

VERMONT LABOR RELATIONS BOARD

DEPARTMENT OF MOTOR VEHICLES)	
DESIGNATION DISPUTE)	
(RE: MOTOR VEHICLE SENIOR)	DOCKET NO. 99-29
INSPECTION SPECIALIST))	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 29, 1999, the Vermont State Employees Association, Inc. ("VSEA") filed a designation dispute concerning the position of motor vehicle senior inspection specialist on behalf of the incumbent in that position, Samuel Thompson. VSEA contended that the designation of this position by the Commissioner of Personnel as "non-management" should be changed to "supervisory".

On October 21, 1999, a hearing was held before Board Members Catherine Frank, Chairperson; Richard Park and Edward Zucarro, in the Labor Relations Board hearing room in Montpelier. Department of Personnel Legal Counsel David Herlihy represented the State. VSEA Deputy Legal Counsel Mark Heyman represented Thompson. The parties filed briefs on October 28, 1999.

FINDINGS OF FACT

1. During all times relevant, Samuel Thompson worked for the Department of Motor Vehicles in the Enforcement and Safety Division. Prior to the action that is the subject of this designation dispute, Thompson held the title of Motor Vehicle Inspector II, Pay Grade 17, a position within the Non-Management Bargaining Unit represented by the VSEA.

2. During all times relevant, Thompson reported directly to Motor Vehicle Inspection Chief Reginald Bragg. There are three units under Bragg's supervision: a criminal investigation unit, an administrative investigation unit, and an inspection and emissions unit. Thompson worked in the inspection and emissions unit. The individuals in the other two units who report directly to Bragg are designated as supervisors. They both have three employees reporting directly to them and are in Pay Grade 20 positions (VSEA Exhibit 2).

3. During all times relevant, the unit in which Thompson worked consisted of himself and two motor vehicle inspectors who hold the title of Motor Vehicle Inspector I and are in Pay Grade 15 positions. The workload in the unit traditionally has been divided into three geographic areas with approximately 450 inspection stations in each designated area. Thompson and the two motor vehicle inspectors are responsible for ensuring that inspection stations in their assigned areas use and maintain the required inspection equipment, complete State inspection forms correctly and collect appropriate fees. They also ensure that inspection mechanics are properly certified (VSEA Exhibits 1, 2).

4. Thompson's responsibilities changed in 1998 as a result of the Federal Clean Air Act and State legislative mandates. The changes took effect in January 1999 and are to be phased in over three years. During 1998, Thompson worked with another agency, the Agency of Natural Resources ("ANR"), to develop procedures for emissions testing. He still interacts with ANR regarding emissions issues.

5. Thompson's additional duties related to the Clean Air Act prompted his filing a PER-10, or request for classification review, on or about February 4, 1999. The

classification of Thompson's position was changed as a result of this request. His position title was changed to Motor Vehicle Senior Inspection Specialist ("senior inspection specialist"), Pay Grade 19. The designation remained unchanged as non-management (VSEA Exhibits 1, 4).

6. In addition to his own inspection duties in his assigned area, Thompson, at all times relevant, also has been responsible for overseeing the duties of the other two motor vehicle inspectors in his unit, currently Stephen Clark and Thomas Tessier.

7. Clark was hired approximately two years ago. He was one of approximately ten applicants. Thompson was on a three person hiring panel that interviewed applicants. Thompson was told that, because the person would be reporting to him, his role on the panel was to hire the right person for the job. Thompson recommended the hire of Clark and such recommendation was followed.

8. Thompson, Clark and Tessier each work out of their homes. Thompson generally goes to his office in Montpelier on Monday mornings and gathers work that has come into the unit by phone messages or by referrals from other government units. He communicates with Clark and Tessier by telephone or e-mail, and sends work assignments to the appropriate inspector according to his geographic area. Approximately 85% - 90% of the work is assigned geographically. Inspectors schedule most of their own work and prioritize their own work. Thompson occasionally will assign an inspector to an area of the State outside his assigned geographic area. For example, there have been occasions in which Thompson has determined it was necessary to send an inspector to an inspection station outside of his own geographic area where he may not be known or recognized as a motor vehicle inspector.

9. Thompson generally meets every other Wednesday with Bragg and the two unit supervisors under Bragg to discuss division and unit issues.

10. In addition to his own inspection work, Thompson reviews the daily work of the two inspectors. He is responsible for completing their annual performance evaluations. He forms a basis for these evaluations by reviewing their daily written work, occasionally accompanying them while they work and meeting quarterly with them. The performance evaluations are passed through the chain of command for the review and signature of Bragg and the Commissioner of Motor Vehicles. Thompson meets with each inspector and discusses his performance evaluation (VSEA Exhibits 7, 8).

11. Thompson approves and signs Clark and Tessier's time sheets. He also is responsible for approving annual leave time. In reviewing leave requests, Thompson ensures that no more than two unit employees, including himself, are off at one time (VSEA Exhibits 9, 10, 11).

12. In the course of reviewing Tessier and Clark's work, Thompson has brought performance deficiencies to their attention. For example, in 1998 Thompson gave Tessier a "to do" list from which to work and reminded him on at least one occasion to work from such list in organizing his day (VSEA Exhibit 12).

13. During 1999, Thompson gave Tessier written feedback through various memoranda and e-mail, requesting additional information on the paperwork Tessier had submitted. Thompson also has sent Tessier e-mails requesting him to be more specific regarding his work schedule (VSEA Exhibits 8, 12 - 17).

14. Approximately one and a half years ago, Thompson was asked to investigate a complaint that one of the inspectors had acted unprofessionally. He

conducted an investigation of the matter, concluded that there was no unprofessional conduct on the part of the inspector and recommended that no disciplinary action be taken. Bragg agreed with his recommendation and took no disciplinary action.

15. A few weeks prior to the hearing in this matter, Thompson received notice that one of the inspectors was going over the speed limit on the interstate. He called the inspector and discussed the matter with him. Thompson did not inform him that he had the right to have his union representative present. The inspector admitted to the possibility of going over the speed limit and promised not to do so again. Thompson most likely did not tell the inspector that he was giving him an oral reprimand. Thompson made a "note" of the incident and will be placing the note in the inspector's personnel file.

16. Thompson does not have the authority to suspend, dismiss, transfer, recall, promote or discharge employees.

MAJORITY OPINION

At issue is whether the Commissioner of Personnel appropriately designated the Motor Vehicle Senior Inspection Specialist position as a non-management employee. The incumbent in the position, Samuel Thompson, disputes the non-management designation and contends that the position should be designated as supervisory.

The State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* ("SELRA"), provides that any disputes over the designation of positions shall be decided by the Board. 3 V.S.A. Section 906. If the Board decides that the senior inspection specialist is a supervisor, the position will be included in the supervisory bargaining unit represented by the VSEA. 3 V.S.A. Section 907.

Section 902(16) of SELRA defines "supervisory employee" as follows:

an individual finally determined by the board as having the 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.

An employee must pass two tests to be considered a supervisor: 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.

VSEA and Thompson contend that the senior inspection specialist is a supervisor because Thompson has the authority to hire, direct or assign, and discipline other employees or effectively to recommend such action; and that the exercise of such authority requires the use of independent judgement.

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).

The evidence was limited to a single incident in which Thompson was on a hiring panel with two other individuals and was told that, because the person would be reporting to him, his role on the panel was to hire the right person for the job, and Thompson's recommendation was followed. We conclude that this experience is too limited and the evidence is insufficient for us to determine that Thompson has the authority to effectively recommend the hiring of employees. We note that, in previous cases, we have concluded that employees with similar limited experience in recommending the hire of employees were not supervisors. Kellogg-Hubbard Library, supra. Proctor, supra.

VSEA and Thompson also contend that the senior inspection specialist has the authority to assign and direct employees; and that the exercise of such authority requires the use of independent judgment. 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, supra. 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 senior inspection specialist do not rise to supervisory status. Most of the time, the assignment of duties to inspectors is based on geographic area, and the inspectors follow established policies and procedures in inspecting their approximately 450 stations. The inspectors schedule most of their own work and prioritize their work. Although Thompson occasionally will assign an inspector to an area of the State outside his assigned geographic area, such assignment is infrequent and insignificant in comparison to his overall duties. We conclude that Thompson's duties in this area generally do not go beyond ensuring that standard operating procedures are followed.

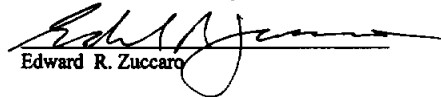
Finally, VSEA and Thompson contend that the senior inspection specialist has the authority to take disciplinary and corrective action to correct instances of misconduct or poor performance. The authority to take a specific disciplinary action or effectively recommend a specific disciplinary action must be demonstrated for supervisory status to be found. Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 85 (1986).

The evidence indicates that Thompson has investigated two incidents in which discipline of employees potentially was at issue. In the first instance, Thompson concluded that there was no unprofessional conduct on the part of the employee, recommended that no disciplinary action be taken and none was taken. More recently, Thompson called an inspector who reportedly had exceeded the speed limit and discussed the matter with him. We conclude that the first incident is insufficient to demonstrate authority to effectively recommend specific disciplinary action. The second incident does not demonstrate authority to discipline employees in that it appeared to be a counseling session with the employee rather than the imposition of disciplinary action.

VSEA and Thompson also contend that Thompson's supervisory authority is evident by his responsibilities in providing performance feedback and preparing performance evaluations. In addressing the issue of employees preparing performance evaluations on non-probationary employees, the Board has determined that an individual who prepares performance evaluations is not a supervisor where the individual is unable to take any adverse action against an employee being evaluated, such as placing an employee in a warning period, or where the individual is unable to reward an employee who receives exemplary evaluations. Burlington Firefighters Association and City of Burlington, 18 VLRB 137, 147-148 (1995). Department of Public Safety Personnel Designation Dispute (State Police Sergeants), 14 VLRB at 186. City of Montpelier and Local 2287, IAFF, 18 VLRB 374, 389-90 (1995). Although Thompson occasionally provided performance feedback and prepared annual performance evaluations, there was no evidence that Thompson has taken any adverse action against an employee being evaluated or that he is able to reward an employee who receives an exemplary evaluation.

We recognize that the senior inspection specialist does perform some functions that are supervisory in nature. However, in considering all the evidence, we conclude that his role in the inspection and emissions unit is that of a team leader, or a first among equals, and does not rise to supervisory status. He generally performs the same duties as the other two inspectors. We find that the evidence is insufficient to conclude that the senior inspection specialist is a supervisor.


Catherine L. Frank, Chairperson


Edward R. Zuccaro

DISSENTING OPINION

I dissent. The context of this case differs from many of the precedents cited by the majority in two key ways: one, most of the cases cited were under the Municipal Act, 21 V.S.A. §1721 et seq., which affirms a policy that public sector workers be allowed the right to bargain collectively. This Board has been cautious in taking that right away by designating someone a supervisor. Such a balancing factor is not present in this case, where Thompson will be represented by the same union with either outcome. Two, in this case, none of the employees are co-located. There is infrequent contact between Thompson and the two inspectors, and no evidence of even infrequent contact between the inspectors and Thompson's supervisor.

Thompson has the authority to hire or to effectively recommend the hire of his two reports. We were presented a clear example of his effectively exercising that authority. The person he recommended was hired. The State presented no argument or evidence that it would have hired someone he did not recommend nor that they would

have not hired his recommendation. In a function with two reports, you cannot demonstrate hiring authority often, unless you have high turnover.

Thompson has the authority to assign and to discipline or to effectively discipline the other two workers. While the findings demonstrate that the assigning of work is not a major component of Thompson's role and that the disciplinary actions taken to date are modest, the State gave no evidence that someone else would perform these roles if the need to assign or discipline was more frequent or significant.

The majority affirms that the existence of actual power, rather than the frequency of its use, determines supervisory status. Yet it applies the contradictory standard that infrequent demonstrations of power in hiring, assigning and disciplining make Thompson a non-supervisor.

The frequency of demonstration of power and authority has been a criteria applied to supervisory status cases in the past. But the work environment has changed in the 1990's. A more collaborative working relationship between supervisors and workers is required. In a modern workforce, the exercise of the traditional application of power and authority are significantly diminished. To continue to apply old supervisory criteria to the new world order creates unintended and absurd consequences.

For example, if Thompson had made a bad hiring decision or created a working environment that led to more turnover, he could demonstrate one or two more hirings, and thus be deemed a supervisor. If he hired, trained, or supervised poorly, if he helped to create a contentious work environment, he might have more assignment, performance and discipline problems, and then we would make him a supervisor and leave a better leader as a non-supervisor.

A final point: if Thompson is not the supervisor of Clark and Tessier, then who is? The State gave no evidence of Bragg performing any of the duties required of supervision that they claim were not the responsibility of Thompson.

Thompson has the authority to hire, assign, and discipline and should be classified as a supervisor.


Richard W. Park

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Motor Vehicle Senior Inspection Specialist is not a supervisor and shall remain in the non-management bargaining unit represented by the Vermont State Employees' Association, Inc.

Dated this 17th day of December, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Edward R. Zuccaro