VERMONT LABOR RELATIONS BOARD

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION	)	
	)	DOCKET NO. 17-50
and	)	
	)	
CITY OF RUTLAND	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 13, 2017, the New England Police Benevolent Association ("Association") filed a Petition for Election of Collective Bargaining Representative, seeking to represent all Sergeants of the City of Rutland Police Department in a separate bargaining unit from other police department employees of the City. The City of Rutland ("Employer") filed a response to the petition on December 20, 2017, contending that the Sergeants are supervisory employee and therefore ineligible to belong to a bargaining unit. In a further response to the petition filed on February 5, 2018, the Employer took the position that it would not be appropriate to place the sergeants in a separate bargaining unit from the other employees of the Police Department if the Sergeants are deemed to not be supervisory employees.

The Labor Relations Board conducted a hearing on these unit determination issues on March 26, 2018, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Alan Willard and Edward Clark, Jr. Attorney Thomas Horgan represented the Association. City Attorney Matthew Bloomer represented the Employer. The Association and Employer filed post-hearing briefs on April 6 and 11, 2018, respectively.[1]

[1] On April 19, 2018, the Employer filed a motion to strike certain language from the Association's post-hearing brief. We have not considered this motion in deciding this matter. Section 12.16 of Labor Relations Board *Rules of Practice* prohibits filing of a reply memorandum by a party after the mutually agreed upon deadline for filing briefs. Grievance of United Academics, AAUP/AFT, 31 VLRB 88, 114-115 (2010). The motion filed by the Employer is

FINDINGS OF FACT

1. The Labor Relations Board certified the American Federation of State, County and Municipal Employees, Loca1 1201 ("AFSCME") as the exclusive bargaining representative of the patrol officers, dispatchers and meter maids of the City of Rutland Police Department on January 14, 1974. On August 23, 1990, pursuant to an agreement by AFSCME and the Employer, the Board issued an Amendment of Certification certifying AFSCME as the representative of City Police Department employees excepting some specified confidential employees and the following supervisory employees: Chief of Police, Deputy Chief of Police/Captain, Lieutenants, and Sergeants. The July 1, 2002 to June 30, 2005, collective bargaining agreement between AFSCME and the Employer covering police department employees included sergeants in the bargaining unit represented by AFSCME (Association Exhibits 3, 5, 7)

2. The July 1, 2005 to June 30, 2009, collective bargaining agreement between AFSCME and the Employer covering police department employees provided as follows with respect to inclusion of sergeants in the bargaining unit:

> During the life of this agreement, all vacancies filled for the position of sergeant shall be considered supervisory and exempt from the bargaining unit. During the life of this agreement, any individual sergeant may voluntarily stipulate-out of the bargaining unit. Such stipulation shall be irrevocable. On June 30, 2009 all Sergeants shall be considered supervisors and exempt from the bargaining unit (Employer Exhibit W).

3. All Sergeants have been excluded from the bargaining unit represented by AFSCME since the 2005 – 2009 collective bargaining agreement. The current collective bargaining agreement between AFSCME and the Employer, effective July 1, 2016 to June 30,

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tantamount to a reply memorandum because it is responding to the Association's brief. Accordingly, we decline to consider the Employer's motion.

2018, states that Sergeants are excluded from the bargaining unit as supervisory employees (Employer Exhibit X).

4. There are currently 41 employees in the bargaining unit represented by AFSCME.

5. The Police Department is headed by a Chief of Police. Three Commanders report directly to the Chief. There are seven sergeants in the Police Department: four Patrol Shift Sergeants, a Bureau of Criminal Investigation ("BCI") Sergeant, a Community Response Team Sergeant, and a Staff Operations Sergeant. Each sergeant reports directly to a Commander except for the Staff Operations Sergeant. The Staff Operations Sergeant reports directly to the Police Chief (Employer Exhibit A, Association Exhibit 9).

6. The Patrol Shift Sergeants each have a corporal and five or six other police officers reporting to them on the day or night shift to which they are assigned. The Patrol Sergeants report directly to the Commander of the Patrol Division (Employer Exhibit A).

7. The BCI Sergeant, who reports directly to the Commander of Professional Standards, has a corporal, two detectives, a police officer and an evidence/property clerk reporting to him. The BCI Sergeant provides guidance and directions to those under him with respect to investigation of criminal activity, apprehension of criminal suspects and recovery of stolen property (Employer Exhibit A, Association Exhibit 9).

8 The Community Response Team Sergeant, under the direction of the Community Outreach Commander, is responsible for the management of the Public Parking Regulation Program, the Animal Control Program, the School Resource Officer Program and the Community Policing Program. The Community Response Team Sergeant directs and supervises the parking enforcement, community policing, animal control and school resource employees under him (Employer Exhibit A, Association Exhibit 9).

9. The Staff Operations Sergeant, who reports directly to the Chief of Police, provides support services including overall information technology responsibility, vehicle maintenance, purchasing, training coordination and documentation, custody and accounting of property and impounded vehicles, and public information. The Staff Operations Sergeant assists with the recruiting and hiring process for police officers. The Staff Operations Sergeant is not part of the hiring panel convened to interview and select officers (Employer Exhibit A, Association Exhibit 9).

10. The Chief of Police and Commanders generally work five days per week from 8 a.m. to 4 p.m. or 9 a.m. to 5 p.m.

11. The Police Department has a minimum staffing policy. During the midnight to noon period, there are a minimum of three patrol officers and one shift commander on duty. There is a minimum of four patrol officers and one shift commander on duty during the noon to midnight period.

12. Patrol Sergeants are the highest ranking on-duty officers approximately 120 out of 168 hours in the week. When a Patrol Sergeant is not on duty, the highest ranking officer typically is a Corporal. Senior patrol officers infrequently serve as the highest ranking officer on the shift. Corporals and senior patrol officers have the same responsibilities as Patrol Sergeants when serving as highest ranking officer on a shift.

13. The Police Department uses an "on-call list" which is posted monthly for filling vacancies to ensure compliance with the Department's minimum staffing policy. The on-call list is used to fill any vacancies that bring staffing levels on a shift below minimum staffing levels.

14. DDACTS ("Data Driven Approaches to Crime and Traffic Safety") is used by the Police Department to determine which areas of the city are high crime and traffic areas at

particular times of the day and specific days of the week. The information is used to assign officers to patrol certain areas of the city for portions of shifts for high crime and traffic periods. The Patrol Division Commander informs Patrol Sergeants when officers need to be in specific areas at particular times during high crime and traffic periods. The Department uses a rotating list to assign officers to patrol areas during these high crime and traffic times. Otherwise, police officers are generally free on their shift to patrol the areas of the city they see fit, and Patrol Sergeants do not direct officers to patrol specific areas.

15. The Police Department uses a rotational system where dispatchers assign calls as they come in to patrol officers to the officer that is next on the list of on duty officers. On duty Patrol Sergeants are not normally in the call rotation and are not initially assigned a call by a dispatcher unless the Patrol Sergeants so direct. After a call is initially assigned to an officer, Patrol Sergeants can assign another officer, or assign themselves, to replace the original responding officer. There have been instances where Patrol Sergeants have assigned another officer, or assigned themselves, to replace the original responding officer (Employer Exhibit B).

16. The Police Department policy manual contains the following provisions:

. . .

20.8 Criteria for Assignment of Additional Units

It is difficult to assess in advance the number of officers required to adequately deal with a specific incident. Supervisors may assign or cancel additional units based upon their assessment of the situation. The following factors may be used in determining the number of officers to be dispatched to an incident;

1. An assault on an officer
2. On scene arrest for a violent felony or misdemeanor
3. Resistance to arrest
4. Use of force
5. Crime in progress
6. Fleeing suspect
7. History of location of suspect

Constant updates from the scene will be made. Units no longer needed will be canceled and sent back to their respective patrol responsibilities.

Final determination of the number of units dispatched rests with the Shift Commander.

20.9 Supervisory Responses to Incident Scenes

Incidents of a serious nature often arise that require the presence of a supervisor who possesses the authority necessary to deal with the problem.

In order to assume command, a patrol supervisor will respond to the scene of the following incidents, when possible:

1. Homicide
2. Suicide
3. Disasters (bombings, flood, etc.)
4. Officer involved shooting
5. Hostage or barricaded suspect
6. Incidents with injury to an officer requiring hospitalization
7. Officer involved traffic accident
8. Any other incident . . . at the discretion of the patrol supervisor

. . .

29.8 Arrest

Arrest is this Department's preferred response to domestic violence because arrest offers the greatest potential for ending the violence. Arrest communicates the following: to the victim that s/he does not have to endure the offender's abuse, to the offender that s/he has committed a serious crime and to the community that violent behavior, even between intimates, is criminal and will not be tolerated. Any deviation from this policy will only be made upon the approval of the shift commander.

. . .

31.11 Control of the Investigation

The first responding officer shall assume command and control of an investigation until or unless one of the following occurs:

1. An officer of higher rank arrives to take control.
2. The investigation is reassigned by:
   a. the Shift Commander
   b. a division commander.
   c. the Chief of Police

If a detective is called to the scene, the original responding/investigating officer shall yield that part of the investigation for which the services of the investigator were requested, if the investigator was called for their expertise in that area.

> The Shift Commander shall have overall responsibility of the crime scene unless the offense is reassigned, by proper authority, to BCI, in which case the Commander of BCI shall assume all responsibilities for the scene.
> . . .
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> **32.11 Prisoner Escapes**
>
> If an officer observes an escape or attempted escape in progress of a prisoner while in the confines of the Rutland Police Department facility, the officer will use appropriate means to request assistance and pursue and apprehend the escapee.
>
> If an officer discovers an escape after the fact, the officer will immediately notify the communications . . .
>
> The shift commander will coordinate the efforts of responding officers, and authorize the notification of, or seek the assistance of, other nearby police agencies.
> . . .
> (Employer Exhibits C, D, E, F)

17. Patrol Sergeants at times have assigned and canceled additional units during incidents, arrived at incident scenes and assumed command, and taken overall responsibility of a crime scene unless, and until, the BCI is assigned to assume responsibility.

18. The Department's Communications policy states that "a roster of employees subject to recall during emergency situations shall be maintained and activated when the on-duty Supervisor so directs." Sergeants have activated the recall list to activate officers when the circumstances have warranted it in their judgment (Employer Exhibit B).

19. During a shooting incident on February 12, 2017, the Patrol Sergeant on duty asked the dispatcher to find out if an off-duty officer could come in early to help with the incident (Employer Exhibits S, T).

20. During a stabbing incident on January 12, 2018, the Patrol Sergeant on the night shift held over police officers past the end of their shift and requested that additional units be sent to the scene. The Sergeant took these actions prior to speaking with a superior officer. The

incoming day shift Patrol Sergeant activated the recall list to find additional officers to assist with the incident (Employer Exhibits O, P, Q).

21. The Police Department has had a directive in effect since 2012 to guide shift and unit commanders in making the proper notifications during critical incidents. The directive provides for the notifications that shift commanders shall make when a variety of specified incidents occur. Typically, notification is made by the dispatcher upon the request of the on-duty shift commander (Employer Exhibit G).

22. The Police Chief and the three Commanders take turns being on call to receive notification of critical incidents when they are off duty. Once they receive notification, they intervene in some instances to provide direction on handling the critical incident. In other instances, they do not provide direction after being notified during incidents.

23. Step One of the grievance procedure under the collective bargaining agreement between AFSCME and the Employer covering police department employees provides that "(b)efore submission of a formal written grievance" at Step Two, there must be an "attempt to resolve it informally". It is required at Step One of the grievance procedure that the "grievant will inform the immediate supervisor outside the Bargaining Unit that a 'grievance' is being raised". The evidence does not indicate specific situations in which Step One grievances have been resolved (Employer Exhibit X).

24. The collective bargaining agreement between AFSCME and the Employer covering police department employees provides for a five-step progressive discipline policy: a) oral caution, b) written warning, c) written reprimand, d) suspension, or demotion in lieu of suspension or discharge if employee is a corporal, and e) termination. Sergeants have issued oral cautions and written warnings. Sergeants have issued written warnings without seeking

permission of a superior officer. It is possible that the disciplinary action imposed by a sergeant could be overturned through the grievance procedure (Employer Exhibits J, K, X).

25. A shift commander has the authority to send a police officer home for the day with pay due to misconduct committed by the officer on the shift.

26. Previously, sergeants participated in investigating internal affairs complaints made against police officers in the Department. Presently, sergeants are not involved in investigating internal affairs complaints.

27. The Police Department requires a 12 month probationary period for newly hired police officers. Corporals act as Field Training Officers ("FTO's") for probationary officers. FTO's complete a Daily Observation Report (a pre-printed Vermont Police Academy form) to rate/score probationary employees. The FTO's then send the completed form to Patrol Sergeants for them to review. The sergeants forward the completed daily observation report to the Commander.

28. During a staff meeting among the Chief, Patrol Division Commander, and Patrol Sergeants, multiple concerns were raised about the ability of a particular probationary officer to perform the job. One Sergeant specifically recommended to the Commander that the officer be separated from employment. The probationary officer was not separated from employment at that time. After a further period passed, the Chief and Commander decided to not extend the officer's probationary period and he resigned from employment.

29. Sergeants with five years of experience are paid approximately $71,000 a year. Corporals and patrol officers with the same experience receive approximately $60,000 and $54,000 annually, respectively. Corporals are paid a 11 percent pay differential from police officers pursuant to the collective bargaining agreement between the Employer and AFSCME in

recognition of the times they replace Patrol Sergeants as shift commanders and due to other increased duties, which they perform.

OPINION

The threshold issue before us is whether the sergeants of the City of Rutland Police Department are supervisory employees. Under the Municipal Employees Relations Act, supervisors are excluded from collective bargaining rights. 21 V.S.A. §1722(12(B). The definition of "supervisor" under the Municipal Act provides:

> "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". Id.

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 (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. Rare supervisory acts do not change the status of an employee to a supervisor. Id. at 351. AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 320 (1989).

The existence of actual power, rather than the frequency of its use, determines supervisory status. AFSCME Local 490 and Town of Bennington, 153 Vt.at 320. 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.

In cases such as this where employees' exclusion from a bargaining unit as supervisory employees resulted from an agreement a number of years earlier between a union and an employer rather than a Board decision, the Board has determined that the burden is on the union to demonstrate that circumstances have changed with respect to the supervisory duties of the employees since the parties' agreement and convince the Board by a preponderance of the evidence that the employees were no longer supervisory employees. International Brotherhood of Electrical Workers Local 300 and City of Burlington Electric Department, 26 VLRB 103, 110-111 (2003). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995).

Here, the parties agreed to remove all sergeants from the bargaining unit nearly nine years ago after they had been in the bargaining unit for several years. The Association has not demonstrated that there has been a sufficient change of circumstances with respect to the supervisory duties of sergeants since their exclusion from the unit to convince us by a preponderance of the evidence that the sergeants are no longer supervisory employees.

There is evidence of supervisory duties exercised by sergeants in some of the areas set forth in the statutory definition of supervisor. This is the case with respect to the assigning of work to employees and directing them. 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).

Patrol Sergeants are the highest ranking on-duty officer on over 70 percent of shifts. In performing these duties, after a call is initially assigned to an officer, patrol officers at times exercise their judgment to assign another officer, or assign themselves, to replace the original responding officer. Further, Patrol Sergeants assign and cancel additional units during incidents, arrive at incident scenes and assume command, and take overall responsibility of a crime scene unless, and until, the BCI is assigned to resume responsibility. They also activate officers from the recall list in emergency situations when circumstances warrant it. These facts indicate that Patrol Sergeants exercise independent judgment in assigning employees and responsibly directing them as a significant part of their overall duties.

We recognize that corporals and senior patrol officers have the same responsibilities as Patrol Sergeants when they are serving as shift commander. However, they perform in this role

much less frequently than Patrol Sergeants. Such infrequent assuming of a supervisory role in comparison with their overall job responsibilities does not change their status to supervisors.

Similarly, the BCI Sergeant exercises independent judgment in assigning employees and responsibly directing them by providing guidance and direction to subordinates with respect to investigation of criminal activity, apprehension of criminal suspects and recovery of stolen property. The Community Response Team Sergeant directs and supervises the parking enforcement, community policing, animal control and school resource employees under him, and the Association has not demonstrated that these duties do not encompass exercising independent judgment in assigning and directing these employees.

The evidence also indicates that sergeants possess supervisory powers in disciplining 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. Colchester Police Officers Association and Town of Colchester, 26 VLRB 9, 17 (2003). Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 85 (1986). If the employee can recommend disciplinary action, but the recommendation generally is not followed, then the employee is not a supervisor. Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987). Sergeants have issued oral cautions and written warnings to police officers under them, the first two steps of a five-step progressive discipline policy pursuant to the collective bargaining agreement covering police officers. This demonstrates the authority to take specific disciplinary action. The possibility that the disciplinary action imposed by a sergeant could be overturned through the grievance procedure does not standing by itself mean that sergeants lack supervisory authority to impose discipline.

The sergeants do not meet the statutory test with respect to the other listed statutory powers. They do not have authority to hire, transfer, suspend, layoff, recall, promote, discharge or reward employees, or effectively to recommend such action. The Employer contends sergeants have authority to recall employees due to their ability to activate officers during emergencies from the "recall list". We conclude that the statutory definition of "supervisor" is not referring to calling in employees to deal with emergency situations. Instead, the placement of "recall" in the statutory definition immediately following "layoff" indicates that the reference is to recall after a layoff.

We further determine that the evidence is insufficient to conclude that the sergeants have the required statutory power with respect to adjusting employee grievances. 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. Colchester Police Officers Association and Town of Colchester, 26 VLRB at 18. AFSCME and Town of Windsor, 6 VLRB 197 (1983). Although sergeants are considered the first step of the grievance procedure under the collective bargaining agreement covering police officers, the evidence does not indicate specific situations in which Step One grievances have been resolved by sergeants.

Nonetheless, supervisory status results from supervisory authority with respect to other listed powers in the statutory definition. The sergeants have such authority with respect to the power of assigning employees, responsibly directing them, and disciplining them.

We note that one of the sergeants, the Staff Operations Sergeant, does not supervise employees. Despite this fact, neither of the parties have requested that this sergeant be treated differently than the other sergeants with respect to supervisor status. We hold that all sergeants

should be given the same supervisory designation. This is due to the nature of their employment where they are all the same rank with equal authority and they are eligible to move into different positions of the same rank. Department of Public Safety Personnel Designation Disputes, 5 VLRB 141, 163-164 (1982). Department of Public Safety Personnel Designation Dispute, 14 VLRB 176,184 (1991). To place equals of rank in a different bargaining unit status would be to ignore the unique nature of police employment and would result in unsettled labor relations. Id.

Given our conclusion that the sergeants are supervisors, and thus excluded from collective bargaining rights, we need not address the issue of whether it would be appropriate to place the sergeants in a separate bargaining unit from the other employees of the Police Department if the Sergeants are deemed to not be supervisory employees.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered: 1) the sergeants of the City of Rutland Police Department are supervisory employees, and 2) the Petition for Election of Collective Bargaining Representative filed by the New England Police Benevolent Association is dismissed.

Dated this 10th day of May, 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Alan Willard

_____

Alan Willard

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.