

VERMONT LABOR RELATIONS BOARD

TEAMSTERS LOCAL 597:	)	
	)	
and	)	DOCKET NO. 19-39
	)	
GREEN MOUNTAIN TRANSIT	)	
AUTHORITY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 23, 2019, Teamsters Local 597 (“Union”) filed a Petition for Election of Collective Bargaining Representative, seeking to represent nine Operations Supervisors and Training Supervisors employed by the Green Mountain Transit Authority (“Employer” or “GMT”) in a separate bargaining unit from other GMT employees represented by the Union. The Employer filed a response to the petition on November 14, 2019, contending that the operations supervisors and training supervisors are supervisory employees and therefore ineligible to belong to a bargaining unit. In an amended response to the petition filed on February 20, 2020, the Employer further contended that the Operations Supervisor assigned to manage GMT’s drug and alcohol program also should be excluded from the bargaining unit as a confidential employee.

The Labor Relations Board conducted hearings on these unit determination issues on January 30 and March 5, 2020, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Alan Willard and Roger Donegan. Attorney Richard Cassidy represented the Union. Attorney J. Scott Cameron represented the Employer. The Employer and Union filed post-hearing briefs on March 24 and 25, 2020, respectively.

## FINDINGS OF FACT

1. GMT is a municipal corporation chartered under Vermont statutes. GMT operates a “public transit system” pursuant to 24 V.S.A Chapter 126. The Union is the exclusive bargaining representative of drivers and terminal duty persons employed by GMT (Employer Exhibit 27).

2. GMT is headed by a General Manager. Four Directors report directly to the General Manager: (1) Director of Finance, 2) Director of Transportation, 3) Director of Human Resources, and 4) Director of Marketing and Planning (Employer Exhibit 1).

3. There are three Operations Managers under the Director of Transportation. Four Urban Operations Supervisors in Burlington report to one of the Operations Managers. Three Rural Operations Supervisors in Berlin report to another of the Operations Managers. Two Training Supervisors in Burlington report to the Director of Human Resources. The Union is seeking to organize the seven Operations Supervisors and two Training Supervisors into their own bargaining unit (Employer Exhibits 1, 2A – 2D).

4. There are approximately 93 Urban Operators working out of Burlington and St. Albans under the four Urban Operations Supervisors. There are approximately 25 Rural Operators working out of Berlin who are under the three Rural Operations Supervisors. One of the Rural Operations Supervisors, Tom Barnes, also serves as Recruitment Supervisor. He oversees the seasonal transit operation and supervises the approximately 21 seasonal drivers who work at Stowe or Sugarbush during the ski season. The seasonal drivers are not part of the bargaining unit that is represented by the Union.

5. GMT operates its transit services seven days a week. In Burlington, the bus routes start at 5 a.m. and run until midnight. In Berlin, the bus routes start at 4:45 a.m. and run until 7 p.m.

6. GMT's General Manager, Director of Transportation, three Operations Managers and its Director of Human Resources work a regular Monday through Friday daytime schedule. The four Urban Operations Supervisors are assigned to one of the following three shifts: 5 a.m. to 1:30 p.m.; 7 a.m. to 3:30 p.m.; 1:30 p.m. to midnight. The three Rural Operations Supervisors are assigned to one of the following three shifts: 4:45 a.m. to 1 p.m.; 8 a.m. to 4 p.m.; 11 a.m. to 7 p.m. The Training Supervisors work a regular Monday through Friday daytime schedule.

7. Operations Supervisors fill in for Operations Managers when they are absent due to vacation or illness. They may be appointed to serve as Interim Operations Managers when a position is vacant (Employer Exhibit 14).

8. All Operations Supervisors have received "reasonable suspicion" training from GMT to enable them to make judgments as to when a driver may be impaired at work due to the consumption of drugs or alcohol. If an Operations Supervisor has a reasonable basis to believe that a driver may be under the influence of drugs or alcohol, the supervisor has the responsibility to immediately relieve the driver of his or her driving duties and require him or her to submit to drug or alcohol testing. This duty requires a supervisor to evaluate various factors and exercise independent judgment (Employer Exhibits 4, 7).

9. GMT Operations Supervisors usually respond in person to significant accidents involving GMT buses. Operations Supervisors gathers information about the accident through observation of the scene, and speaking with the driver, passengers, driver(s) of the other vehicle(s), responding police officers and bystanders, as appropriate. The supervisor makes a

decision on the scene whether the driver will be allowed to continue working and whether the driver will be required to submit to immediate drug and alcohol testing (Employer Exhibit 4).

10. If an accident involves a fatality, an immediate post-accident drug and alcohol test of the driver is mandatory. If an individual involved in an accident suffers bodily injury requiring medical treatment away from the scene of the accident, or if any vehicle involved in the accident sustains damage requiring it to be towed from the scene, post-accident testing of the driver is required unless the supervisor determines that the driver's performance can be completely discounted as a contributing factor to the accident. This decision requires the supervisor to assess relevant facts and use independent judgment. If the supervisor determines that testing is required, the supervisor relieves the driver from further driving duties and directs the driver to submit to a test. The supervisor typically transports the driver to the facility where the test is conducted. If the supervisor decides that a test is not required, no test is conducted (Union Exhibit 1, Employer Exhibits 4, 6, 11, 12).

11. Article IV of the collective bargaining agreement between the Union and Employer covering GMT drivers addresses work assignments, including the bidding of regular shifts, the order of assignment for replacements, and overtime hours. It addresses the substantive and procedural steps that are followed for replacement of an employee whose absence is known in advance. Operations Supervisors are involved in implementing these provisions of the agreement (Employer Exhibit 27).

12. In addition to these driver absences, the Employer must respond to emergency situations that arise. Under Article 4, Section J, of the collective bargaining agreement, an "emergency assignment" is one that must be made within two hours. Emergency assignments are triggered by various events, including: last minute callouts by drivers due to illness of the

employee or family member or some other unexpected event that prevents the driver from coming to work, the driver is late for work, an on the job accident that require replacement of drivers, driver illness that occurs during a shift, or the necessary replacement of a driver following relief of the driver from duty due to reasonable suspicion or post-accident drug testing (Employer Exhibit 27).

13. Emergency assignments are made by Operations Supervisors or, in some instances, dispatchers. Operations Supervisors may assign work to reserve drivers or may call drivers in to work. They will consider a variety of factors in making the assignments; these include seniority, work schedules, amount of time between last and next shift for drivers, and overtime implications. In situations where there are not enough drivers to staff all the routes, the supervisor has the authority to cancel or delay a route during a shift.

14. Operations Supervisors are called upon at times to address bus route deviations. The need to change a route results from various circumstances, including road construction and repair, accidents and the weather. Route deviations are more frequent during the road repair and construction season. If a normal route is closed, the Operations Supervisor finds an alternative route for the driver. Drivers may not make a route deviation themselves; they need guidance and approval from the Operations Supervisor for the revised route (Employer Exhibit 4, Joint Exhibit 1).

15. Operations Supervisors need to address disputes between drivers and passengers. Conflicts between drivers and passengers result from issues such as fare disputes, anger, intoxication, and personal disagreements. When a conflict between a driver and a passenger cannot be resolved, a driver is required to call a supervisor for assistance. Operations Supervisors travel to the scene to deal with the issue. They attempt to de-escalate the situation. A supervisor

may move the passenger to another bus, may ask the passenger to leave the bus and call the police if the passenger refuses, or may direct the driver to allow the passenger to remain on the bus. A supervisor may take corrective action to ensure a driver is acting in conformance with GMT policies and procedures (Employer Exhibits 4, 10C; Joint Exhibit 1).

16. GMT operates a bus service for skiers at resorts in Sugarbush and Stowe during the winter months. GMT hired 21 seasonal drivers for the 2019-2020 season. Fourteen of them were returnees from the previous year and seven were new hires. Operations and Recruiting Supervisor Tom Barnes recruits seasonal driver applicants, conducts interviews of them, and recommends the hiring of drivers. This involves deciding which drivers from the previous year to rehire and which new drivers to hire. Jon Moore, Director of Transportation and Acting General Manager, has always followed the recommendations of Barnes.

17. Barnes moves his regular location from Berlin to Stowe and/or Sugarbush during the ski season. He directs the seasonal drivers serving the ski resorts from there. Barnes has authority to cancel or change routes or suspend service if warranted without asking permission of GMT management. He may do so due to weather conditions. When Barnes makes a decision to suspend service, he either sends the drivers home or halts bus service temporarily. If the drivers are sent home, the drivers are not paid for the hours that are canceled. If service is suspended temporarily, drivers are paid during the waiting time to see if service will be resumed.

18. The collective bargaining agreement between the Union and the Employer provides that “discipline will be imposed within eighteen (18) days of the date that management became aware of the event prompting the discipline, unless additional time is reasonably necessary for management to investigate the event.” The Employer and Union both interpret this

clause to mean that the 18 day period to impose discipline begins when an Operations Supervisor becomes aware of the event that may result in discipline (Employer Exhibits 2, 7).

19. The Operations Supervisors verbally provide counsel and correction to employees if they observe or become aware of performance deficiencies. If not corrected, continuing deficiencies in the future can result in discipline. Operations Supervisors may issue “counseling statements” and “performance improvement plans” to employees. These are not discipline, but they provide notice to employees as to conduct that could lead to discipline if repeated (Employer Exhibits 10A, 10B, 10C, 14, 17, 18, 20, 26).

20. Article VI of the collective bargaining agreement covering drivers provides:

...

D. Discipline and Discharge

No covered Employee who has successfully completed his/her probationary period and become a regular employee shall be subject to the imposition of discipline without just cause. The Employer shall typically follow progressive discipline as follows:

- First offense – maximum of written verbal warning
- Second offense – maximum of written warning
- Third offense – maximum of short suspension (0 to 3 days)
- Fourth offense – maximum of long suspension (2 to 5 days)
- Fifth offense – maximum of termination.

This Agreement shall be read as establishing two separate and distinct disciplinary progression tracks. The first shall be for lateness and the second shall be for all other offenses. The first (lateness) track shall be followed in the precise order specified herein.

..

However, as to the second track (all other offenses), the Employer may bypass one or more steps of the progressive discipline track if and only if warranted by the severity of a single offense. . .

(Employer Exhibit 27)

21. Discipline against employees covered by the collective bargaining agreement typically is issued at the GMT management level – i.e., Operational Managers, Director of Transportation, General Manager. Managers often rely on the investigation and report of

Operations Supervisors before making a decision to impose disciplinary action (Employer Exhibits 16, 18, 19, 22A, 22B, 22C).

22. On December 4, 2019, Operations Supervisor Gene Winnicki drafted a “written verbal warning” memorandum to a driver based on his failure to report to work on time. He presented the draft memorandum to Operations Manager John Charissakis for review. Charissakis issued the “written verbal warning” (Employer Exhibit 13).

23. On October 30, 2019, Operations Supervisor Mark Stupik submitted a “Supervisor Supplemental Report” concerning an investigation he had conducted after becoming aware that a driver may have failed to report an accident that damaged a bus. Stupik interviewed the driver who did not acknowledge any damage to the bus. He observed the bus, interviewed the driver who had operated the bus after the first driver, and reviewed the bus’s on-board video. Stupik determined that the original driver under investigation had damaged the bus while backing it up and had failed to report the accident or acknowledge it even when Stupik spoke to him about the accident. Stupik noted that this conduct was a “continuation of concerning activity” by the driver and stated in the report: “It is my opinion that this driver should be suspended at the very least, but preferably terminated” (Employer Exhibit 21).

24. Acting General Manager Jon Moore and Stupik met with the driver in a *Loudermill* meeting to provide him an opportunity to respond before a final decision was made whether to dismiss him. Following the meeting, Stupik told Moore that he recommended the dismissal of the driver. Moore dismissed the driver.

25. The Union filed a grievance on behalf of the driver. The Employer and the Union agreed to the reinstatement of the driver as a settlement of the grievance. On January 6, 2020, a dispatcher received a complaint that the driver was driving erratically, braking hard, drove



through a red light, and shut a passenger in a door. Operations Supervisor Gene Winnicki investigated the complaint. On January 7, 2020, a dispatcher reported additional complaints to Winnicki and upper management about the driver, including concerns about damage to a bus. Winnicki recommended that the driver be terminated at the conclusion of his investigation (Employer Exhibits 22A, 22B, 22C).

26. Moore and Winnicki met with the driver in a *Loudermill* meeting to provide him an opportunity to respond before a final decision was made whether to dismiss him. Following the meeting, Moore asked Winnicki if he had heard anything that changed his recommendation about dismissing the driver. Winnicki responded that his recommendation was still dismissal. Moore dismissed the driver.

27. The Operations Supervisors participate as members of hiring committees and provide input to management during the hiring process. Their input is considered by management in determining whom to hire.

28. Training Supervisors train, evaluate and ultimately decide whether and when a newly hired employee is prepared to advance to independently driving a regular bus route. Training Supervisors are not involved in the initial hiring of a new driver. Newly hired employees are subject to a 90 day probationary period.

29. A new driver is trained for the first four to six weeks on GMT policies and procedures, routes, customer service, Americans with Disabilities Act requirements, and safety. If a new hire does not have a commercial driver license, the Training Supervisor provides training to the driver to assist him or her in obtaining the license. The Training Supervisor evaluates the progress of each new driver on a weekly basis (Union Exhibits 2 through 6, Employer Exhibit 8).

30. During weeks six through eight of a new driver's employment, the driver begins driving busses as a Trainee Driver, meaning the employee is accompanied by a permanent GMT driver. The objective is to provide the new driver with driving experience on all GMT busses and routes.

31. The Training Supervisor performs "on board" evaluations of the probationary employee's driving performance. If the Training Supervisor concludes that the employee demonstrates sufficient ability to operate the bus independently, the employee is advanced to the "revenue service". This means the employee will be solely responsible for the operation of the bus. The decision to advance an employee to the revenue service is based solely on the Training Supervisor's evaluation and recommendation. This evaluation by the Training Supervisor is generally done approximately 45 to 60 days into the probationary period. The GMT General Manager makes the decision to move the driver to the revenue service based on the recommendation of the Training Supervisor. The General Manager has consistently followed the recommendations of the Training Supervisor in this regard(Union Exhibits 2 through 6).

32. After 30 days of driving independently in the revenue service, the probationary driver is evaluated by the Training Supervisor. This evaluation usually occurs towards the end of the 90 day probationary period. If the evaluation performed by the Training Supervisor is positive, the candidate successfully completes probation and enters regular service. If the evaluation is not satisfactory, the Training Supervisor may recommend that the employee's probationary period be extended or that the candidate be terminated (Employer Exhibit 9).

33. Pursuant to Article IV of the collective bargaining agreement between the Union and the Employer covering the drivers, an employee's original probationary period may only be extended with the mutual agreement of the Employer and the Union. Training Supervisors have

recommended the extension of drivers' probationary periods. The Union and Employer have always accepted the recommendation of a Training Supervisor with respect to extending probation. There is no evidence that a Training Supervisor has recommended the termination of any driver (Employer Exhibit 27).

34. The Training Supervisors designed the GMT training program for drivers. The program they proposed was adopted by GMT management (Union Exhibit 2).

35. Training Supervisors perform the annual evaluations of GMT regular drivers. There is no evidence that Training Supervisors have authority to either reward or discipline drivers through the evaluative process.

36. Operations Supervisor Jonathan Mabee also has served as GMT's Drug and Alcohol Program Manager for several years. He indicated during the March 5 hearing in this matter that he would no longer be performing these duties after the end of the quarter. Mabee has received specialized training and is certified to manage GMT's Drug and Alcohol Program. Approximately 20 percent of Mabee's worktime has been devoted to managing the Drug and Alcohol Program.

37. All "safety-sensitive" positions at GMT are subject to random testing for drugs and alcohol as provided by federal statutes. Safety-sensitive positions include approximately 118 regular and 21 seasonal drivers, dispatchers, all supervisory positions at GMT, the three Operations Managers, the Director of Transportation, and the General Manager. The nine positions subject to the petition in this matter are included among the safety-sensitive positions (Employer Exhibit 4, Joint Exhibit 1).

38. Random drug testing is conducted on approximately one-third of GMT's safety-sensitive employees every calendar quarter. The Drug and Alcohol Program Manager is the only

person at GMT who has advance knowledge of the identity of the employees randomly selected for testing. On the day of the test, the Drug and Alcohol Program Manager informs employees randomly selected and requires them to immediately report for the test.

39. Under federal law, safety-sensitive employees also may be subject to drug testing in a “post-accident” situation. Safety-sensitive employees further are subject to drug testing in circumstances that give rise to a “reasonable suspicion” that they may be impaired (Employer Exhibit 4, Joint Exhibit 1).

40. The Drug and Alcohol Program Manager is responsible for processing and maintaining all records related to the Drug and Alcohol Program, including lists of employees selected for random drug testing, test results of employees tested either randomly or based on reasonable suspicion (including results and follow-up requirements in the case of a positive test) and records related to post-accident testing. These records are confidential, and the Drug and Alcohol Program Manager is the only employee at GMT who has access to them.

41. The Drug and Alcohol Program Manager receives the results of each drug test and is responsible to notify GMT management of any positive tests. GMT employees who test positive are required to undergo drug treatment and rehabilitation. Employees are subject to dismissal if they do not fulfill the required obligations or if they have a subsequent positive test. The Drug and Alcohol Program Manager reviews rehabilitation and return to work plans for employees who have a positive test.

### OPINION

The first issue before us is whether the GMT Operations Supervisors and Training Supervisors 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.

We first examine whether the Operations Supervisors' responsibilities to assign work to drivers and direct them rise to a level sufficient to make them supervisors. 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).

We conclude that the Operations Supervisors engage in a number of duties that aggregate to result in them clearly meeting the statutory definition of supervisor status with respect to assigning and directing employees. If an Operations Supervisor has a reasonable basis to believe that a driver may be under the influence of drugs or alcohol, the supervisor has the responsibility to immediately relieve the driver of his or her driving duties and require him or her to submit to drug or alcohol testing. This duty requires a supervisor to evaluate various factors and exercise independent judgment.

Similarly, in responding in person to significant accidents involving GMT buses, Operations Supervisors gather information about the accident and makes a decision on the scene

whether the driver will be allowed to continue working and whether the driver will be required to submit to immediate drug and alcohol testing. If an individual involved in an accident suffers bodily injury requiring medical treatment away from the scene of the accident, or if any vehicle involved in the accident sustains damage requiring it to be towed from the scene, post-accident testing of the driver is required unless the supervisor determines that the driver's performance can be completely discounted as a contributing factor to the accident. These decisions require the supervisor to assess relevant facts and use independent judgment.

Further, Operations Supervisors make emergency assignments due to unexpected events that prevents the driver from coming to work or remaining at work. Operations Supervisors may assign work to reserve drivers or may call drivers in to work. They consider a variety of factors in making the assignments that require the use of independent judgment.

Also, Operations Supervisors are called upon at times to exercise independent judgment to address bus route deviations resulting from various causes. If a normal route is closed, the Operations Supervisor finds an alternative route for the driver. Drivers may not make a route deviation themselves; they need guidance and approval from the Operations Supervisor for the revised route.

In addition, Operations Supervisors need to address disputes between drivers and passengers. In dealing with the situation, they exercise independent judgment in weighing various factors and deciding the appropriate action. The actions include moving the passenger to another bus, asking the passenger to leave the bus and call the police if the passenger refuses, or directing the driver to allow the passenger to remain on the bus.

In sum, these responsibilities indicate that the Operations Supervisors exercise independent judgment in assigning employees and responsibly directing them as a significant

part of their overall duties. This determination is sufficient for a holding that the Operations Supervisors are supervisory employees within the meaning of the Municipal Employee Relations Act. Nonetheless, we examine the other listed powers in the statutory definition of supervisory employee to determine if Operations Supervisors possess such responsibilities.

We next consider whether the Operations Supervisors meet the statutory definition of supervisory employee with respect to 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).

It is a close question concerning Operations Supervisors' supervisory responsibilities in this regard. On the one hand, there are many instances where Operations Supervisors are limited to investigating incidents and making reports to management without making recommendations as to discipline. On the other hand, we have specific evidence of an Operations Supervisor recommending issuance of a "written verbal warning", the first step in the five-step progressive discipline policy pursuant to the collective bargaining agreement covering drivers, and this recommendation was followed. Also, there are two recent instances of an Operations Supervisor recommending the dismissal of an employee, and the recommendation was followed.

Further a general indicator supporting supervisory authority in disciplining employees is that the Employer and Union both interpret a provision of the collective bargaining agreement to mean that an 18 day period for management to impose discipline begins when an Operations



Supervisor becomes aware of the event that may result in discipline. On balance, the specific and general evidence before us are sufficient to demonstrate the authority of the Operations Supervisors to effectively recommend a specific disciplinary action.

We next examine whether the Operations Supervisors meet the statutory definition of supervisory employee 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. Colchester Police Officers Association and Town of Colchester, 26 VLRB at 16. Proctor Education Association/Vermont-NEA/NEA and Proctor School Board, 18 VLRB 174, 185 (1995). Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992).

Most of the Operations Supervisors have not hired employees or effectively recommended their hiring to warrant a supervisory designation in this regard. The exception is Tom Barnes, one of the Rural Operations Supervisors who also serves as a Recruiting Supervisor for seasonal drivers serving ski areas. Barnes recruits seasonal driver applicants, conducts interviews of them, and recommends the hiring and rehiring of drivers. These recommendations have always been followed, leading us to conclude that he possesses the authority to effectively recommend the hiring of employees. The evidence indicates that he also exercises independent judgment in assigning and responsibly directing seasonal drivers, resulting in supervisory authority in this regard.

The Operations Supervisors do not meet the statutory test with respect to the other listed statutory powers. They do not have authority to transfer, layoff, recall, promote, or reward employees, or effectively to recommend such action. They also do not have the required statutory power with respect to adjusting employee grievances.

Nonetheless, supervisory status results from supervisory authority with respect to the other listed powers in the statutory definition as detailed above. The Operations Supervisors have such authority with respect to the power of assigning employees, responsibly directing them, and disciplining them. In addition, Operations Supervisor Barnes has supervisory authority with respect to hiring employees.

We turn to examining whether the Training Supervisors meet the statutory definition of supervisory employees. Training Supervisors have duties much different than Operations Supervisors. They train, evaluate and ultimately decide whether and when a newly hired employee is prepared to advance to independently driving a regular bus route.

The preparing of performance evaluations on both probationary and non-probationary employees has been cited by employers in past cases to justify a supervisory designation. The Board has indicated that, to prevail on such a claim concerning probationary employees, an employer must present sufficient evidence to demonstrate that the evaluations are given significant weight in determining whether a probationary employee attains permanent status, the preparing of such evaluations is done more than infrequently, and the recommendations made on the evaluations as to attainment of permanent status generally are followed. Burlington Firefighters Association and City of Burlington, 18 VLRB 137, 147-148 (1995).

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. Id. Colchester Police Officers Association and Town of Colchester, 26 VLRB 9, 17-18 (2003). Department of

Motor Vehicles Designation Dispute (Re: Motor Vehicle Senior Inspection Specialist), 22 VLRB 349, 357-58 (1999). City of Montpelier and Local 2287, IAFF, 18 VLRB 374, 389-90 (1995). Department of Public Safety Personnel Designation Dispute (State Police Sergeants), 14 VLRB 176, 186 (1991).

In applying these standards here, we conclude that the Employer has presented sufficient evidence that the Training Supervisors possess supervisory authority concerning probationary employees. The Training Supervisors regularly evaluate the progress of each new driver. This includes performing “on board” evaluations of the probationary employee’s driving performance. If the Training Supervisor concludes that the employee demonstrates sufficient ability to operate the bus independently, the employee is advanced to the “revenue service” which means the employee will be solely responsible for the operation of the bus. The decision to advance an employee to the revenue service during the probationary period is based solely on the Training Supervisor’s evaluation and recommendation, and such recommendation is consistently followed.

The probationary driver is further evaluated by the Training Supervisor towards the end of the probationary period. If the evaluation performed by the Training Supervisor is positive, the candidate successfully completes probation and becomes a permanent status driver. If the evaluation is not satisfactory, the Training Supervisor may recommend that employee’s probationary period be extended or that the candidate be terminated, and this recommendation also is consistently followed.

In sum, the evidence demonstrates that the evaluations made by Training Supervisors are given determinative weight in deciding whether a probationary employee attains permanent status. The preparing of such evaluations is done as a regular part of their duties, and the

recommendations made on the evaluations as to placement in the revenue service and attainment of permanent status are consistently followed. We recognize there is no evidence that a Training Supervisor has recommended the termination of any driver. Nonetheless, this does not change the reality that the evaluations require Training Supervisors to exercise independent judgment and are central to the advancement and attainment of permanent status by probationary drivers. There is ample evidence demonstrating that the Training Supervisors possess supervisory authority concerning probationary employees.

This determination is sufficient for a holding that the Training Supervisors are supervisory employees within the meaning of the Municipal Employee Relations Act. The Training Supervisors do not meet the statutory test with respect to their other duties. They perform the annual evaluations of GMT permanent drivers, but there is no evidence that they have authority to either reward or discipline drivers through the evaluative process. This is not sufficient to confer supervisor status. Also, the Training Supervisors do not meet the statutory test with respect to the other listed statutory powers.

The remaining issue is whether the Operations Supervisor who also serves as GMT's Drug and Alcohol Program Manager is a confidential employee within the meaning of the Municipal Act. Under Act, individuals who meet the statutory definition of "confidential employee" are ineligible to be included in a bargaining unit. The term "confidential employee" is defined 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 . . . official duties". 21 V.S.A. §1722(6).

A finding that a person assists or acts in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations is a necessary element under the labor nexus rule if an employee is to be classified as a confidential employee. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). The essential issue is whether challenged employees have such a close relation to the employer's management of labor relations that the employer would be prejudiced by their inclusion in a bargaining unit with other employees. Harwood Union High School District and Harwood Education Association, 172 Vt. 167, 176 (2001). Employers are entitled to rely upon employees who are not subject to divided loyalties, and employees should not be in a position where they must choose between their obligations to a union and to their employer. Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 68 (1982).

Employees who do not have access to confidential information as part of their regular duties do not meet these tests. Employees whose duties require only occasional access to confidential material and which could be reassigned, or employees who occasionally substitute for confidential employees, do not meet the definition of confidential employee. Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). American Federation of Teachers, Local 333 and Washington Central Supervisory Union, 1 VLRB 288 (1978). Further, an employer must demonstrate not only access to confidential information, but that such access would adversely impact on the employer's conduct of its labor relations policies if employees are included in a bargaining unit. Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 78 (1989).

In applying these standards here, we conclude that the Drug and Alcohol Manager is a confidential employee. The nature of the duties performed is confidential, and constitute a regular part of the Manager's duties as approximately 20 percent of the Manager's work time is spent on such duties.

The Drug and Alcohol Manager is the central person involved in drug testing of GMT employees. All "safety-sensitive" positions at GMT are subject to random testing for drugs and alcohol. This includes drivers, dispatchers, managers and the nine positions subject to the petition in this matter. Random drug testing is conducted on approximately one-third of GMT's safety-sensitive employees every calendar quarter. The Drug and Alcohol Program Manager is the only person at GMT who has advance knowledge of the identity of the employees randomly selected for testing. Safety-sensitive employees also may be subject to drug testing in a "post-accident" situation and in circumstances that give rise to a "reasonable suspicion" that they may be impaired.

These duties are sensitive and confidential. The Drug and Alcohol Program Manager is responsible for processing and maintaining all records related to the Drug and Alcohol Program, including lists of employees selected for random drug testing, and test results of employees. These records are confidential, and the Drug and Alcohol Program Manager is the only employee at GMT who has access to them.

The duties involve confidential personnel administration matters. The Drug and Alcohol Program Manager is responsible to notify GMT management of any positive tests. GMT employees who test positive are required to undergo drug treatment and rehabilitation. Employees are subject to dismissal if they do not fulfill the required obligations or if they have a subsequent positive test.

Given the confidential nature of these duties that may result in discipline of employees represented by the Union, there would be an adverse effect on the Employer's conduct of its labor relations policies if the Drug and Alcohol Program Manager is included in a bargaining unit with other employees. The Drug and Alcohol Manager would be subject to divided loyalties in carrying out these sensitive personnel administration matters and would be in a position of having to choose between obligations to the Union and the Employer. The Employer is entitled to be able to rely on an employee in this position who is not subject to divided loyalties.

### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered: 1) the Operations Supervisors and the Training Supervisors of Green Mountain Transit Authority are supervisory employees as defined by the Municipal Employee Relations Act, 2) the Operations Supervisor whom also serves as GMT's Drug and Alcohol Program Manager is a confidential employee as defined by the Municipal Employee Relations Act, and 3) the Petition for Election of Collective Bargaining Representative filed by Teamsters Local 597 to represent these employees is dismissed.

Dated this 24th day of April, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Alan Willard

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Alan Willard

/s/ Roger P. Donegan.

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Roger P. Donegan