

**CITY OF CHARLOTTESVILLE
LABOR RELATIONS ADMINISTRATOR**

In the matter of)	
)	Decision No. 23001
)	
Amalgamated Transit Union (ATU),)	
)	
Petitioning Employee Organization,)	May 22, 2023
)	
)	Determination of
)	Bargaining Unit Composition
)	- Transit
-and-)	
)	
City of Charlottesville,)	
)	
)	
Employer)	
Case No. R002)	
)	

APPEARANCES

For the Petitioning Employee Organization:
John Ertl, Collective Bargaining Administrator, ATU
Christopher Bangs, Esq., Assistant General Counsel, ATU

For the City:
Robin Burroughs, Esq.
VENABLE LLC

DECISION AND ORDER

STATEMENT OF THE CASE¹

The Amalgamated Transit Union (“ATU” or “Petitioner” or “Petitioning Employee Organization” or “Union”), petitioned for an election to determine whether the employees in the Transit bargaining unit desire the ATU to be the exclusive representative to bargain collectively on behalf of all employees in the bargaining unit. On April 17, 2023, the LRA determined ATU met the requirements of the City of Charlottesville Collective Bargaining Ordinance (“CBO”) and demonstrated a showing of interest. By order of the LRA, the City posted Notice of Petition.² The LRA directed the City to provide the Petitioning Employee Organization the initial bargaining unit list, with the contact information specified in the Procedures Related to the Administration of the Collective Bargaining Ordinance, Sections 19-201 through 19-218, as adopted by the LRA (“Procedures”). Also as specified in the Procedures, the LRA directed the City to provide to the LRA and the Petitioning Employee Organization a list of any job titles or individual employees assigned to job titles who could otherwise be included in the petitioned for bargaining unit, that the City asserts should not be included in the bargaining unit per the exclusions listed in the CBO and an explanation of the exclusions asserted. On or about April 18, 2023, ATU asserted a number of additional positions should be included in the Unit, including: Administrative Assistant I; Administrative Assistant II; Customer Service Representative; Customer Service Supervisor; Marketing Coordinator; Safety & Security Training Coordinator; Senior Accountant; Senior Project Manager; School Bus Aide; Transit Operations Supervisor; and Transit Technician Supervisor. On or about April 26, 2023, the ATU submitted its response to exclusions and supporting documentation.

A virtual informal conference was convened by the LRA on May 3, 2023. At that time, the City agreed the School Bus Aide positions were appropriately included in the petitioned for unit. In addition to the views expressed by the City and the ATU at the informal conference, the City submitted a written summary of its position on May 3, 2023. The City previously provided job descriptions and organizational charts. The City also provided transit position comparisons with like positions assigned to other City offices and/or departments. On or about May 5, 2023 the ATU provided a summary of its position and a witness affidavit from Phillip Miller (“Miller”), Transportation Operations Supervisor. The disputed positions were narrowed, by agreement of the parties to exclude certain positions previously disputed. The remaining disputed positions include: Customer Service Representative; Customer Service Supervisor; Transit Operations

¹ The Statement of Case was edited to correct clerical errors. The parties were provided notice of this correction on May 22, 2023, and an opportunity to express their views on the correction in accordance with National Academy of Arbitrators Advisory Opinion No. 20.

² The period of intervention in which any additional interested employee organization could submit a petition of intervention and administratively acceptable evidence to the LRA expired at 12:00 PM on April 28, 2023. No additional petitions were received.

Supervisor; and Transit Technician Supervisor. The City and the Union also provided information related to legislative history.

On or about May 15, 2023, the LRA issued Scheduling Order No. 2, directing the City and the ATU to exchange virtual witness lists on May 17, 2023, in advance of a continuation of the informal conference. On May 19, 2023, the LRA re-convened the informal conference for the purpose of hearing testimony concerning the disputed positions. The City offered testimony from two witnesses, Juwhan Lee (“Lee”), Assistant Director of Transit, and Kendra Vaughters (“Vaughters”), Transit Operations Supervisor. The ATU offered testimony from Matthew Ray (“Ray”), Operator. Both parties were afforded the opportunity to examine or cross-examine witnesses. At the conclusion of the informal conference, the LRA reaffirmed her intention to issue an election order on or about May 22, 2023 and order an in-person election on May 30, 2023, as previously discussed and determined at the May 3, 2023 informal conference.

The issue presented is: Whether or not the positions of Customer Service Representative, Customer Service Supervisor, Transit Operations Supervisor, and/or Transit Technician Supervisor, are included in the transit bargaining unit?

DISCUSSION

The City asserts the Customer Service Representative (one incumbent) assigned to Charlottesville Area Transit (“CAT”) and the three supervisor titles, Customer Service Supervisor (two incumbents), Transit Operations Supervisor (six incumbents), and Transit Technician Supervisor (one incumbent) “should be excluded from the Transit bargaining unit under the City’s Collective Bargaining Ordinance.” (City Reply at 1). Concerning the Customer Service Representative (“CSR”), the City argues that “in any matter of statutory interpretation, it is well-settled that a court, arbitrator, or other decision-maker should look first to the text of the statute itself when analyzing its meaning.” (City Reply at 6). The City states that the language of the CBO defines the transit bargaining unit as “comprised of “operators and maintenance employees of the Charlottesville Area Transit and the Pupil Transportation Department, except those excluded by definition under sec. 19-202.” (City Reply at 2). Therefore, the City argues that CSR “are neither “operators” nor “maintenance employees” under the common understanding of the words” and that to include CSR in the bargaining unit would be the equivalent of “rewrite[ing] the CBO.” (City Reply at 6).

The City asserts that “even if it were necessary to look to legislative history (it is not), pre-enactment legislative history supports the City’s position regarding the Transit unit’s composition.” (City Reply at 8). The City contends the initial definition of the transit bargaining unit read:

A unit consisting of all regular full-time and part-time employees of the Charlottesville Area Transit in the positions of Transit Operator Leads, Transit Operators, Transit Maintenance Workers, Transit Maintenance Assistants, Transit Bus Technicians, School

Transit Operator Leads, School Transit Operators, and School Bus Aids, excluding all office and clerical employees and those excluded by definition under sec. 19-202.

(City Reply at 8). The City further asserts that the final draft “reframed the unit as one of “operators and maintenance employees” and that “a summary of changes... indicated that the Transit definition was changed “to allow for a fact-driven determination of the unit composition by the labor relations administrator.” (City Reply at 9).

Concerning the Customer Service Supervisor, Transit Operations Supervisor, and Transit Technician Supervisor positions, the City avers that the “CBO’s definition is notably more expansive than the definition of supervisor under the NLRA” because “an individual can be a supervisor if they *either* (1) spend most of their time giving direction to at least two other employees, *or* (2) if they have the requisite supervisor authority.” (City Reply at 2-3). The City asserts that “the CBO does not require both” of these conditions and that:

a position where the incumbent spends less than half of their time performing supervisor activities would still be classified under the CBO as a supervisor if that position has the requisite authority, and an individual with limited supervisor authority may still be a statutory supervisor if they regularly direct the work of at least two other employees.

(City Reply at 3). The City asserts that “a fact-specific inquiry” demonstrates that “each of these positions supervises more than two individuals [when fully staffed], and each exercise substantial supervisor authority.” (City Reply at 3). In support of its position, the City contends each Transit Operations Supervisor:

- Oversees a shift that includes up to 19 operators and “fulfill the role of front-line supervisor”;
- Ensures proper scheduling and reviews leave requests and has “substantial discretion regarding whether to approve or deny the request” (City Reply at 3);
- Ensures operators are fit for duty;
- Hires and trains new operators;
- Determines whether a drug test is warranted;
- Coaches and counsels operators, investigates complaints made by the public, and recommends and administers discipline;
- Is “deeply involved in the City’s review of the accident and recommendations for discipline or training for the involved operator” (City Reply at 3); and
- Is “first point of contact for operator in attempting to resolve” grievances. (City Reply at 4).

The Petitioning Employee Organization contests the proposed exclusion of the disputed positions from the transit bargaining unit. Concerning the CSR, the ATU asserts in part: “customer service is intrinsically part of operations and sets the CSR position apart from the clerical positions

the Union has now agreed to exclude from the Transit bargaining unit.” (Union Summary at 2). The ATU avers: “If the LRA agrees that operations staff are appropriate for the Transit bargaining unit, it would thus be important to include the CSR position.” (Union Summary at 2).

Concerning the determination of whether the Customer Service Supervisor, Transit Operations Supervisor, and/or Transit Technician Supervisor, should be included in the transit bargaining unit, the ATU contends in part that in making a fact-dependent determination, “the LRA should keep in mind that the language defining “supervisors” must be construed narrowly since a worker found to be a supervisor is consequently denied important rights protected under the law” and that the City failed to meet the Employer’s burden to “show the purported supervisors have the authority to exercise independent judgment to perform or effectively recommend any of the Section 2(11) duties, and, in practice, do so as a regular and substantial part of their jobs.” (Union Summary at 3). The Union asserts that while the National Labor Relations Act (“NLRA”) is inapplicable, the National Labor Relations Board’s (“NLRB”) well-established standard is persuasive authority. In addition, the Union asserts that some or all of the supervisors at issue:

- Do not direct the work of operators and whose principal duties are more akin to dispatchers;
- Do not exercise substantial discretion over leave requests as they “mechanically apply a quota policy, and any discretionary approval beyond established limits of how many employees are allowed to take off must be approved by an assistant Director of Transit” (Union Summary at 5);
- Play a “limited role” in administering discipline, including “hand[ing] out low-level disciplines that are prescribed by policy, as well as those decided by management, but they do not ... use their own judgment to determine whether an infraction is worth discipline. Nor do they “effectively recommend” discipline” (Union Summary at 5);
- Do not handle grievances;
- Do not “transfer, suspend, layoff, recall, promote, demote, discharge, or reward employees, nor does their limited participation in the hiring or discipline processes rise to that of a statutory supervisor” (Union Summary at 6).

Concerning legislative history, the ATU contends:

The language of the CBO did indeed change through the course of the legislative process, but the Union believes (as do legislators who voted on it) that specific job titles were removed and the Transit unit’s description was made more vague so as to allow for a unit of operations and maintenance department staff to unionize together, subject to a fact-based determination of ineligible classification by the LRA.

(Union Summary at 7). The ATU concludes: “The Transit bargaining unit ought to encompass all operations and maintenance department staff which includes Customer Service Representatives,

Customer Service Supervisors, Transit Operations Supervisors, and Transit Technician Supervisors.”(Union Summary at 7).

The CBO designates that the appointed Labor Relations Administrator (“LRA”) is responsible for administering “provisions of [the CBO], including the process for certification and decertification of bargaining agents” and serves “as a neutral agency.” (Sec. 19-207 (a)). Concerning the instant dispute, Sec. 19-209 – Duties of administrator, specifies that one of the duties of the LRA is to “determine unresolved issues of employee inclusion in or exclusion from the bargaining unit identified in this article.” (Sec. 19-209 (a) (5)). In doing so, the LRA employs the preponderance of evidence standard. The LRA may “request from the city or an employee organization, and the city or such employee organization shall provide, any relevant assistance, service, and data that will enable the administrator to properly carry out duties” and also “hold hearings and make inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence.” (Sec. 19-209 (a) (2) and (3)). Here, the City and the ATU agree that a fact-specific inquiry is necessary.

In considering whether the disputed positions are appropriately included or excluded from the bargaining unit, the LRA first considers the relevant language of the CBO, including:

Sec. 19-204. -Authorized bargaining units.

(c) Employees in the following specified bargaining units may be authorized to engage in collective bargaining through an employee organization recognized by the city.

(3) *Transit.* A unit consisting of all regular full-time and part-time operators and maintenance employees of the Charlottesville Area Transit and the pupil transportation department, except those excluded by definition under section 19-202.

Sec, 19-202. – Definitions

Supervisor means all personnel who devote a majority of work time to the supervision or direction of two (2) or more employees, or who have authority to hire, transfer, suspend, layoff, recall, promote, demote, discharge, reward, or discipline other employees, or adjust grievances, or who can effectively recommend such action. With respect to the fire department, “supervisor” includes all personnel at the rank of battalion chief and above. With respect to the police department, “supervisor” includes all personnel at the rank of sergeant and above.

First, in considering whether the CSR position should be included in the transit bargaining unit, the LRA is mindful of the language set forth in the CBO, which defines the composition of the transit bargaining unit as “consisting of all regular full-time and part-time operators and maintenance employees of the Charlottesville Area Transit and the pupil transportation department.” (Sec. 19-204 (c) (3)). While it was clear from the testimony and arguments asserted by the City and the ATU that the customer service representative plays an important role in CAT,

including administering the ADA application and certification processes to determine eligibility for paratransit services and interacting with the public, the CSR is not an operator or a maintenance employee. Unlike the school bus aides in the pupil transportation department, the CSR does not ride the bus to assist the operator. Additionally, CSR positions are not unique to CAT. Rather, CSR positions are also found in other City departments, including the City Manager's Office, Finance, City Treasurer, and Social Services.

It is a well-established tenet of statutory construction that where the language of the statute is clear and unambiguous, the plain meaning must be given effect. Here, it is clear that the CSR is neither an operator nor a maintenance employee. As such, the LRA concludes that the CSR is excluded from the transit bargaining unit.

Next, in considering whether the Customer Service Supervisor, Transit Operations Supervisor, and/or Transit Technician Supervisor are properly included in the transit bargaining unit, the LRA considers the definition of supervisor in the CBO as compared to the duties and responsibilities of the positions at issue. The CBO defines a supervisor in relevant part as: "all personnel who devote a majority of work time to the supervision or direction of two (2) or more employees, or who have authority to hire, transfer, suspend, layoff, recall, promote, demote, discharge, reward, or discipline other employees, or adjust grievances, or who can effectively recommend such action." (Sec. 19-202). The LRA is cognizant of the fact that the CBO definition is similar but not identical to the criteria to determine supervisors employed by the NLRB. As to the supervisors' authority, the LRA considers the persuasive authority found in NLRB precedents and, consistent with the CBO, will determine a position meets the definition of supervisor and warrants exclusion in the event the position 1) "hold[s] the authority to engage in any ... of the supervisory functions ... (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (internal quotations omitted). The United States Supreme Court further clarified that independent judgment in the context of a supervisor's authority under the NLRA means "the degree of discretion involved in making the decision, not the kind of discretion exercised – whether professional, technical, or otherwise...". *Oakwood Healthcare at 692 citing NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

In the instant matter, it is clear that the positions in question do not exercise the authority to transfer, suspend, layoff, recall, promote, demote, discharge, reward, or adjust grievances, or effectively recommend such action. At issue, therefore, is whether the positions "devote a majority of work time to the supervision or direction of two or more employees, or who have authority to ... hire ... or discipline other employees, or who can effectively recommend such action." (Sec. 19-202). The CAT Assistant Director of Operations, Juwhan Lee, testified that two of the three titles at issue report directly to him (Transportation Operations Supervisor and Customer Service Supervisor) and that the duties performed by these supervisors are without distinction.³ Lee

³ As to the Transportation Technician Supervisor, Lee testified that it was his understanding that position would be responsible for similar duties in relation to maintenance employees.

explained that there are three aspects associated with the positions: taking care of employees; taking care of the customers; and making sure service runs smoothly. The duties of the supervisors include: monitoring employees and routes; handling incidents and accidents involving the operators; and investigating complaints made by the public. When there are routes that must be filled at the beginning of the shift due to absence, supervisors are responsible for securing and assigning coverage and making necessary adjustments. Supervisors do not serve as operators on routes.

In regard to the operators, Lee testified that the supervisors are responsible for checking them in and addressing any issues the operators might have in relation to the pre-trip check of the buses. Lee estimated the supervisors are engaged in these functions for approximately one hour at the beginning of each of the two shifts (morning and afternoon). Lee also explained that the supervisors ensure operations are on time by monitoring the routes, providing direction to the operators where there might be detours or other delays, making road observations, coaching and counseling operators in regard to their performance, exercising discretion as to when to coach and counsel and when to issue a verbal reprimand, drafting and administering written reprimands, and, in some cases, pulling video to investigate incidents. Lee stated that all discipline above a verbal reprimand, is sent to Human Resources for review prior to issuance. Supervisors cannot themselves suspend or discharge an employee.

In addition, Kendra Vaughters (“Vaughters”), a Transit Operations Supervisor who has been in the supervisory role for approximately five years, testified she spends significant time answering operators’ questions, addressing operators’ concerns, and coaching and counseling operators. Vaughters also testified that she received training specific to being a supervisor that was provided by the City upon her promotion to the role. Matthew Ray (“Ray”), Operator, testified that he disagreed somewhat with Vaughters’s testimony in that Vaughters current responsibilities with pupil transportation involve a lot of time in the training of school bus operators and that Vaughters current role involves different responsibilities than those of supervisors who are only on the CAT side of operations.

As to accidents, supervisors determine when or whether to send a driver for a drug test in accordance with DOT guidelines and exercise discretion in determining whether a drug test is otherwise warranted. Lee testified that supervisors receive training on what constitutes reasonable suspicion. The supervisors are also involved in the accident review committee and discuss and recommend whether or not an accident was preventable and what action will be taken (for example, re-training, discipline).

As to leave requests, Lee testified that there are a set number of operators that may be off on a particular shift and that supervisors grant requests on a first come, first serve basis. Where a supervisor wishes to grant time off in excess of the established number, the supervisor discusses that with Lee and makes a recommendation, which Lee generally accepts. Given these facts, the LRA finds the supervisors handling of leave requests is of a routine and clerical nature and does not require independent judgment.

Concerning the supervisors' role in hiring, there are currently two supervisors who interview candidates. Where supervisors do not believe a candidate should continue in the hiring process, candidates are not hired. Vaughters testified that, in one instance, she determined a candidate would not be a good fit based on responses to interview questions (which are scripted) and the candidate was not hired.

Having considered the testimony and documentary evidence, the LRA concludes that the City has met its burden to establish by a preponderance of the evidence that the Customer Service Supervisor, Transit Operations Supervisor, and/or Transit Technician Supervisor meet the CBO's definition of supervisor and must, therefore, be excluded from the transit bargaining unit. In making this determination, the LRA notes that the supervisors are primarily responsible for the direction of operators on their assigned shifts, monitor operator performance, and exercise discretion in coaching and counseling the operators in the performance of their duties. The supervisors also have the authority to issue verbal reprimands and to effectively recommend written reprimands. In addition, the supervisors are responsible for investigating incidents and accidents and are critical to the accident review committee's determinations. The supervisors receive training related to their supervisory responsibilities from the City and exercise independent judgment in matters related to reasonable suspicion drug testing, making recommendations related to hiring, and in coaching and counselling and issuing reprimands to employees.⁴ Importantly, in fulfilling their duties, the positions in question supervise the performance and direct the work of the operators assigned to a particular shift (up to 19 operators) and supervisors are not themselves engaged as operators. For these reasons, the LRA concludes the positions in question devote a majority of work time to the supervision or direction of two or more employees, or have authority to hire or discipline other employees, or who can effectively recommend such action.

ORDER

By virtue of and pursuant to the powers vested in the Labor Relations Administrator by the Collective Bargaining Ordinance, it is hereby ordered:

- 1. That the positions of Customer Service Representative, Customer Service Supervisor, Transit Operations Supervisor, and Transit Technician Supervisor are excluded from the Transit bargaining unit.**

CITY OF CHARLOTTESVILLE LABOR RELATIONS ADMINISTRATOR

Sarah Miller Espinosa, J.D.

May 22, 2023

⁴ While Vaughters testified that she only recommended one candidate not move forward in the hiring process, it is clear to the LRA that in doing so she exercised independent judgment in relation to candidate "fit". That most candidates have thus far been deemed adequate does not negate the supervisor's discretion to make that determination.