonstrated an employee actually has taken the action or effectively recommended the action. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205 (1992). Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 80-81 (1989). Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987). Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). The evidence does not indicate that assistant chiefs have ever taken, or effectively recommended the hiring, promotion, layoff, recall or transfer of employees. Thus, we cannot conclude that they have supervisory authority in these areas. Also, we conclude that assistant chiefs possess no supervisory authority with respect to adjusting employee grievances, since the first step of the grievance procedure is a written grievance to the chief.

The Employer contends that assistant chiefs possess the authority to discipline, or effectively recommend the discipline, of employees. The authority to take a specific disciplinary action or effectively recommend a specific disciplinary action must be demonstrated for supervisory status to be found. Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 85 (1986). If the employee can

recommend disciplinary action, but the recommendation is not followed, then the employee is not a supervisor. Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987).

The evidence does not indicate that assistant chiefs possess supervisory authority in this regard. The evidence indicates only two instances over the past 20 years where assistant chiefs suspended employees, in both cases for the remainder of the shift, and the chief overruled the assistant chief in one of the instances. The assistant chiefs have not been involved in dismissal of employees, and there is no evidence of reprimands issued by them. Given such limited and mixed evidence of disciplinary authority, we are not inclined to hold that assistant chiefs possess disciplinary authority. Further, the authority to send an employee home for the remainder of the shift by itself is insufficient to constitute supervisory authority. IAFF and Town of Hartford, 146 Vt. 371 (1985).

The central issue in this case is whether the assistant chiefs' responsibility to assign work to employees or direct them rises to a level sufficient to make them supervisors. The key determination is whether the employee is exercising independent judgment, or is simply ensuring that standard operating procedures are followed. If an employee is relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor. Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). City of Winooski and Winooski Police Employees' Association, 9 VLRB 85 (1986).

However, if employees' duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing

and assigning employees, then the employees meet the statutory definition of supervisor. South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332 (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. AFSCME, Local 490 and Town of Bennington, 153 Vt. 318 (1989). Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991).

We conclude that, outside of fire emergencies, lieutenants do not assign or direct employees within the meaning of the statutory definition. The assigning and directing of employees by the assistant chiefs at the fire station with respect to cleaning and maintenance operations are of a routine nature and do not require the use of independent judgment. Also, with respect to ambulance calls, assistant chiefs do not often go to the scene and, if they do, they receive direction from the highest-rated Emergency Medical Technician on the scene rather than giving direction. Further, any other assigning and directing duties outside of fire emergencies are insignificant in comparison with overall duties to constitute the performing of supervisory duties.

It is evident, however, that assistant chiefs have the authority to assign and direct employees when they are officers in charge at serious structural fires, and that this authority requires the use of independent judgment. At the time of a serious structural fire, the authority of assistant chiefs is considerable in providing clear, decisive direction. The assistant chief must size up the situation and assess and

reassess employee and apparatus placement and activities. The number of serious structural fires a year, however, is limited to 3-4 on average.

The assistant chiefs also assign and direct employees at minor structural fires, but we have insufficient evidence before us to indicate how often the exercise of independent judgment is required in carrying out these responsibilities. The assistant chiefs also assign and direct employees at non-structural fires, but the evidence does not indicate that independent judgment is required in this regard except in limited circumstances such as if a dumpster fire is near a building.

The issue we need to decide is whether the assigning and directing responsibilities of assistant chiefs at serious structural fires, taken together with the general evidence we have on minor structural fires and non-structural fires, are sufficient to make them supervisors within the meaning of the statutory definition.

In South Burlington Career Firefighters Association and City of South Burlington, 15 VLRB 93 (1992), the Board reviewed past decisions and stated as a general rule that deputy chiefs, captains or lieutenants who direct firefighters at fire scenes are supervisors. Id. at 104; *citing* NAGE, National Association of Firefighters, 1 VLRB 464 (1978); Burlington Fire Officers' Association and City of Burlington, 9 VLRB 64 (1986). In South Burlington, the Board recognized that there are exceptions to the general rule, and cited the following situations where the Board had concluded that lieutenants or captains who performed some directing duties of fire scenes were not supervisors:

- Captain or lieutenant directed fire fighting work only in the absence of a superior officer. Firefighters of Brattleboro, Local 2628, 1 VLRB

248 (1978); *Affirmed*, 138 Vt. 347 (1980). Springfield Firefighters Local #2750, IAFF, AFL-CIO, CLC and Town of Springfield, 3 VLRB 237 (1980).

- Lieutenant directed only one firefighter at minor or routine fires. Springfield, supra.

- Firefighting members of the Department generally knew what duties they were supposed to perform at a fire, and non-supervisory firefighters also took charge at a fire. Local 1343, AFSCME, AFL-CIO and City of St. Albans Fire Department, 10 VLRB 99 (1987).

The Board also recognized another exception in the South Burlington decision, by indicating that, if the assigning and directing responsibilities of the fire captains in that case at fire scenes were limited to such responsibilities at major structural fires, then the Board would conclude that they were not supervisors. 15 VLRB at 103-04. This was because there had been only three serious structural fires during the previous three years. Id. at 98 (Finding of Fact #15), 104. The Board indicated that the small number of such fires meant captains would have been performing supervisory acts rarely or infrequently, insufficient to make them supervisors. Id. at 103-04. The Board did not have to rely solely on assigning and directing responsibilities of the captains at major structural fires, however, under the facts of that case. The evidence there indicated that captains assigned and directed employees at more frequent minor fires, such as minor structural fires, car fires, dumpster fires and grass fires. Id. at 104. The Board further stated: "it is evident that captains exercise independent judgment in this regard at minor fires, as well as major

fires, by assigning and directing employees with respect to equipment placement and use, and extinguishing fires, to ensure the safety of persons and the protection of property". Id. at 105. The Board ultimately concluded that the combined assigning and directing responsibilities at major and minor fires sufficed to make the captains supervisors. Id. at 104-06.

In applying these precedents to this case, we also consider that the Employer has the burden of demonstrating that circumstances have changed with respect to the duties of the assistant chiefs since the 1974 Labor Relations Board holding that the assistant chief were not supervisors, and convince the Board by a preponderance of the evidence that the assistant chiefs are now supervisors. South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116, 126 (1995). Burlington Fire Officers' Association and City of Burlington, 9 VLRB 64 (1986). The Union contends that the Employer has presented insufficient evidence of change and, thus, the Employer's unit clarification petition should be denied.

We agree. The Employer has failed to produce sufficient specific evidence on the responsibilities of assistant fire captains at minor structural fires and non-structural fires for us to conclude that they exercise independent judgment in such matters on more than an infrequent basis. Unlike the South Burlington case, where we had before us detailed evidence on such responsibilities (See Findings of Fact #16 - 22, 15 VLRB at 98-100), here we have only general evidence on assistant chiefs' responsibilities in this regard.

Further, this case is distinguished from our earlier decisions, holding that fire employees were supervisors due to their assigning and directing responsibilities at

fires, given the ambulance responsibilities of the Montpelier Fire Department. Over 80 percent of all emergency responses of the Fire Department are to ambulance calls. As previously indicated, assistant chiefs do not exercise independent judgment in assigning and directing employees in this regard. The fact that the bulk of responses occur in areas where assistant chiefs perform no supervisory responsibilities is pertinent in our ultimate determination whether their responsibilities at fires are significant in comparison to their overall duties.

Under all the circumstances, we conclude that the Employer has failed to meet its burden of demonstrating to us that circumstances have changed sufficiently since the 1974 Board decision to reach a different result. We are left with specific evidence on assigning and directing responsibilities at major structural fires, which we conclude occur too infrequently to warrant a supervisory designation, and unhelpful general evidence on such responsibilities at other fires. The evidence is insufficient to warrant a conclusion that assistant chiefs assign and responsibly direct employees within the meaning of the statutory definition.

Finally, we examine the Employer's remaining contention that the assistant chiefs possess the supervisory responsibility of rewarding employees. The Board previously has determined that employees who prepare performance evaluations do not reward employees, within the meaning of the statutory definition, where he or she is unable to grant pay raises as a result of performance evaluations prepared on employees. Burlington, 18 VLRB at 148. Department of Public Safety Personnel Designation Dispute (State Police Sergeants), 14 VLRB 176, 186 (1991).

In this case, the performance evaluations which assistant chiefs prepare on

employees is a factor in determining the amount of merit pay, if any, which a firefighter will receive under the collective bargaining agreement between the Employer and the Union. Assistant chiefs exercise independent judgment in this regard given the subjective assessment which is necessarily involved in the evaluating of employees' performance. However, the evaluations constitute only one of three factors which determine the granting of merit increases, and the other two factors are objective standards - i.e., a physical fitness test, and ambulance and fire certifications. Under these circumstances, we conclude that such duties are insignificant in comparison with the overall duties to warrant a supervisory designation on the grounds of rewarding employees.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the assistant chiefs employed by the City of Montpelier Fire Department are not supervisory employees and, thus, remain eligible to be included in the bargaining unit of Fire Department employees represented by Local 2287, International Association of Firefighters.

Dated this 30th day of June, 1995, at Montpelier, Vermont..

VERMONT LABOR RELATIONS BOARD

/s/Charles H. McHugh, Chairman
Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Carroll P. Comstock
Carroll P. Comstock