

VERMONT LABOR RELATIONS BOARD

AFSCME Council 93,)	
Local 1201)	
)	
and)	Docket No. 94-60
)	
Rutland Housing Authority)	

FINDINGS OF FACT, OPINION AND ORDER

On October 17, 1994, AFSCME Council 93, Local 1201 ("Union") filed a petition for Election of Collective Bargaining Representative, requesting an election among all employees, excluding the Executive Director, employed by the Rutland Housing Authority ("RHA"). The RHA responded to the petition on November 9, 1994, and raised three objections. First, it contended that the Director of Facilities is not eligible for inclusion in the proposed bargaining unit because he is a supervisor. Second, it contended that the Financial Manager and the Section 8 Administrator/Secretary are not eligible for inclusion in the unit because they are confidential employees. Third, the RHA questioned whether there was a community of interest between the Section 8 Administrator/Secretary and the balance of the staff.

A hearing was held on December 8, 1994, before Labor Relations Board Members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver. Ralph Crippen, Vermont Coordinator for AFSCME Council 93, represented the Union. Attorney Rebecca Rice-Osterhoudt represented the Rutland Housing Authority. At the hearing the Board permitted the RHA to amend its answer to the petition to contend that the Director of Facilities is also a confidential employee. Both parties raised an issue with respect to the eligibility of two

employees to vote in the election. The parties filed post-hearing briefs.

FINDINGS OF FACT

1. The RHA provides low income rental housing for qualified persons in the City of Rutland. The RHA's income is derived from subsidies administered by a Federal Agency, the U.S. Housing and Urban Development ("HUD"), and from rents.

2. The RHA is governed by a Board of Commissioners who are appointed by the mayor of the City of Rutland. The chief administrative officer for the RHA is the Executive Director, Linnea Swahn-Packard. She is directly responsible to the Commissioners for the operation of the RHA. All other staff positions at the RHA are under the Executive Director. The staff consists of a Financial Manager, a Section 8 Administrator/Secretary, a Director of Facilities, and five Maintenance employees. The Maintenance employees are under the Director of Facilities on the RHA's organizational chart (Petitioner's Exhibit 1).

3. The RHA owns and maintains three rental housing sites in the City of Rutland: Templewood Court, Sheldon Towers and Forest Park. In addition to these rental housing sites, which contain 210 rental units, the RHA administers a federally subsidized "Section 8" program for people who rent from private apartment owners. Tenants who are eligible for Section 8 "certificates" pay the private owners 30 percent of their income and the RHA pays the balance of the rent.

4. The Executive Director, Section 8 Administrator/Secretary and Financial Manager work at the RHA's administrative office at Templewood Court. The Section 8

Administrator/Secretary's desk is in the reception area. The Executive Director and Financial Manager have separate offices on each side of the reception area.

5. The RHA issued "Personnel Policy and Job Descriptions" in 1990. The RHA Commissioners revised such policies and job descriptions in July, 1994 (Petitioner's Exhibit 1).

6. The Commissioners hired the present Executive Director, Linnea Swahn-Packard, approximately two and one half years ago. She is responsible for planning, organizing and directing the activities of the Agency. The RHA's Personnel Policy provides that the Executive Director may "recommend the hiring, suspension, termination, lay-off or reassigning of any employee of the Agency subject to the approval of the Commissioners" (Petitioner's Exhibit 1).

7. Barbara Townsley is the Financial Manager and has been in that position for approximately two and one half years. She is responsible for the RHA's financial transactions. She maintains records for all funds that pass through the RHA and prepares monthly reports for the RHA's Certified Accountant. She writes all checks, including payroll, and keeps track of all employee hours and pay. She also acts as the Executive Director in Swahn-Packard's absence.

8. Townsley assists the Executive Director in preparing budgets by providing account summaries of funds disbursed from each line item account. Such line items include insurance, maintenance supplies, and wages. These summaries represent money that the RHA has already spent. Townsley does not have any input into budget planning with respect to salaries.

9. At the present time, employee personnel files are maintained in two areas. One set of files contains hiring information and disciplinary actions; these files are either in the Executive Director's office or the Section 8 Administrator/Secretary's reception area. The other set of employee files are in Townsley's office and contain records such as employees' pay, sick time, vacation time, and wage garnishments (if applicable).

10. The Section 8 Administrator/Secretary maintains all the tenant files for Section 8 certificates and deals directly with the tenants and apartment owners in the Section 8 program. She is also the Executive Director's secretary.

11. The Section 8 Administrator/Secretary generally types all correspondence that leaves the RHA. Such correspondence includes letters to HUD, tenants, and packets for the Commissioners for board meetings. The Executive Director does a limited amount of her own typing.

12. In carrying out her duties as the Executive Director's secretary, the Section 8 Administrator/Secretary has retrieved the personnel files that contain hiring information and disciplinary actions for the Executive Director. This is not a task that has been performed with any frequency. The RHA has not terminated an employee for eight years.

13. The Section 8 Administrator/Secretary types the Executive Director's budget proposal. The budget proposal contains salary recommendations. The Executive Director presents her budget to the Commissioners at public meetings.

14. The position of Director of Facilities was created in July, 1994. Among the duties of the position is to oversee the maintenance of RHA's facilities, a task previously performed by a maintenance working foreman.

15. Harold Brookman is the Director of Facilities and has held that position since it was created. Prior to July, 1994, Brookman was the Modernization Coordinator, a position that no longer exists at the RHA. Brookman had previously worked as a contractor and as the director for maintenance for a Connecticut company before being employed at the RHA as Modernization Coordinator.

16. Brookman administers the Comprehensive Improvement Assistance Program ("CIAP"), a HUD funded grant program that enables the RHA to improve its properties. Brookman assesses the RHA's property to determine what work needs to be done, estimates the amount of money it would take to improve the property, drafts an informal proposal to the Commissioners, then makes a formal request to HUD for CIAP funds. If the proposal to HUD is successful and the RHA receives CIAP funds, Brookman hires subcontractors to complete the project and oversees the completion of the work by the subcontractors.

17. Brookman is also in charge of all maintenance at the RHA's three complexes. His office is separate from the RHA's administrative offices and is located at the RHA's Forest Park facility. Brookman assesses maintenance problems as they come into his office and prioritizes the work. The Maintenance employees meet at Brookman's office every morning and he tells each employee where

to work that day. None of the employees are assigned to specific buildings. Brookman makes all maintenance decisions, most of which are routine. Occasionally during the course of the day, something may occur which requires that Brookman change employees' work assignments.

18. None of the Maintenance employees have specialized training and each generally has some knowledge about most things related to the maintenance of rental housing units - for example, repairing a leaking water pipe or toilet. Brookman has tried to make changes in the maintenance department in the short time that he has been the Director of Facilities. He has asked the Maintenance employees to not just follow their work orders, but to always look around when they are making repairs, and if they see a problem that is not on their work orders to go ahead and make the repair.

19. Brookman generally does not perform maintenance duties except when an employee has a question about how to perform a certain task or when he is training an employee. There are no written manuals or standard operating procedures for Maintenance employees.

20. During his tenure as the Director of Facilities, Brookman has verbally reprimanded Maintenance employees. Such actions have taken the form of counseling the employee. None of these actions have been placed in employees' personnel files. Brookman has not issued written reprimands, but believes he has the authority to issue reprimands beyond verbal reprimands.

21. The Personnel Policy states that the Director of Facilities "recommends disciplinary action of the maintenance

staff". In the limited time the position has existed, Brookman has not had to recommend disciplinary action beyond verbal reprimands. The Personnel Policy does not give the Director of Facilities the authority to recommend the suspension or termination of employees; that authority specifically lies with the Executive Director, as set forth in Finding No. 6. The Executive Director is not in a position to observe Maintenance employees' work performances and has not met with the maintenance staff on a regular basis since Brookman was hired as the Director of Facilities. The Executive Director relies on Brookman to direct the activities of the maintenance department, including the handling of minor disciplinary matters that may arise (Petitioner's Exhibit 1).

22. Brookman has prepared budgets for the RHA, including a budget for supplies and a budget for salaries. Brookman has presented such budgets to the Commissioners for their approval at public meetings. In December, 1994, after this petition was filed, Brookman proposed a budget to the Commissioners that included salary recommendations; he recommended which Maintenance employees should get raises and the amount of the raises.

23. During August, 1994, Maintenance employee Barry Adams injured his back at work. The RHA did not replace him for approximately one and one half months because it was uncertain when he would be able to return to work. The RHA learned in October, 1994, that Adams is temporarily totally disabled and is scheduled to have a back operation. Adams' doctors will not know for approximately one year after his operation if he will be able to return to work, or if he will be partially or totally disabled.

Adams is receiving workers' compensation benefits and remains on the RHA's payroll for benefits.

24. The RHA hired Henry Rabtoy in October, 1994, to replace Adams. At the time of his hire, Rabtoy had worked for approximately six months at the RHA with the maintenance staff in a program funded by the State of Vermont. Brookman recommended to Schwan-Packard that the RHA hire Rabtoy. Schwan-Packard made such recommendation to the Commissioners, who hired Rabtoy on a temporary basis. The RHA does not provide full benefits for Rabtoy because he is working in a temporary capacity.

OPINION

The first issue before us is whether the Director of Facilities 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 Director of Facilities has the authority to transfer, suspend, layoff, recall, promote, discharge, or reward employees, or adjust employee grievances, or to effectively recommend any such actions.

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

In determining whether the responsibility to assign and direct the work of employees rises to a level sufficient to make the Director of Facilities 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. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 211 (1992). 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. 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 Director of Facilities with respect to assigning and directing employees rise to the level of supervisory status. The Director of Facilities is not merely carrying out the orders of a superior, nor is he merely following established operating procedures. The Executive Director, who supervises the Director of Facilities and whose office is located at a separate facility, has no direct or active involvement in the operation of the maintenance department. She relies on the Director of Facilities to keep the Employer's three facilities and 210 units maintained. The Director of Facilities determines what the maintenance needs are each day, prioritizes such needs, then assigns, and occasionally reassigns, the Maintenance employees; the time he spends overseeing the operation of the maintenance department directing and assigning employees occurs on more than an infrequent basis. There was no evidence that the maintenance staff had regular and distinct duties each day or followed standard operating procedures. In the short time he has held the position, the Director of Facilities has tried to make some institutional changes in the operation of the department by

directing his staff to look beyond their work orders when they are making repairs. We conclude under the circumstances that the Director of Facilities exercises independent judgment in directing and assigning employees and such duties are significant in comparison with his overall duties.

We distinguish this case from the Board's holding in a previous case involving a housing authority maintenance supervisor in which the Board found the position not to have supervisory status. Teamsters Local 597 and Burlington Housing Authority, 9 VLRB 126 (1986). The position in dispute in the Burlington Housing Authority case was a working foreman. The Board viewed the maintenance supervisor's position to be that of a lead worker who normally performed the same duties as the other maintenance workers. As set forth in the findings of fact in that case, the maintenance supervisor clearly had a different job description than the Director of Facilities in the present case. The Director of Facilities is not a working foreman or lead worker, as his predecessor at the Rutland Housing Authority had been. He performs maintenance duties only when he is instructing or training an employee.

The Employer also contends that the Director of Facilities has supervisory authority because he has the authority to discipline and to effectively recommend the hire of employees. We have already concluded that the Director of Facilities meets the statutory definition of supervisor because he possesses the power to assign and direct employees. An employee is a supervisor if the employee possesses one of the listed powers in

the statute. Brattleboro, 138 Vt. at 351. Thus, we need not decide whether the Director of Facilities possesses any of the additional powers set forth in the statute.

The Employer contends that the Director of Facilities is also a confidential employee. In light of our conclusion that the Director of Facilities is a supervisor and excluded from the proposed bargaining unit, *we decline to consider this claim.* Also, there is no need to consider the claim of the Union raised in its post-hearing brief that the Director of Facilities is a professional employee. That only becomes an issue if the individual is an "employee" within the meaning of the Act, at which point we would decide if the individual is a professional employee entitled to vote on whether he or she wishes to be included in the bargaining unit with non-professional employees. 21 V.S.A. §1724(c)(1). Since we have concluded that the Director of Facilities is a supervisor, and thus is not an employee within the meaning of the Act, we need not decide the professional status of that position.

The next issue before us is whether the Section 8 Administrator/Secretary 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 Section 8 Administrator/ Secretary in disciplinary and budgetary matters makes her a confidential employee. We conclude that the Section 8 Administrator/Secretary is not a confidential employee.

The Section 8 Administrator/Secretary is responsible for administering the Section 8 certificate program for the Employer

and also acts as the Executive Director's secretary. None of the duties of administering the Section 8 certificate program are confidential duties under the labor nexus rule. The Section 8 Administrator/Secretary's regular duties in the Section 8 program may involve handling information that is "confidential" with respect to tenants' finances; however, it is not confidential information with respect to employees in the proposed bargaining unit.

The Section 8 Administrator/Secretary is also responsible for the Executive Director's typing, including typing the Executive Director's budget proposals. 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. IBEW Local 300 and Morristown Police Department, 15 VLRB 66, 69-70 (1992). Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60 (1989). Washington South District Teachers Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989). In this case, the budget proposals typed by the Section 8 Administrator/Secretary are presented to the Commissioners at a public meeting.

As the Executive Director's secretary, the Section 8 Administrator/Secretary is also responsible for retrieving

personnel files that may contain disciplinary information. This is an infrequent occurrence. The Board has previously determined that such rare access to confidential information does not make membership in, or representation by, the Union incompatible with her official duties. IBEW, supra. Addison Northwest Education Association, Vermont-NEA and Ferrisburg Central Board of School Directors, 12 VLRB 199 (1989). Colchester, supra. Thus, we conclude that the Section 8 Administrator/Secretary is not a confidential employee.

The Employer also contends that the Financial Manager is a confidential employee because she is involved in budgetary matters and is involved in, and has access to, employee payroll information. We conclude that the Financial Manager is not such a confidential employee.

It is evident that the Financial Manager has no involvement with respect to the budget which would make her membership in, or representation by, the Union incompatible with her official duties. Her fiscal duties in this regard are limited to regularly providing the Executive Director account summaries of money the Employer has already disbursed. She has no input into budget planning with respect to salary proposals the Executive Director prepares. Although the Financial Manager writes employee checks and keeps track of employee hours as part of her regular duties, such information would be otherwise available to the Union; membership in, or representation by, the Union would

not be incompatible with this official duty. Thus, we conclude that the Financial Manager is not a confidential employee.

The Employer questioned whether there was a community of interest between the Section 8 Administrator/Secretary and the other employees in the proposed bargaining unit. It did not produce any evidence with respect to this claim and did not pursue this issue in its post-hearing brief. We, therefore, decline to address this issue.

We note that a potential issue exists as to the eligibility of two individuals to vote in the representation election in this matter; one who currently is receiving worker's compensation benefits and is not working, and the other being his temporary replacement. We have made Findings of Fact concerning this potential issue (see Findings of Fact #23 and #24), but believe it is premature at this juncture to decide it. We will not know whether this potential issue will ripen into one we need resolve until the voter eligibility list is furnished by the Employer, and the Union indicates whether there will be any challenges to such list.

ORDER

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

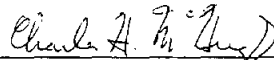
1. The Director of Facilities employed by the Rutland Housing Authority is a supervisory employee and is ineligible to be included in a bargaining unit represented by AFSCME Council 93, Local 1201; and

2. The Section 8 Administrator/Secretary employed by the Rutland Housing Authority is not a confidential employee and the Financial Manager employed by the Rutland Housing Authority is not a confidential employee, and, thus, are eligible to be included in a bargaining unit represented by AFSCME Council 93, Local 1201; and

3. The Vermont Labor Relations Board shall conduct a representation election wherein all employees, excluding the Executive Director and the Director of Facilities, employed by the Rutland Housing Authority may determine whether they wish to be represented by AFSCME Council 93, Local 1201.

Dated the 11th day January, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles R. McHugh, Chairman


Louis A. Toepfer


Leslie G. Seaver