

ATTORNEY-CLIENT PRIVILEGED

October 5, 2021

VIA ELECTRONIC MAIL ONLY – jarneson@richmondvt.gov

Josh Arneson
Town Manager
Town of Richmond
P.O. Box 285
Richmond, VT 05477

Re: Richmond Volunteer Fire Department

Josh:

In order to opine on the role and effect of the Richmond Volunteer Fire Department (“RVFD”) Bylaws in the Town-RVFD relationship, and how Town policies or other authoritative documents interact with the Bylaws, preliminary questions are whether the RVFD is a municipal fire department and whether firefighters are Town employees. RVFD is most likely either a municipal fire department established under and governed by 24 V.S.A. § 1951 et seq. or a private volunteer fire department recognized under 20 V.S.A. § 2921.

However, self-governed volunteer fire departments funded by municipal budgets have long been a traditional approach to fire and rescue services for towns without full-time/career firefighters. The situation likely presents a hybrid of bona fide town fire departments established under and governed by 24 V.S.A. § 1951 et seq. and private volunteer fire departments recognized under 20 V.S.A. § 2921. While these arrangements are common in our experience, questions and issues do arise with regard to authority and other interactions between the fire department and municipal government.

However, there is nothing in Vermont law preventing a municipal fire department established by a town under 24 V.S.A. § 1951 from being manned by firefighters who are free to choose when and whether to respond to incident calls – i.e., what we generally think of as “volunteer firefighters.” The fact that such individuals may be free to choose whether to appear for given incidents or activities does not, by itself, mean they might not be a type of municipal employee.

In Richmond, it is unclear whether the Selectboard did, at some time in the past, actually establish the RVFD as a municipal fire department of the Town under 24 V.S.A. § 1951. The Town's charter does not explicitly recognize a fire department, but it does recognize the inherent authority of the Selectboard to establish departments of the Town. See 24 V.S.A. § 143-503(c)(1). This charter provision is oddly worded, but we read it to mean that the Selectboard determines a department should be created, and then it is up to the Town Manager to act on that directive – i.e., to “organize” it in the words of the charter. Once “organized,” the charter authorizes the Town Manager to direct and supervise the administration of a department. The January 6, 1986, RVFD Bylaws do not state how RVFD was created, nor whether the Selectboard has ever approved the Bylaws.

There are several references in the Bylaws to the Town's role in RVFD which align with RVFD being a municipal fire department. Article 5 § 4(b) of the current RVFD Bylaws indicates that the Selectboard appoints the chief and asst. chief, which suggests that RVFD is regarded as a municipal fire department. Vermont statute, 24 V.S.A. § 1953, provides that that a town's selectboard appoints and removes the chief, assistant chief, and captains of a municipal fire department. Moreover, it is unlikely a selectboard has authority at law to appoint a private volunteer fire department chief and assistant chief, even if a private VFD wished it so, because a selectboard only has the authority given to it by statute.

24 V.S.A. § 1953 also states that a selectboard sets compensation for these officers and that their employment is subject to rules and regulations adopted by the selectboard. Bylaws Art. 5 § 5(b) states that one of the Chief's responsibilities is to enforce the rules and regulations set forth by the Richmond Selectboard, again pointing to RVFD being a municipal fire department. See 24 V.S.A. § 1956 (“Personnel Rules. The officers, firemen, and employees of a fire department organized under this chapter may be governed by rules adopted by the legislative body of the municipality under subchapter 11 of chapter 33 of this title.”). Bylaws Article 8 states the Richmond Selectboard determines what members are to be paid for responding to incidents and time spent training, again suggesting it is a municipal department.

On the other hand, many provisions in the Bylaws are inconsistent with RVFD being viewed as a municipal department. Town departments are usually not governed by votes of the employees, or volunteers, who staff it, but the RVFD Bylaws largely do provide for self-governance. A trend we have seen in at least some towns has been to modernize volunteer fire departments to function like other town departments, governed by town policies rather than membership bylaws.

There may be sound reasons to pursue such a change to a municipal volunteer fire department structure. Absent control over certain aspects of a fire department, a

town may have little ability to affect the enterprise's compliance with state and federal law despite possibly being liable for the same. For example, the Town may ultimately be responsible for the firefighters' conduct in a variety of areas such as employment practices, public accommodations, and VOSHA compliance.

However, this concern alone does not necessarily mean that firefighters must be considered town employees. Instead, the arrangement can be that the firefighters remain volunteers but, to be eligible to participate as volunteers for the town, they must comply with certain expectations, some of which can be contained in a town's personnel policy. A personnel policy for towns fitting this description may include a section which states that volunteer fire department personnel are not town employees and that only certain provisions apply to them, and that they must conform to such provisions to be eligible to serve within the department. How Richmond might classify RVFD firefighters is discussed under Question 1 below.

Given all these considerations, the answers to the questions below may well depend on whether RVFD is a municipal fire department or a private volunteer fire department. Depending on what the Town's intention is on this subject, it may be that revisions to the Bylaws are appropriate, or that changes to Town policies are in order.

1. What is the most appropriate title to be given to the firefighters when referencing them in relation to the Town of Richmond? Are they part-time employees?

RVFD firefighters do appear to meet the category in the Personnel Guidelines (§ VI(a)(2)) of "on-call employee," which means employees who "will be working mutually agreed periods of time on short notices." However, this view should not be confused with whether they are ever actually "on-call." Assuming they do function as outlined in the Bylaws, they are not limited in their off-duty conduct and are not required to be available to be summoned by the employer at any time, and so they are not "on-call" as meant by wage-and-hour laws.

Even if they are on-call employees under the Personnel Guidelines, they might be volunteers for other purposes – specifically, the Fair Labor Standard Act, which governs overtime, minimum wage, etc. We do note VLCT's indication you shared with us that paying a firefighter less than \$20,000 annually avoids classifying them as employees under FLSA. \$20,000 may be a safe rule-of-thumb, but the actual criteria to avoid them becoming employees for purposes of FLSA is that they are not paid more than 20% annually of what a full-time firefighter would be paid. Payment can be made on a per-call basis or as a monthly or annual stipend but paying a volunteer fire fighter on an hourly basis likely would invalidate volunteer status. Additionally, they may be reimbursed for expenses incurred such as meals, travel, training courses, and they may be provided benefits such as health insurance.

Note that, per IRS guidance, “volunteer” status does not necessarily exempt the Town from paying FICA taxes based on compensation paid to volunteer firefighters, unless the firefighters belong to a retirement system like VMERS. Assuming RVFD personnel do not work more than 1040 hours per year, it is our understanding they cannot be covered by VMERS (though you could check with the Vermont State Treasurer to make sure) and so FICA withholding may be required for them.

The fact that the Selectboard apparently appoints the Chief and Asst. Chief does not necessarily make them Town employees, but it probably qualifies them as Town officials. The charter reserves this authority to the Selectboard by virtue of 24 V.S.A. § 143-503(b)(2), which states that “[w]here general State law places the appointment or dismissal of an official in the control of an official other than the Town Manager, general State law shall control.” We understand that some towns, make the volunteer fire department chief an actual town employee, possibly a part-time employee, and then staff the department with volunteer firefighters and EMTs.

If it is not the Selectboard’s intent that RVFD firefighters be classified as a type of Town “employee,” then one modification to Town policies might be to revise the definition of on-call employee to expressly exclude volunteer firefighters. Such a step could affect aspects of the review of question # 2 below.

2. What parts of the Town of Richmond Personnel Guidelines apply to Richmond Firefighters?

Assuming RVFD firefighters are “on-call employees,” they are covered by the Personnel Guidelines, though some of the sections in the Guidelines specifically state they do not apply to on-call employees.

However, there are apparent conflicts between the RVFD By-laws and the Personnel Guidelines. The most striking conflict is that the Personnel Guidelines (Section V), as well as the Charter (24 V.S.A. § 143-503), indicate that the Town Manager, or an authorized department head, appoints Town employees. Article III of the Bylaws states that firefighters join the RVFD by way of member voting whether to accept an individual for probationary and then non-probationary membership. On the other hand, Article 11 states the Bylaws shall not supersede “any laws of the land present or future.” The Charter is statute, which makes it the “law of the land” for the Town of Richmond.

We further note the Personnel Guidelines state that on-call employees are at-will and not subject to disciplinary procedures under the Guidelines. On the other hand, Bylaws Art. 3 § 5 states that “[a]ctive members shall be entitled to the rights provided them by the Employment Laws of the State of Vermont in regard to dismissal

and/or suspension.” The meaning of this provision is unclear. To the extent RVFD is a membership-governed organization, it may be able to choose to conduct its membership practices by whatever rules it likes. I.e., even though there exist no actual Vermont employment laws governing dismissal or suspension of members of private volunteer fire departments, they perhaps could conduct their practices according to whatever laws they think might apply to them.

On the other hand, the RVFD Bylaws state (Art. 5 § 5(b)) that one of the Chief’s responsibilities is to enforce the rules and regulations set forth by the Richmond Selectboard. Thus, if the firefighters are on-call employees, then they are subject to the Personnel Guidelines and the Town Manager should be able to require the appointed Chief and Asst. Chief to hold the firefighters accountable to comply with such policies or face discipline.

3. What Town policies apply to the Richmond Fire Department?

If RVFD is a municipal fire department, then all Town policies should be applicable to it the same as any other department, such as the Richmond Police Department (before it became unionized and subject to a collective bargaining agreement at least). If RVFD is a separate organization from the Town, then Town policies would likely be applicable only to the extent RVFD agrees to conform to such policies. The Town likely could condition providing public funding and resources to RVFD on its compliance with Town policies as a term of such arrangements, though there could be questions as to how such compliance could be enforced if necessary.

We do note the existence of the Coin Drop policy, which effectively is a conditional authorization to the RVFD to hold Coin Drops on Town highways. That policy does appear to weigh against RVFD being viewed as a municipal department.

4. Does the Town Code of Ethics apply to the Richmond Firefighters?

Yes. The Code of Ethics states it applies to “Public Officials,” and “Public Official” is defined within the Code to include “any Town of Richmond ... employee or volunteer firefighter.”

Again, however, if the RVFD is not a municipal fire department, it is unclear how the Town might enforce the Code of Ethics with respect to a firefighter. The RVFD Bylaws do say the Chief will enforce the Town’s rules, and so the Town might insist the Chief remove a firefighter who the Town finds has violated the Ethics Code. However, it is unclear what recourse the Town would have if the Chief failed to do so, other than perhaps refuse to approve compensation for a firefighter who is not removed from duty for violation of the Ethics Code. The Selectboard might also remove the Chief for failing to enforce Town policies within RVFD. Once again

though, if RVFD is not a municipal department, the Selectboard has no actual authority to appoint or remove anyone, and so the effectiveness of a Selectboard directive likely would depend on RVFD agreeing to abide by it.

We note the Code of Ethics suggests volunteer firefighters are not considered employees based on “employee” and “volunteer firefighter” each being separately listed in the “Public Official” definition. However, we do not find this one reference to outweigh our determination that the Personnel Policy’s definition of on-call employee may encompass firefighters. And, again, if RVFD were a private volunteer fire department, then its firefighters would not reasonably be viewed as Town officials.

5. What other, if any, Town of Richmond guiding documents should the Richmond Fire Department reference in our updated By-Laws?

This question appears to greatly depend on the classification of RVFD, i.e., whether it is a municipal department or a private volunteer organization. The Bylaws contain indications which might support two different conclusions on the subject, but the accepted role of the Selectboard may suggest that RVFD should be considered at this time to be a municipal department of the Town.

If RVFD indeed is a municipal fire department, then the Bylaws may possibly be a municipal policy which the Selectboard has not created or ratified but, instead, has implicitly recognized, approved, and perhaps even adopted as governing the RVFD. Under this view, it may be prudent for the Selectboard to review, revise, and formally ratify the Bylaws, or a substitute for the Bylaws, as a Town policy. Certainly any such process could include collaboration with RVFD officers and firefighters. The result of such a process should be that the role of the Selectboard and Town Manager would be more clearly established, the rules and policies which apply to RVFD would be clarified, and the extent to which any self-governance could or should be reserved would be determined and memorialized.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Klesch". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John H. Klesch, Esq.

JHK/sem