

VERMONT LABOR RELATIONS BOARD

LOCAL 1343, AFSCME,	)	
AFL-CIO	)	
	)	
and	)	DOCKET NO. 96-66
	)	
TOWN OF SHELBURNE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 24, 1996, Local 1343, AFSCME, AFL-CIO ("Union") filed a Petition for Election of Collective Bargaining Representative to expand its existing bargaining unit of all police officers employed by the Town of Shelburne ("Employer"); certified by the Vermont Labor Relations Board on April 4, 1991 (Docket No. 90-65) and June 10, 1993 (Docket No.93-15); to add all full time employees in the Highway, Sewer, Building and Grounds, Water, Finance, and Recreation Departments. On October 7, 1996, the Employer responded to the petition and contended: 1) there should be two bargaining units because there is no community of interest among the police officers and the employees the Union is seeking to add to the existing bargaining unit; 2) the Highway, Sewer, Water and Recreation Department heads are not eligible for inclusion in the unit because they are supervisory employees; and 3) the two Finance Department employees are not eligible for inclusion in the unit because they are confidential employees. The Employer subsequently withdrew its objection to one bargaining unit; the Employer also withdrew its objection to including the two Finance Department employees and the Water Department head in the expanded unit.

A hearing was held on December 5, 1996, at the Board hearing room in Montpelier before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park. Union President Lindol Atkins represented the Union. Attorney Robert Fletcher represented the Employer. The Employer filed a post hearing brief on December 20, 1996; the Union did not file a post-hearing brief.

#### FINDINGS OF FACT

1. The Employer has approximately 38 full time employees. Approximately ten employees report directly to the town manager, including the police chief, fire chief, Highway Department superintendent, Water Department superintendent, Sewer Department chief operating engineer, head librarian, town planner, town zoning administrator, business administrator, Recreation Department director and assessor.

2. Martha Koonz is the current recreation director, and has held that position for approximately three years. She is the only employee in the Recreation Department who works all year. Koonz reports directly to Town Manager William Finger.

3. Koonz is responsible for the day to day management and operation of the Recreation Department. The Recreation Department has a staff of approximately 10 - 14 seasonal employees who work each summer conducting a waterfront program and childrens' camps. She hires approximately six employees for 10 weeks to run the waterfront program, including lifeguards and gatekeepers; the balance of the seasonal employees work in the eight week summer camp program.

4. Koonz evaluates the summer programs and employees at the end of

the season, determines which employees will be invited to return the following summer, and sends those employees letters inviting them back for the following year. Each year at least one or two summer employees are not invited back. Approximately two-thirds of the summer staff accept re-employment.

5. Koonz advertises for the remaining open positions prior to the start of the summer season. She reviews applications for experience to determine which applicants will receive interviews, interviews those candidates, checks references and offers employment to the successful candidates.

6. Koonz oversees the summer programs and may transfer employees from one position to another when necessary. She has never had occasion to formally discipline summer employees, but may informally counsel employees if she observes problems with their performance or conduct.

7. During the remainder of the year, Koonz develops program ideas, teaches a class or two, and oversees programs run by volunteers, such as basketball and soccer. Koonz also offers contracts to 6 - 8 individuals each year to run such programs as yoga, karate, dog obedience training; these classes generally run for 6 or 8 weeks.

8. The Sewer Department was operated by a fire district until 1991, when it was taken over by the Employer. David Rathburn is the current Sewer Department chief operating engineer. He is responsible for overseeing the operation and maintenance of the Town's sewer plants and the collection system. He reports directly to Town Manager William Finger. Rathburn has worked in the Sewer Department for approximately 27 years. There are three other Sewer Department

employees, including an assistant chief operating engineer. All Sewer Department employees work from 7:00 a.m. - 3:30 p.m., and all employees take turns being on call.

9. The Sewer Department operates two treatment plants. Rathburn works with one employee at Plant Number 1 and the assistant chief operating engineer works at Plant Number 2 with the other department employee. Rathburn visits Plant Number 2 on a daily basis.

10. There has been only one hiring since the Employer took over the operation of the Sewer Department in 1991. There were approximately 14 -15 applications for the advertised position. Rathburn reviewed the applications and interviewed candidates with the assistant chief operating engineer. Rathburn selected a candidate and made a recommendation to the town manager, who hired the candidate Rathburn recommended.

11. The current employees in the Sewer Department generally know what is expected of them and perform their jobs with a minimum of direction. If there is an unusual event, such as natural disaster or equipment failure, Rathburn is responsible.

12. Rathburn generally performs similar duties to the other employee in the treatment plant, although he also performs other administrative tasks, such as reviewing development plans, developing the department budget and preparing performance evaluations.

13. Rathburn performs a performance evaluation for each of the Sewer Department employees on an annual basis on a form provided by the Employer. He

then meets with the employee and they discuss any differences of opinion. The employee signs the form and Rathburn forwards it to the town manager. The evaluation is not used to determine compensation.

14. Rathburn prefers a team approach to problem solving. Recently, two Sewer Department employees working in the same plant were not getting along with each other. Rathburn attempted to resolve the situation through discussions with both employees. This was not successful, so Rathburn separated the employees by assigning them to work at different plants.

15. Paul Goodrich is the current Highway Department superintendent and is responsible for the operation of the department. He has held that position since 1979 and reports directly to the town manager. There are four other full time employees in the Highway Department, including a mechanic, truck driver, operator and maintenance worker. The Highway Department is located in a separate location from the town offices.

16. Goodrich reviews developers' plans to ensure compliance with the Employer's specifications. Goodrich prepares the annual budget for the Highway Department.

17. Highway Department employees, including Goodrich, generally work from 7:00 a.m. - 3:30 p.m. and are on call from November through April.

18. Except for the mechanic, Highway Department employees generally all perform the same functions, including Goodrich. Each morning Goodrich decides what needs to be done and meets with the employees and assigns them their duties for the day. He does not consult with the town manager regarding the day to day

operations of his department. If there is an unusual event, Goodrich decides what needs to be done and who will perform the tasks.

19. Goodrich recently participated in the hiring of a new Highway Department employee. He reviewed the applications and interviewed the candidates with the town manager. He made a recommendation to the town manager, who hired the candidate.

### OPINION

At issue is whether the recreation director, Sewer Department chief operating engineer and Highway Department superintendent are supervisors and, thus, ineligible to belong to a bargaining unit pursuant to 21 V.S.A. Sections 1502 and 1722.

Supervisor is defined in 21 VSA Section 1502(13) 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".

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, 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. Nor do rare or infrequent supervisory acts change the

status of an employee to a supervisor. Brattleboro, 138 Vt. 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). However infrequently used, the power exercised must be genuine. Id. 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. 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.

#### Recreation Director

The Employer contends the recreation director is a supervisor because she has the authority to hire, reward, direct and discipline seasonal employees; and that the exercise of such authority requires the use of independent judgement.

This is the first time that the Board has been called upon to determine supervisory status when the employees being supervised are seasonal employees since the Municipal Employees Relations Act ("MERA") was amended in 1989. Prior to 1989, the definition of "municipal employee" excluded individuals employed on a seasonal basis, as well as individuals employed on a part-time or probationary basis, and such employees were ineligible to be included in a bargaining unit. MERA was amended in 1989 to only exclude individuals employed on a probationary status. 21 V.S.A. Section 1722(12)(c).

Most evidence presented at the hearing related to the recreation director's

responsibilities with respect to hiring employees. In the area of hiring employees, it must be demonstrated that an employee actually has taken the action or effectively recommended the action, on more than a rare or infrequent basis, to warrant a supervisory designation. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992). Proctor Education Association/Vermont-NEA/NEA and Proctor School Board, 18 VLRB 174, 185 (1995).

In applying this standard, we conclude that the recreation director has the authority to hire seasonal employees every summer and has exercised this authority throughout her tenure as recreation director. Koonz has complete autonomy throughout the hiring process - each spring she advertises positions available, reviews the applications, selects candidates for interviews, checks references and offers employment to successful candidates. At the end of each summer season, she assesses performance and makes offers of re-employment to employees who have performed their jobs to her satisfaction during the summer season.

Although the Union is not seeking to represent the employees being supervised by the recreation director, it is evident that the fundamental concept behind the supervisory exclusion is the individual's authority to act as an arm of management in supervising their employees. If an employer expects an individual to carry out significant supervisory functions over employees in a major component of the employer's operation, then we believe that individual meets the statutory definition of supervisor regardless of whether those employees are in the bargaining unit. Chittenden South Education Association, Vermont-NEA and Shelburne Board of School Directors, 12 VLRB 242,249 (1989).



We conclude that the hiring of 10 - 14 seasonal employees each year is not a rare or infrequent event and is a significant supervisory function in the Employer's operation. Although the employees hired by the recreation director work only during the summer months, resulting in the recreation director not actually supervising employees during the major part of the year, it is significant that the recreation director's hiring responsibilities extend beyond the summer months in evaluating employees for re-hire, determining which employees to hire for the succeeding year, seeking and interviewing candidates for hire, and determining which employees will be hired. Under these circumstances, we conclude that it is appropriate to exclude the recreation director from the bargaining unit as a supervisor based on her hiring responsibilities.

#### Chief Operating Engineer

The Employer contends that the Sewer Department chief operating engineer is a supervisor because he has the authority to hire, assign and direct employees, and to adjust grievances; and that the exercise of such authority requires the use of independent judgment.

Given the evidence before us, the assigning and directing responsibilities of the chief operating engineer are most significant in determining whether he is a supervisor. In the area of assigning and directing employees, 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 an employee's duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing and assigning employees, then the employee meets the statutory definition of supervisor. South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332 (1988). c.f., South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995). 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).

In applying these standards, we conclude that the assigning and directing responsibilities of the chief operating engineer of the Sewer Department make him a supervisor. It is particularly significant in this regard that the town manager, who supervises the chief operating engineer, does not have direct or active involvement in the operation of the department. Although the three other employees in the Sewer Department generally know what is expected of them and perform their jobs with a minimum of direction at the present time, Rathburn is solely responsible for overseeing the department's operation, visits both plants on a daily basis, and has had to exercise his authority by reassigning employees who were unable to work together. Under these circumstances, we conclude that the directing and assigning

duties of the chief operating engineer rise to the level of supervisory status.

Highway Department superintendent

The Employer contends that the Highway Department superintendent is a supervisor because he has the authority to hire, direct and assign employees, and to adjust grievances; and that the exercise of such authority requires the use of independent judgment. Once again, given the evidence before us, the assigning and directing responsibilities of the chief operating engineer are most significant in determining whether he is a supervisor. We conclude that the Highway Department superintendent is a supervisor because he has the authority to direct and assign employees within the statutory definition of supervisor.

The superintendent has overall responsibility for maintaining the Employer's roads and keeping them safe, and assigns and directs employees in this regard. Highway Department employees do not have regular and distinct duties each day. The superintendent determines on a day to day basis what needs to be done each morning, meets with his employees and assigns them their duties for the day. If there is an unusual event, the superintendent decides what needs to be done and who will perform the tasks. He does not consult with the town manager regarding the day to day operations of his department. These duties are sufficient for us to conclude that the superintendent exercises independent judgment in directing and assigning employees and such duties are significant in comparison with his overall duties.


### ORDER

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

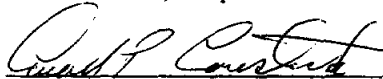
1. The recreation director of the Town of Shelburne is a supervisory employee and is ineligible to be included in a bargaining unit represented by Local 1343, AFSCME, AFL-CIO ("Union");
2. The chief operating engineer of the Sewer Department of the Town of Shelburne is a supervisory employee and is ineligible to be included in a bargaining unit represented by the Union;
3. The Highway Department superintendent of the Town of Shelburne is a supervisory employee and is ineligible to be included in a bargaining unit represented by the Union; and
4. The Vermont Labor Relations Board will conduct a representation election among all full time employees in the Highway, Sewer, Building and Grounds, Water and Finance Departments; excluding the recreation director, Sewer Department chief operating engineer and Highway Department superintendent; of the Town of Shelburne to determine whether the employees wish to be represented by the Union.

Dated this 6<sup>th</sup> day of February, 1997, at Montpelier, Vermont.

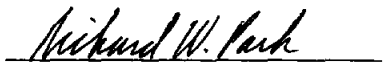
VERMONT LABOR RELATIONS BOARD



Catherine L. Frank, Chairperson



Carroll P. Comstock



Richard W. Park