

VERMONT LABOR RELATIONS BOARD

PROCTOR EDUCATION ASSOCIATION/)	
VERMONT-NEA/NEA)	
)	
and)	DOCKET NO. 94-71
)	
PROCTOR SCHOOL BOARD)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 30, 1994, the Proctor Education Association/ Vermont-NEA/NEA ("Association") filed a petition for Election of Collective Bargaining Representative, requesting an election among all custodians, paraeducators and secretaries employed by the Proctor School Board ("Employer"). The Employer responded to the Petition and raised questions of unit determination. First, the Employer contended that the secretary to the principal at the Proctor Junior-Senior High School is not eligible for inclusion in the proposed bargaining unit because she is a confidential employee. Second, the Employer contended that the head custodian at the Proctor Junior-Senior High School is not eligible for inclusion in the unit because he is a supervisor.

A hearing was held on February 16, 1995, before Labor Relations Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Ellen David Friedman, Vermont-NEA Organizer, represented the Association. Attorney John Zawistoski represented the Employer. The parties filed post-hearing briefs.

FINDINGS OF FACT

1. The Association is the collective bargaining representative for all teachers employed by the Employer.

2. The Employer's school district consists of the Proctor Elementary School and the Proctor Junior-Senior High School. Each school is in a separate building located approximately one mile apart and has its own principal, custodians and kitchen staff.

3. Marilyn Grunewald is the principal of the Proctor Junior-Senior High School and has held that position for approximately four years. She has supervisory responsibility over the teaching and support staff and is responsible for administering the teachers' collective bargaining agreement. Grunewald has a computer in her office and does some of her own typing.

4. Bonnie Blanchard is the secretary to the principal at the Proctor Junior-Senior High School and has worked in that capacity for 16 years.

5. Blanchard has her own office which is separate from the principal's office and connected by a door. The principal has another door leading into her office. It would be possible for someone to visit the principal without going through Blanchard's office.

6. The principal formally evaluates the 20 teachers in the junior-senior high school. Last year, Grunewald typed some of these evaluations and Blanchard typed the remaining evaluations for her.

7. There has been no formal evaluation process relating to the support staff. Blanchard is currently working with Grunewald to develop an evaluation form for support staff employees.

8. Personnel files are kept in lockable file cabinets in the principal's office and both the principal and Blanchard have keys to access such cabinets. The personnel files contain current contracts and may also contain disciplinary letters and grievance materials. Blanchard has retrieved information from personnel files for use by the principal and the Employer's attorney. Duplicate personnel files are kept in the superintendent's office.

9. Blanchard has gathered information from personnel files related to grievances. There has been only one formal grievance filed against the Employer in the last four years and the principal typed her own response to the grievance.

10. Grunewald knows the filing system and sometimes retrieves materials from personnel files without Blanchard's assistance.

11. During her sixteen year tenure, Blanchard has typed a limited number of disciplinary letters to teachers and support staff for the principal. She typed approximately six letters of reprimand in the last four years; four letters involved the same individual.

12. The Employer's annual budget is constructed in separate parts. Grunewald is responsible for submitting a budget proposal for her school which includes recommended spending proposals for personnel and materials. Blanchard gathers the budget sheets for equipment, material and supplies from each department. She also types the principal's proposed budget for the school.

13. The superintendent's office may direct the principal to formulate a personnel budget that adjusts teachers' salaries across the board according to a certain percentage increase, such as 2% or 3%. Grunewald has also routinely requested a full time position in the guidance office in her annual proposed budget and the school board has routinely reduced the position to a half time position. Blanchard has had access to the principal's recommended spending proposals for personnel and materials before the Association or the public. The school board may discuss such proposals in executive session and has final authority to revise or follow such recommendations. Blanchard does not attend school board executive sessions.

14. Keith Gallagher is a custodian at Proctor Junior-Senior High School and has held that position since September, 1990. He had previously worked for the Employer as a part time custodian. His individual contract with the Employer identifies his current position as "custodian". During 1991 and 1992, Gallagher attempted to have his position reevaluated because he did not believe he received adequate compensation for his duties. A job description which he assisted in writing in 1993 identifies his position as "maintenance supervisor"; the school board has not notified Gallagher as to whether it has adopted this job description (Board Exhibit 1; Association Exhibits 1 - 4).

15. Gallagher is responsible for the general maintenance of the school and grounds. He cleans and oversees the general cleaning of the building, repairs minor electrical and plumbing problems, contacts contractors for major electrical or plumbing

problems and maintains inventory for supplies and equipment. He submits an annual budget for maintenance materials to the principal and she incorporates such information in her budget.

16. Gallagher works from 7:00 a.m. to 3:00 p.m. The night custodian arrives at 2:45 p.m. Gallagher uses the 15 minutes between shifts to talk to the night custodian about such things as activities scheduled to take place in the school that evening or problems Gallagher has observed in the general cleaning and maintenance of the school.

17. At some point, Gallagher told Grunewald he needed a substitute custodian to call when he or the night custodian was absent. The Employer placed an advertisement in the newspaper and hired Ron Gee as a substitute custodian. At some later time, Gallagher recommended to the principal that the Employer hire Gee on a permanent part time basis. The principal made this recommendation to the school board and Gee was hired. Gee works in the evening with the night custodian, who oversees his work. Gallagher generally does not see Gee unless he is at the school for an evening activity, such as a basketball game. Gallagher occasionally leaves messages for the night custodian and/or Gee and they also leave messages for him. Gallagher has an outstanding request for a substitute custodian; the principal has not acted on this request.

18. Most of the cleaning is done at night when the school is less active. Gallagher created a two week "duty sheet" when he worked as a part time custodian for the Employer in 1988. Such duty sheet is still used by the custodial staff. The duty

sheet details which cleaning jobs should be preformed each day. Such routine cleaning duties are checked off by the custodial staff as they are completed. Departures from this sheet occur when the principal or a faculty member notifies Gallagher that there is a special activity scheduled for the evening and he passes such information on to the night custodian.

19. T.C. worked part time as a custodian from 1991 through the Fall of 1994. T.C. did not always show up for work during his scheduled hours and he did not always perform the duties he was expected to perform. Gallagher wrote at least three letters or notes to T.C. in 1991, 1992 and 1994 in which he reminded T.C. of his work hours or indicated that T.C. had left his shift without performing certain duties. Grunewald also wrote at least one letter to T.C. because he failed to show up at work on November 16, 1992. Neither Gallagher nor Grunewald told T.C. that he would be subjected to disciplinary action for these incidents or further incidents if they reoccurred. Gallagher recommended to Grunewald at the end of the 1993-94 school year that the Employer not reissue T.C. a contract. The principal told Gallagher he had to document performance deficiencies if he did not want the Employer to reissue T.C. a contract. The Employer offered T.C. a contract for the 1994-95 school year. T.C. quit the following year (Board Exhibits 2, 3, 5; Association Exhibit 7).

20. Both Gee and the night custodian go through Gallagher when they want to change work hours or take vacation time. Gallagher coordinates custodial coverage and has changed the part

time custodian's hours to cover the night custodian's absence. Gallagher does not request permission from the principal to make such changes or approve time off, but always notifies her regarding such scheduling changes. To date, the principal has never reversed his decision (Board Exhibits 4, 5, 6).

21. In August, 1994, Gallagher recommended that the Employer increase Gee's hourly wage from \$5.00/hour to \$5.62/hour for the 1993 - 1994 school year. Such recommendation was not implemented (Association Exhibit 6).

OPINION

The first issue before us is whether the secretary to the principal 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 on 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, 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 333 and Washington Central Supervisory Union, 1 VLRB 288 (1978). Employees whose duties require only occasional access to confidential materials and which duties could be reassigned, 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).

The Employer contends that the involvement of the secretary to the principal in disciplinary and budgetary matters makes her a confidential employee. We disagree with that contention and conclude that she is not a confidential employee.

The secretary to the principal has access to personnel files which contain disciplinary actions and she has also typed letters for the principal related to employee disciplinary matters. There have been a limited number of disciplinary actions during the incumbent secretary's 16 year tenure. In the last four years, there has been only one formal grievance and 6 disciplinary letters involving 3 employees. The Board has previously determined that such rare access to confidential information does not make membership in, or representation by, a union incompatible with an employee's official duties. AFSCME, Council 93, Local 1201 and Rutland Housing Authority, 18 VLRB 1, 16 (1995). IBEW Local 300 and Morristown Police Department, 15 VLRB 66, 69-70 (1992). Colchester Education Association,

Vermont-NEA and Colchester Supervisory District School Board, 12 VLRB 60, 79 (1989).

The secretary also types teacher performance evaluations for the principal. The principal prepared 20 teacher performance evaluations last year, some of which she typed herself. The Board previously determined that the typing of 15 - 25 evaluations a year as a confidential employee did not warrant exclusion from the bargaining unit unless the Employer could demonstrate some harm which would result to the Employer, or any undue benefit which would accrue to the Association. Colchester, 12 VLRB at 79. The Employer has produced no evidence that typing of teacher performance evaluations would result in harm to the Employer or provide a benefit to the Association.

The secretary to the principal is also responsible for the typing of the principal's proposed annual budget. In past cases, the Board has excluded employees from bargaining units as confidential employees where the employees were privy to confidential information relating to the budget as part of their regular duties, which information was not available to the public. Colchester, 12 VLRB at 75-76. Washington South District Teachers Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989).

The secretary may have access to information that is not initially available to the public if the principal proposes an increase or decrease in staff or staff hours. Such proposals during Grunewald's tenure have been limited to annual recommendations to increase a position from part time to full

time, which the school board has routinely rejected. The secretary also may have access to information that is not initially available to the public if the superintendent has directed the principal to formulate a budget by increasing teacher salaries across the board by a certain percent. Although such information may not be available to the public, we are extremely reluctant to exclude an employee based on these limited activities. The principal could write or type such information herself if the Employer believed such information would harm the Employer or benefit the Association in contract negotiations. Employees whose duties require occasional access to confidential materials, and which duties can be reassigned, do not meet the definition of "confidential" employee. Rutland, 2 VLRB at 112.

Thus, we conclude that the Secretary to the principal is not a confidential employee.

The next issue before us is whether the custodian is a supervisor, and thus ineligible to belong to a bargaining unit pursuant to 21 VSA § 1502(13) and § 1722(12).

Supervisor is defined in 21 VSA § 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 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 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 classes of employees from union representation. Id.

There was no evidence that the custodian has the authority to transfer, suspend, layoff, recall, promote, or reward employees, or adjust employee grievances, or to effectively

recommend any such actions.

The Employer contends that the custodian is a supervisor because he has the authority to: 1) effectively recommend the hire of employees, 2) effectively recommend the discharge of employees, 3) discipline employees; and 4) assign and direct employees; and that the exercise of such authority requires the use of independent judgment.

In the area of hiring employees, it must be demonstrated that an employee actually has taken the action or effectively recommended the action. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992). The evidence in this case was limited to a single incident in which the custodian recommended that the Employer hire a part time employee who had already been hired by the Employer as a substitute custodian. Although the recommendation was followed, the limited evidence is insufficient for us to conclude the custodian has effective authority to hire. In a previous case where the recommendation of an employee to hire employees was followed in two instances in two years, the Board concluded such acts were rare and infrequent and did not make the employee a supervisor. Kellogg-Hubbard, 15 VLRB at 214. Here, the experience is even more limited.

In the area of effectively recommending the discharge of employees, the Employer has presented no evidence of the Employer

following the custodian's recommendation to discharge an employee. Thus, there is no basis to conclude that the custodian has supervisory authority in this regard.

In the areas of discipline, it must be demonstrated that an employee has the authority to take a specific disciplinary action or to effectively recommend a specific disciplinary action. Teamsters Local 597 and Burlington Housing Authority, 9 VLRB 126, 131 (1986). The evidence here was limited to the custodian writing letters to an employee who failed to complete work or failed to work his scheduled hours. Such letters did not recommend any disciplinary action, and, thus, the evidence is insufficient for us to conclude that the custodian has the authority to take, or to effectively recommend specific disciplinary action against employees.

The last area we discuss is whether the custodian has the authority to 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 custodian a supervisor, 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. Kellogg-Hubbard, 15 VLRB at 211. 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 requires the use of independent judgment in directing and assigning employees, then the employee generally meets the statutory definition of supervisor. Kellogg-Hubbard, 15 VLRB at 212. 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. Bennington, 153 Vt. 318, 320 (1989).

In applying these standards to the facts of this case, we conclude that the duties of the custodian with respect to assigning and directing employees does not rise to the level of supervisory status. The other two employees in the custodial department primarily perform cleaning duties which are set forth on a two week duty sheet which has been in use for many years, and any supervisory authority by the custodian in this regard is of a routine nature. Gallagher's personal interaction with the night custodian is 15 minutes a day. He does not regularly see the part time custodian and primarily interacts with him through the night custodian or by leaving notes. Although Gallagher oversees the cleaning and maintenance of the school, he is merely ensuring that standard operating procedures are followed and that there is custodial coverage. His responsibilities are

insufficient to constitute effective supervisory authority.

ORDER


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

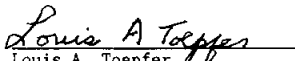
1. The secretary to the principal at the Proctor Junior-Senior High School is not a confidential employee and, thus, is eligible to be included in a bargaining unit represented by the Proctor Education Association/Vermont-NEA/NEA; and
2. The custodian at the Proctor Junior-Senior High School employed by the Proctor School Board is not a supervisory employee and, thus, is eligible to be included in a bargaining unit represented by the Proctor Education Association/Vermont-NEA/NEA; and
3. The Vermont Labor Relations Board shall conduct a representation election wherein all custodians, paraeducators and secretaries employed by the Proctor School Board may determine whether they wish to be represented by the Proctor Education Association/Vermont-NEA/NEA.

Dated the 20th day April, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer