

VERMONT LABOR RELATIONS BOARD

FIREFIGHTERS OF BRATTLEBORO )  
VERMONT, LOCAL 2628 )  
- and - )  
BRATTLEBORO FIRE DEPARTMENT, )  
TOWN OF BRATTLEBORO )

DOCKET NO. 78-61R

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 13, 1978 a Petition for Election of Collective Bargaining Representative was filed with the Vermont Labor Relations Board by the Firefighters of Brattleboro, Vermont Local 2628, in accordance with the provisions of 21 V.S.A. Sec. 1724(a)(1).

The Petition requested that the Board hold a hearing to determine whether a question of representation exists on the ground that the employer, The Town of Brattleboro, declined to recognize the Petitioner as the representative of the employees of the Brattleboro Fire Department. The employer, the Town of Brattleboro filed its Answer to said Petition with the Board on April 13, 1978. In its Answer, the employer denied that the captains of the Brattleboro Fire Department were appropriate members of the bargaining unit of firefighters as alleged in the Petition. Having found reasonable cause to believe that a question of unit determination or representation existed, the matter was brought before the Board for a hearing on June 1, 1978. The Petitioner was represented by Martin E. Pierce, of the International Association of Firefighters. The employer, Town of Brattleboro, was represented by John S. Burgess, Esquire.

#### FINDINGS OF FACT

1. The Town of Brattleboro, Vermont is a "municipal employer" within the meaning of 21 V.S.A. Sec. 1727(13) of the Municipal Labor Relations Act.
2. The Town of Brattleboro, Vermont has a full time fire department which includes twenty three persons.
3. The parties agree that an appropriate bargaining unit may be formed to represent "the municipal employees" of the Fire Department of Brattleboro upon an election among the members of the bargaining unit.
4. The parties stipulate that the following fire department personnel are "municipal employees" within the meaning of 21 V.S.A. Sec. 1722(12): 13 firefighters including lieutenants, one dispatcher and one fire inspector.
5. The parties further stipulate that the following fire department personnel are not "municipal employees" and therefore shall not be included in the appropriate bargaining unit: one fire chief (supervisory), one assistant fire chief and superintendent of fire alarms (supervisory); one secretary (confidential) and one probationary fire fighter (probationary).
6. There are four captains in the Brattleboro Fire Department. The captains have requested that they should also be included as members of the appropriate bargaining unit. (Petitioner's Exhibit #2).

7. The job description of a fire captain in the Brattleboro Fire Department states that a fire captain "performs many duties required of a firefighter", such as cleaning of quarters, equipment and apparatus at fire stations, and the laying of hose lines, raising of ladders and rescuing of persons at the scene of a fire. (Town's Exhibit "B").

8. At the scene of a fire, a captain directs the firefighting work only in the absence of a superior officer.

9. At the fire station, a captain carries out routine duties and additional work as assigned by the fire chief. In the absence of the fire chief and the deputy fire chief, captains are on occasion designated as acting fire chiefs and supervise the operation of the fire department during that period.

10. A captain of the Brattleboro Fire Department cannot hire, transfer, lay off, recall, promote, discharge, assign or reward other employees of the fire department. While a captain can "recommend" such action, there is no evidence to show that his recommendation would be any more "effective" than that of a lieutenant or other employee of the fire department.

11. According to the Personnel Rules of the Town of Brattleboro (Town's Exhibit "A"), final authority for hiring, promoting, laying off, recalling, discharging or suspending employees of the Brattleboro Fire Department is vested in the Town Manager of the Town of Brattleboro. As the department head of the fire department, the fire chief has the authority to effectively recommend such action with the final approval of the Town Manager.

12. There is no evidence to show that the captains are aware that they have the authority to discipline or suspend another

employee except in the most extreme circumstances, and even then their actions are limited to sending a man home because he is unfit for duty and then reporting the matter to the chief for further action. Any such further action by the chief would be subject to the final approval of the Town Manager. (Town's Exhibit "A", Page 8, Section 11(b) ).

13. All policy for the operation of the fire department is established by the chief and the City Manager. The captains are expected to carry out that policy and not deviate from it. Any direction or assignment of duties by the captain to the members of their platoon are based upon the policies established by the chief. The captains have very little discretionary rights except when they are the senior officer at the scene of the fire when they are permitted to exercise discretion in the most suitable way to bring the fire under control. Whenever possible, however, captains are supervised at the scene of a fire by the chief, the deputy chief or a call chief.

14. During the last rating period the captains of the Brattleboro Fire Department reviewed the performance evaluation reports with each member of their platoon.

#### OPINION

The issue in this case is whether or not a fire captain of the Brattleboro Fire Department is a "municipal employee" within the meaning of 21 V.S.A. Sec. 1722 (12), and, therefore, eligible to vote in a certification election as part of the appropriate bargaining unit for the firefighters of the Brattleboro Fire Department. The statutory definition of a

supervisor contained in 21 V.S.A. Sec.1502(13) is as follows:

"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 judgement." 21 V.S.A., Sec. 1502(13)

This definition is based on and identical to the definition of a supervisor in the National Labor Relations Act, 29 U.S.C. Sec. 152(11). Courts have determined that the determination of who is a supervisor "is a question of fact in which the Board is afforded a large measure of discretion." N.L.R.B. v. Hoerner-Waldorf Corp. 525 F.2d 805, 808 8th Cir. 1975. See also N.L.R.B. v. Broyhill Co. 514 F.2d 655, 658 (8th Cir 1975). The Vermont Labor Relations Board has similar discretion in applying the definition of a "supervisor" to the facts in the instant case.

The Board has made determinations on the identical issue of fire captains as supervisors in four previous opinions. In each case the determination of this issue was based on the particular set of circumstances and facts surrounding the composition and operation of the fire department in each town or city. On the one hand, the Board found that the "captains" in the fire departments of the City of Barre and the City of Montpelier were not "supervisors" within the meaning of 21 V.S.A. Sec. 1502(13). (See Vermont Labor Relations Board Findings of Fact and Order for the International Association of Firefighters Local #2287 and City of Montpelier, dated January 30, 1974, and for In Re Petition of International Association of Firefighters Local #881 and Fire Department City of Barre, dated April 21, 1969). On the other hand, the Board found that "captains" were

"supervisors" in the fire departments of the City of Burlington and the City of Rutland (See Vermont Labor Relations Board Findings of Fact and Order for In the Matter of City of Rutland Fire Department, I.A.F.F. Local 2323 and City of Rutland, dated June 17, 1974, and for In Re Petition of Burlington Fire Prevention Association, Inc. and City of Burlington Fire Department, dated January 6, 1970.)

The determination of this issue hinges on a variety of facts including the relative size of the fire department and the degree of effective authority vested in the captains. The fire department of the Town of Brattleboro is small and the fire chief, as the department head, is able to and does directly supervise all of its employees with relatively little assistance from the captains except as regards routine duties involved in the maintenance of the fire station and the training of its personnel. While such routine duties may require a captain to assign various tasks to members of his platoon, they do not require the use of "independent judgement" on the part of the captains since these tasks are part of routines and policies established by the chief.

In the case of the N.L.R.B. v. City Yellow Cab Company 344 F.2d 575 (6th Cir. 1965), a significant factor in the court's determination as to whether or not switchboard operators were supervisory personnel was the fact that the switchboard operators did not consider themselves to be supervisors. Similarly in the instant matter, the captains of the Brattleboro Fire Department are unaware of any supervisory duties or authority they may have. While the Personnel Rules of the Town of Brattleboro allow "the designated representative" of a department head to carry out certain supervisory duties such as suspensions or other disciplinary measures, there is no evidence to show that the captains have

ever considered themselves to be or were ever specifically told that they were "the designated representatives" of the fire chief. The mere fact that captains might exercise disciplinary authority as the chief's "designated representative" is not sufficient to establish that the captains are in fact supervisors.

"It is well established that theoretical or paper power will not suffice to make an individual a supervisor." Store Emp. U. Local 347, A.M.C. and B.W. v. N.L.R.B. 422 F.2d 685 (1969).

The test is whether or not an employee can effectively exercise the authority which may be granted to him on paper. There is no evidence in the instant case that the captains of the fire department of the Town of Brattleboro do effectively exercise supervisory authority or can effectively recommend supervisory actions.

The only instances in which a captain does act as a supervisor are ones in which he is either the superior officer at a fire or is designated by the chief as acting fire chief in the absence of the fire chief and the deputy chief. These instances are not sufficient, however, to show that a captain has supervisory authority. In N.L.R.B. v. Sayers Printing Company 453 F.2d 810 (8th Cir. 1971) the court stated that, "an employee does not acquire a supervisor's status by reason of temporarily taking over the duties of an absent supervisor." *id.* at 815. Similarly the fact that an employee may perform some supervisory functions on rare instances, for example sending a man home because he is unfit for duty when the chief is not present at the station to give prior approval to the action, such infrequent activities do not change the status of an employee to a

"supervisor". Pulley v. N.L.R.B. 395 F.2d 870 (6th Cir. 1968).

At the hearing before the Board, the employer, Town of Brattleboro, presented evidence to show that fire captains during the last rating period had prepared performance evaluation reports and reviewed them with members of their platoon. While the Board finds that the captains did so as a matter of fact, it also finds that the preparation and review of evaluations are only remotely related to supervisory actions as defined in 21 V.S.A. Sec.1502(13). While an employee might be promoted, suspended or laid off as a result of a performance evaluation, there is no evidence to show that the captains could effectively take or recommend such actions based on their preparation and review of the reports. There is, furthermore, no evidence to show that as a practical matter the captains have ever actually taken such actions or recommended them based on the reports.

Since the statutory definition of a supervisor is "set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer supervisory status." N.L.R.B. v. Magnesium Casting Company 427 F.2d 114 at 117 (1st Cir. 1970). See also N.L.R.B. v. Metropolitan Life Insurance Company 405 F.2d 1169, 1173 (2nd Cir. 1968). In this case, a finding by the Board that the Brattleboro fire captains possessed any one of the supervisory powers enumerated in 21 V.S.A. Sec.1722(12)(B), as defined further in 21 V.S.A. Sec.1502(B), would be sufficient grounds for conferring "supervisory" status on the captains. The Board, however, taking



into consideration all of the evidence presented at the hearing, is unable to find that sufficient evidence exists to support a finding that the Brattleboro captains either exercise or can effectively recommend any one of the supervisory duties defined in the statute. The evidence presented indicated these duties were of a routine nature. The Board therefore finds that the captains are "municipal employees" within the meaning of 21 V.S.A. Sec.1722(12).

The Board further finds that, based on the community or similarity of interest which exists between the captains and the other firefighters in the Brattleboro Fire Department, the captains should be eligible for representation as appropriate members of the bargaining unit. 17 V.S.A. Sec.1724(c)(1).

#### ORDER

That the employees of the Town of Brattleboro Fire Department, except those persons identified in Paragraph 5 of the Findings of Fact, shall be eligible to vote in a certification election as part of one collective bargaining unit. The election to be conducted by the Board on a date selected by the parties, otherwise on July 25<sup>th</sup>, 1978.

Dated this 15 day of July, 1978, in Montpelier, Vermont.

Vermont Labor Relations Board

*Kimberly B. Cheney*  
Kimberly B. Cheney, Chairman

*William G. Kemsley, Sr.*  
William G. Kemsley, Sr.

*Robert H. Brown*  
Robert H. Brown

*Order affirmed  
June 18 79*