

VERMONT LABOR RELATIONS BOARD

CITY OF BURLINGTON	)	
	)	
and	)	DOCKET NO. 86-15
	)	
LOCAL 1343, AFSCME	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 24, 1986, the City of Burlington ("City") filed a Petition for Clarification of Unit Determination. The City requested the Labor Relations Board designate the position of secretary to the Director of Public Works as a "confidential" position within the meaning of 21 VSA §1722(6), and thus exempt it from eligibility to be part of the collective bargaining unit represented by Local 1343, AFSCME ("Union").

The City and the Union agreed to waive an evidentiary hearing before the Board; that they would submit an agreed-upon statement of facts and then argue orally before the Board as to whether the disputed position was an eligible bargaining unit position. The Board concurred with the procedure the parties agreed upon to resolve this matter.

The City and the Union filed a statement of Agreed Facts on April 11, 1986, and those findings are herein adopted by the Board. Oral argument was heard before the Board on April 17, 1986. Union President Lindol Atkins represented the Union. Attorney James Dunn represented the City.

The parties waived the filing of briefs.

#### FINDINGS OF FACT

1. On or about July 1985, the Burlington City Council adopted a resolution approving a reorganization which consolidated and merged certain previously independent City departments, i.e. Street Department, Traffic Department, Public Health and Safety Department and the Waste Water Division of the Water Resources Department, into a new Department of Public Works.

2. The Resolution of the City Council creating the Department of Public Works created the position of Director of the Department of Public Works, and, as part of the merger, transferred all positions previously located in the aforementioned departments to the new Department of Public Works.

3. The new Department of Public Works has approximately 70 employees under the control and supervision of the Director. Of that number, approximately 40 are members of the bargaining unit represented by the Union.

4. A position of Office Assistant IV, which was one of six positions previously located in the Traffic Department, was transferred into and is now part of the Department of Public Works.

5. Prior to its transfer into the Department of Public Works, the Office Assistant IV position in the Traffic Department, although vacant prior to the transfer, was considered eligible for and was in fact included in the bargaining unit represented by the Union.

6. Following the consolidation and reorganization as hereinbefore set forth, the Director of the new Department of Public Works indicated his intention to utilize the Office Assistant IV position, which has

not been permanently filled since the merger, in the Department's administrative office as his "first line" personal secretary.

7. The Director of the Department of Public Works has prepared a specific list of duties and responsibilities that will be assigned to and regularly expected of the employee who serves in the position of his "first line" personal secretary. Those duties and responsibilities include, among others, the following:

- typing all personnel related matters in the Department of Public Works, including any warnings, reprimands or other disciplinary actions;
- preparation of performance evaluations of Department employees;
- typing the Director's responses to the Union's proposals of contract negotiations; and
- calculating the estimated costs of various contract proposals submitted by the Union during negotiations (Exhibit A).

8. The City has requested the Union voluntarily recognize that, as a result of the reorganization and consolidation of Departments, this position will be utilized by the City in a confidential manner such as to make inclusion in the bargaining unit inappropriate.

9. The Union has refused to voluntarily recognize this position as being of a confidential nature under the reorganized structure of the Department.

10. The position cannot be filled on a permanent basis until it is determined whether the position will or will not be included in the bargaining unit.

### OPINION

The issue presented by the parties is whether the position of personal secretary to the Director of Public Works is confidential under the Municipal Employee Relations Act (MERA), and thus excluded from eligibility to be part of the bargaining unit represented by the Union under 21 VSA §1722(12)(D).

The term "confidential employee" is defined in 21 VSA §1722(6) as:

...an employee whose responsibility or knowledge or access to information relating to collective bargaining, personnel administration, or budgetary matters would make membership in or representation by an employee organization incompatible with his official duties.

The City contends this position is of a confidential nature in that the work regularly assigned to this position provides the employee with access to personnel and disciplinary records of employees within the Department as well as to information concerning the City's position with respect to its contract proposals, responses to the Union's proposals and cost estimates of such proposals.

The Union contends the City must negotiate the removal of a position from the bargaining unit with the Union and cannot remove a position unilaterally. Further, the Union contends the City must establish a "track record" demonstrating a position is confidential before it is removed from the bargaining unit.

We concur with the Union that a municipal employer may not act unilaterally to remove a position from a bargaining unit on the grounds it has become confidential. The legislature intended the Board maintain

ultimate control of the bargaining unit to ensure ineligible employees do not remain in the bargaining unit; City of St. Albans and Local 1343, AFSCME, 7 VLRB 48 (1984); AFSCME Local 490 v. Town of Bennington, 6 VLRB 88, at 97 (1983); and this intent would be subverted if an employer could unilaterally remove a position from a bargaining unit.

However, that is not what the Employer is attempting to do. By filing a petition with the Board and awaiting Board determination as to status of the position before making any change, the Employer has acted consistent with legislative intent. 21 VSA §1724(a) provides a "petition may be filed with the board... by the employer alleging... that the presently-certified bargaining unit is no longer appropriate under Board criteria". This is a statutory recognition that circumstances may change in the duties of a position which would warrant that position being removed from a bargaining unit, such as a position becoming confidential and thus ineligible to be in a bargaining unit. City of St. Albans and Local 1343, AFSCME, AFL-CIO, supra, at 54 (1984). Contrary to the Union's claim, the City was not required to negotiate the removal of the position from the unit with the Union. There is nothing in statute to indicate the Vermont General Assembly intended to impose such a requirement on an employer and, absent evidence the City explicitly waived its statutory right under §1724(a), the City clearly had the right to petition the Board to remove the secretary position from the bargaining unit. City of St. Albans and Local 1343, AFSCME, AFL-CIO, supra.

Under the circumstances of this case, we reject the Union's remaining argument the City must establish a track record demonstrating the position

is confidential before it is excluded from the bargaining unit. We have consistently held first-line secretaries to chief administrators whose regular duties include access to confidential information are properly excluded from the bargaining unit as confidential employees. Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 69 (1982). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Castleton Education Association and Castleton School Board, 1 VLRB 374 (1978). American Federation of Teachers, Local 3333 and Washington Central Supervisory Union, 1 VLRB 288 (1978).

Given the duties the Director of the Department of Public Works will assign to the employee who serves as his "first-line" secretary, it is evident the employee's regular duties will include access to confidential information. The secretary will be typing disciplinary letters, performance evaluations and management responses to the Union's contract negotiations proposals. These are confidential matters relating to collective bargaining and personnel administration within the meaning of the statutory definition of confidential employee. Given the large number of employees the Director of Public Works has under his direction due to the merger of City departments, it is apparent his secretary would have access to such confidential information as part of regular duties. Essentially, the merger created a situation where the Director needs a secretary in a confidential position. The secretary will assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations and, thus, will be in a confidential position. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983).

It would be unreasonable and impractical under circumstances present herein to require the City to first hire the secretary and then, at the point the secretary's regular duties include work of a confidential nature, petition the Board to remove the position from the bargaining unit. As we stated in American Federation of Teachers, supra, at 293:

Vermont's municipal labor relations statute, therefore, adheres to the rationale generally accepted in labor law that an employer should be entitled to rely upon employees who are not subject to divided loyalties and that employees should not be put in a position where they must choose between their obligations to a union and to their employer.

Such divided loyalties would be the likely result if we declined to rule the position confidential at this time and a secretary was hired.

Moreover, the Union has the right to petition the Board in the future if actual experience demonstrates the secretary is not performing confidential duties as part of regular duties.

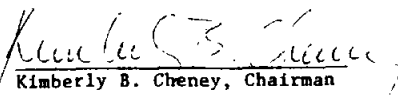
#### ORDER

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

The position of personal secretary to the Director of Public Works is excluded from the bargaining unit represented by Local 1343, AFSCME, as a confidential position as defined in 21 VSA §1722(6).

Dated this 15<sup>th</sup> day of May, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cheney, Chairman

---

William G. Kemsley, Sr.