VERMONT LABOR RELATIONS BOARD

COLCHESTER POLICE OFFICERS' ASSOCIATION	)	
and	)	DOCKET NO. 02-45
TOWN OF COLCHESTER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 4, 2002, the Colchester Police Officers' Association ("Association") filed a unit clarification petition with the Labor Relations Board, seeking to add the patrol sergeants of the Town of Colchester Police Department to the existing bargaining unit of police officers below the rank of sergeant represented by the Association. On October 2, 2002, the Town of Colchester ("Town") filed a response to the petition, contending that the sergeants are supervisors and, thus, are ineligible for inclusion in the existing bargaining unit.

In a 1982 decision, the Labor Relations Board granted a petition filed by the Town to remove sergeants from the bargaining unit represented by the Association on the grounds that the sergeants were supervisory employees. Colchester Police Officers' Association and Town of Colchester 5 VLRB 43. The Association contends there have been substantial changes in the Colchester Police Department since the 1982 decision, and that the sergeants are no longer supervisory employees.

A hearing was held before Labor Relations Board Members Richard Park, Chairperson; Carroll Comstock and John Zampieri on October 31, 2002, in the Board hearing room in Montpelier. Attorney James Dunn represented the Association. Attorney Marsha Smith Meekins represented the Town. The Association and the Town filed

Proposed Findings of Fact and Conclusions of Law on November 13 and 14, 2002, respectively.

FINDINGS OF FACT

1. In 1982, the Colchester Police Department had three sergeants. One was Director of Staff Services, which included all supportive detective, juvenile and dispatching functions. The juvenile officer, detective, and dispatcher all reported directly to the Director of Staff Services. The other two sergeants were patrol commanders in charge of shifts with two to three patrol officers under them. All patrol officers reported directly to the Patrol Commanders, who assigned their work and directed them. The sergeants reported directly to the Chief of Police. When the Chief was not on duty, the sergeants had total command of the shift. When the Board determined in the 1982 decision that the sergeants were supervisory employees, there remained eleven officers in the bargaining unit represented by the Association. 5 VLRB at 46.

2. In 1984, the Colchester Police Department created its first lieutenant position. The lieutenant in essence served as a deputy chief. In 1992, the Department established a second lieutenant position and restructured the organization. Since that time, there has been a Support Services Lieutenant, an Operations Lieutenant, and three sergeants. At all times relevant, the Operations Lieutenant has been responsible for the uniformed employees – sergeants, corporals, patrol officers and officers in some special units. The Operations Lieutenant works Monday through Friday on the day shift. The Support Services Lieutenant is responsible for non-uniformed employees, including dispatchers, records employees, detectives, the youth service officer and the officer assigned to the sex crimes unit.

3. The Department provides patrol services on a 24 hour a day, 7 days per week schedule through three shifts. The shifts are generally designated as day, evening and midnight shifts. There are three teams to cover the shifts. The management goal was for each team to consist of one sergeant, one corporal, and three patrol officers. The Department has not been able to maintain that level of staffing as it has been operating below its authorized number of positions. In addition, new specialized positions have been created (e.g., DARE Officer, Youth Services Officer, Marine Officer) which have reduced the patrol officers available for each shift. The goal was to have either a sergeant or a corporal on any given shift. That does not always occur. On some shifts, a senior patrol officer is the team leader. Sergeants have performed more patrol functions than envisioned by management due to the short-staffing and addition of specialized positions.

4. The Department maintains a minimum staffing policy which provides that no fewer than two officers work any shift, and that three officers work on weekend evening shifts. Sergeants and corporals count towards the minimum number on a shift. During the past two years, shifts have been operating at minimum manning levels more often than any other staffing level. If there is a vacancy on the shift so that minimum manning is not met, the Department has an automatic policy whereby another officer is required to fill the vacancy from the overtime list.

5. The Operations Lieutenant makes assignments of officers to teams. If long-term vacancies occur on a shift, the Operations Lieutenant transfers officers to other teams to keep balance on the teams. Once teams are set by the Operations Lieutenant, the teams rotate among the shifts every three weeks.

6. The Department has divided the Town into two patrol areas. If there are three team members on duty, including a sergeant, the sergeant is team leader. The sergeant serves as a cover officer and backup to the other two officers who each cover one of the areas. Assignment to areas is routine; officers rotate the patrol area they cover each shift.

7. When only two team members are present on a shift, including a sergeant serving as team leader, the sergeant covers one area, and the other officer patrols the other area. The sergeant is dispatched to calls in his area, and handles complaints in his area, like the other officer. When a shift is operating at this level, the sergeant spends approximately 75 percent of his time on patrol functions such as doing a sweep of the area, looking for motor vehicle violations, responding to complaints and completing related paperwork. During the past two years, sergeants have responded to almost as many complaints as patrol officers.

8. The Department has adopted detailed policies and procedures to cover many of the events that occur in the Town. Each officer has a policies and procedures binder and is expected to know the policies and procedures. There are occasions, such as high-speed pursuits, where team leaders may have to exercise independent judgment in directing officers. In addition, the Police Chief and Lieutenants issue directives which officers need to follow. Sergeants meet regularly with the Operations Lieutenant and receive directions and directives from him (Association Exhibit 1).

9. When a sergeant is on a shift, the sergeant provides guidance to subordinate officers as needed to ensure Department policies and procedures and statutes are followed. The sergeant counsels subordinates and assists them in the performance of

their duties. They also review paperwork and reports of team members for accuracy, completeness and compliance with the Department's procedures. There have been situations where sergeants have brought to the attention of the Operations Lieutenant that officers should receive additional training (Town Exhibits A – D).

10. Sergeants work a schedule that averages 40 hours per week. When a sergeant is not working on a shift due to regularly-scheduled time off, vacation leave or sick leave, another sergeant does not replace the absent sergeant. The corporal on that team is the team leader and performs the functions normally performed by the sergeant. If the sergeant and the corporal are both absent, the duties of team leader are performed by the senior patrol officer.

11. The Operations Lieutenant has directed that he be contacted by the sergeant or whomever is serving as team leader for critical incidents that occur on a shift when he is not working such as a cruiser accident, serious injury, death, civil disturbance, and a hostage situation. Recent events where the Lieutenant was contacted included a motor vehicle collision where three persons died and a homicide. When critical incidents occur, the Operations Lieutenant either provides instructions to handle the situation or comes to the scene to take command of the situation. If the Operations Lieutenant is unavailable to be contacted for serious incidents due to being on leave, the sergeant or whomever is serving as team leader contacts the Chief of Police or Support Services Lieutenant. Sergeants do not fill the role of the Operations Lieutenant in his absence.

12. Sergeants have not done performance evaluations of members of their teams for five years. The Town is developing a new system for doing performance appraisals, and a sergeant is the ad-hoc chair of the committee developing the system.

There are members of the Association on the committee. When sergeants did performance evaluations in the past, they did not result in pay increases or bonuses for employees.

13. Sergeants participate on oral hiring boards, along with officers in the bargaining unit represented by the Association and lieutenants. In such role, sergeants ask a set series of questions of candidates and give numerical scores along with other members of the hiring board. The numerical scores are gathered as a board and provided to the hiring authority.

14. The collective bargaining contract between the Association and the Town provides that the first step of the formal grievance procedure is to file a grievance with a sergeant. In practice, sergeants accept a grievance from an officer, inform the officer they cannot resolve the grievance at their level, and then submit it to the Operations Lieutenant without attempting to resolve it.

15. There have been rare instances where sergeants have been asked to investigate citizen complaints against officers. In these instances, the sergeant investigates the facts of the situation, and makes a report to the Operations Lieutenant without recommendation of any action to take. There is no evidence of sergeants disciplining, or effectively recommending the disciplining, of employees.

OPINION

In this unit clarification petition filed by the Colchester Police Officers Association, the issue before the Labor Relations Board is whether the three sergeants of the Colchester Police Department are no longer supervisory employees and, thus, eligible to be added to the bargaining unit of police officers below the rank of sergeant

represented by the Association pursuant to 21 V.S.A. Sections 1502(13) and 1722(12)(B). This matter is appropriately handled as a unit clarification petition, pursuant to Article 34 of the Board Rules of Practice, because it is a dispute over the unit inclusion or exclusion of employees where there is no question concerning the majority status of the exclusive bargaining representative. South Burlington Police Officers Association and City of South Burlington, 18 VLRB 116, 135-36 (1995).

Given that the Board previously has decided that the sergeants are supervisory employees, Colchester Police Officers Association and Town of Colchester, 5 VLRB 43 (1982), the burden is on the Association to demonstrate circumstances have changed sufficiently with respect to the supervisory duties of lieutenants since the 1982 decision, and convince the Board by a preponderance of the evidence that the sergeants are no longer supervisory employees. South Burlington Police Officers Association, 18 VLRB at 126.

Supervisor is defined in 21 V.S.A. 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 or not an individual can effectively exercise the authority granted him or her; theoretical or paper power will not

make one a supervisor. Rare or infrequent supervisory acts do not 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, 320 (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. at 321-23.

Many of the listed powers in the statutory definition can be quickly addressed. In the areas of promoting, laying off, recalling and transferring employees, it must be demonstrated an employee actually has taken the action or effectively recommended the action. Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 80-81 (1989). Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 149 (1987). The evidence does not indicate that sergeants have ever taken, or effectively recommended, the actions of promoting, laying off, recalling or transferring employees. Thus, we cannot conclude that they have supervisory authority in these areas.

We also conclude, as the Board did in the 1982 decision, 5 VLRB at 49, that sergeants lack supervisory authority 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). While sergeants participate on oral hiring boards, so do officers in the bargaining unit represented by the Association. Sergeants ask a set series of questions of candidates and give numerical scores along with other members of the hiring board. The numerical scores are gathered as a board and provided to the hiring authority. This role as a group member is not sufficient to demonstrate authority to hire or effectively recommend the hiring of employees.

We further conclude, as the Board did in the 1982 decision, that the sergeants do not possess effective 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 126,131 (1986). There have been rare instances where sergeants have been asked to investigate citizen complaints against officers. In these instances, the sergeant investigates the facts of the situation, and makes a report to the Operations Lieutenant without recommendation of any action to take. These investigatory duties are not sufficient to constitute effective disciplinary authority.

The sergeants also possess no supervisory authority with respect to rewarding employees. Conducting of performance evaluations on employees possibly could lead to rewarding employees through wage increases. 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 176, 186 (1991). City of Montpelier and Local 2287, IAFF, 18 VLRB 374, 389-90 (1995). Although sergeants previously conducted performance evaluations on employees, they have not done so for

five years. Further, when sergeants did performance evaluations in the past, they did not result in pay increases or bonuses for employees.

In the 1982 decision, the Board concluded that the sergeants had the effective authority, as the Employer's representative at the first step of the grievance procedure, to adjust employee grievances with the exception of disciplinary grievances. 5 VLRB at 49. In the area of adjusting grievances, the employee must not only have the authority to hear grievances, but it also must be demonstrated the employee can actually settle or resolve a grievance for that employee to be considered a supervisor. AFSCME and Town of Windsor, 6 VLRB 197, 202 (1983).

The collective bargaining contract between the Association and the Town provides that the first step of the formal grievance procedure is to file a grievance with a sergeant. In practice, sergeants accept a grievance from an officer, inform the officer they cannot resolve the grievance at their level, and then submit it to the Operations Lieutenant without attempting to resolve it. Given this practice, we conclude that the Association has demonstrated that circumstances have changed since 1982 so that the sergeants no longer possess supervisory authority in practice with respect to adjusting employee grievances.

The remaining area to be examined is whether the assigning and directing responsibilities of the sergeants make them supervisory employees. In the 1982 decision, the Board concluded that the sergeants possessed effective supervisory authority in this area. 5 VLRB at 49. The Association must demonstrate that circumstances have changed warranting a different conclusion.

In cases where the assigning and directing responsibilities of employees is at issue, 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. South Burlington, 18 VLRB at 130. 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, 340 (1988).

The existence of detailed regulations cannot itself determine whether an employee's duties involve supervisory responsibility. Bennington, 153 Vt. at 322. Exercise of independent judgment in assigning and directing employees, however, must occur on a more than infrequent basis or be significant in comparison with overall duties to make one a supervisor. Bennington, 153 Vt. at 321-23. Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB at 185-86.

In applying these standards, we conclude that the Association has met the burden of demonstrating that the assigning and directing responsibilities of the sergeants are no longer sufficient to make them supervisors. In 1982, there were no lieutenants in the Police Department and the three sergeants reported directly to the Chief. 5 VLRB at 46. One of the sergeants was Director of Staff Services, which included supervision of three employees providing detective, juvenile and dispatching functions. The other two

sergeants were patrol commanders, with two to three patrol officers under them. In the absence of the Chief, the sergeants were in total command of the shift.

Circumstances have changed significantly since 1982. There has been significant restructuring of the Department, including addition of two lieutenant positions and creation of specialized non-patrol positions. One of the lieutenants, the Support Services Lieutenant, has assumed responsibilities previously performed by the sergeant serving as Director of Staff Services. The other lieutenant, the Operations Lieutenant, is responsible for the uniformed employees – sergeants, corporals, patrol officers and officers in some special units.

The addition of the Operations Lieutenant has made a significant difference in the responsibilities performed by the three sergeants, who each serve as team leaders on shifts they are working. The Operations Lieutenant has assumed supervisory authority with respect to assigning employees. He makes assignments of officers to teams. If long-term vacancies occur on a shift, he transfers officers to other teams to keep balance on the teams. Once teams are set by the Operations Lieutenant, the teams rotate among the shifts. Assignment of officers to patrol areas is routine; officers rotate the patrol area they cover each shift. The evidence indicates that the supervisory authority sergeants had in 1982 with respect to assigning employees no longer exists.

Also, the degree to which sergeants exercise independent judgment in responsibly directing employees on their shifts is more limited than existed in 1982, and is no longer sufficient to make them supervisors. The Department has adopted detailed policies and procedures to cover many of the events that occur in the Town. Each officer is expected to know the policies and procedures. When a sergeant is on a shift, the sergeant provides

guidance to subordinate officers as needed to ensure Department policies and procedures are followed. Similarly, the Police Chief and Lieutenants issue directives and directions which sergeants must ensure are carried out.

In performing these functions as team leaders, it is true that on occasion sergeants will have to exercise independent judgment in guiding employees on how to handle certain incidents. However, the Department policies and procedures, and the directives and directions from sergeants' superiors, substantially reduce the exercise of such judgments. South Burlington, 18 VLRB at 133. Further, corporals and senior patrol officers serve as team leaders in the absence of a sergeant a substantial minority of the time, and in such role are performing the same functions as sergeants even though they are non-supervisory employees in the bargaining unit represented by the Association.

Another factor contributing to our determination that the directing responsibilities of sergeants are no longer sufficient to make them supervisors is the Operations Lieutenant has directed that he be contacted by the sergeant or whomever is serving as team leader for critical incidents that occur on a shift when he is not working. When critical incidents occur, the Operations Lieutenant either provides instructions to handle the situation or comes to the scene to take command of the situation. This assumption of responsibility by the Operations Lieutenant further reduces the need for sergeants to exercise independent judgment in directing employees.

We conclude that, in addressing incidents that arise in the Town, sergeants generally are ensuring that subordinates adhere to established policies and procedures and relaying instructions from supervisors, rather than responsibly directing employees through the exercise of independent judgment. In other areas as well, such as counseling

employees and reviewing officers' reports, it is apparent sergeants are acting more to ensure adherence to established Department procedures and policies than to exercise independent judgment. AFSCME Local 490 and Town of Bennington, 11 VLRB 89 (1988); *Affirmed*, 153 Vt. 318 (1989).

Another significant change since the 1982 decision impacting on the directing responsibilities of sergeants is the increase in patrol duties performed by sergeants due to short staffing on patrol teams. During the past two years, shifts have been operating at minimum manning levels more often than any other staffing level. This means that frequently sergeants are one of only two officers on a shift. When this is the case, the sergeant covers one of the two patrol areas, and the other officer patrols the other area. The sergeant is dispatched to calls in his area, and handles complaints in his area, like the other officer. When a shift is operating at this level, the sergeant spends approximately 75 percent of his time on patrol functions. During the past two years, sergeants have responded to almost as many complaints as patrol officers. Short staffing has resulted in a substantial increase in patrol duties for sergeants, resulting in sergeants performing the same duties as patrol officers a significant portion of their time and devoting less time to other duties, including directing responsibilities.

The Vermont Supreme Court has determined that it is appropriate to give great weight to a finding that sergeants perform the same duties as patrol officers a significant portion of the time in concluding that sergeants do not meet the statutory definition of supervisory employees. Bennington, 153 Vt. at 323-24. We consider it of importance here that sergeants frequently perform the same duties as patrol officers for a major part of their work day.

In sum, we conclude that, when compared with overall duties, the exercise of independent judgment by sergeants in assigning and directing employees is not significant enough to make them supervisors. Bennington, 153 Vt. at 321-23. Sergeants are more highly skilled individuals who frequently perform the same duties as patrol officers but who, because of their experience and skill, ensure that officers on their shift adhere to established policies, procedures, directives and directions. Bennington, 11 VLRB at 97. South Burlington, 18 VLRB at 134. They are more closely aligned with non-supervisory employees than with management, and are eligible to be included in the bargaining unit. Id.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The sergeants of the Colchester Police Department are not supervisory employees as defined in 21 V.S.A. Section 1502(13); and

2. The sergeants of the Colchester Police Department are included in the Police Department bargaining unit represented by the Colchester Police Officers' Association, and the Colchester Police Officers' Association is certified as the exclusive bargaining representative of the sergeants.

Dated this ____ day of March, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
Carroll P. Comstock

_____
John J. Zampieri