

VERMONT LABOR RELATIONS BOARD

VERMONT DEPARTMENT OF PUBLIC )  
SAFETY DESIGNATION DISPUTE )  
(RE: STATE POLICE LIEUTENANTS) )

DOCKET NO. 11-62

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 18, 2011, the Vermont State Employees' Association ("VSEA") filed a designation dispute contesting the designation by the Vermont Department of Human Resources of the Vermont State Police Lieutenants as managerial employees. VSEA requests that the Labor Relations Board order that the Lieutenants return to their designation as supervisory employees in the Supervisory Bargaining Unit represented by VSEA.

Hearings were held before Board Members Richard Park, Chairperson; James Kiehle and Alan Willard on May 17, May 31 and June 13, 2012, in the Labor Relations Board hearing room in Montpelier. Michael Casey, VSEA General Counsel, represented VSEA. Assistant Attorney General William Reynolds represented the State. The parties filed post-hearing briefs on July 3, 2012.

FINDINGS OF FACT

1. The Vermont Department of Public Safety ("DPS") consists of four divisions: the Vermont Emergency Management Division, the Fire Safety Division, the Criminal Justice Services Division, and the Vermont State Police. The employees of DPS fall into two categories: 1) those who are sworn law enforcement officers in VSP, and 2) civilian employees who do not perform law enforcement duties. Keith Flynn has been

Commissioner of DPS since January 2011. Commissioner Flynn is the chief executive officer of DPS.

2. The Vermont State Police (“VSP”) is the largest of the divisions that make up DPS. The VSP at all times relevant has been a paramilitary organization that has a formal rank and chain of command structure to reflect the position and level of responsibility for sworn police officers. The chain of command runs from the entry level position of Trooper, to Senior Trooper, to Corporal, to Sergeant, to Lieutenant, to Captain, to Major, to Colonel, to the DPS Commissioner. The chain of command structure facilitates the two-way flow of information from the top to the bottom of the chain and from the bottom to the top. There is equal authority within a specific rank. Higher ranking officers have authority over members of lesser rank. In responding to an incident, the highest ranking officer present assumes command, absent specialized training by a subordinate. VSP members are expected to adhere to the chain of command and not “skip” the chain by going around their immediate superior. There are approximately 327 sworn police officers in the VSP.

3. Commissioner Flynn works closely with Joanne Chadwick, Director of DPS Administrative Services, in planning the annual DPS budget. Commissioner Flynn relies on Chadwick and the directors of the four DPS divisions to assemble the information needed to create the proposed budget and to answer questions regarding portions of the budget pertaining to their divisions. Colonel Thomas L’Esperance is the VSP Director. Commissioner Flynn makes the final decision within DPS concerning what is included in the proposed budget that is submitted to the Commissioner of Finance

& Management and the Governor for approval and ultimately to the Vermont Legislature for funding.

4. Commissioner Flynn is the primary DPS representative who testifies before the Legislature on the proposed budget. The directors of the DPS divisions testify at times before the Legislature regarding the operations of their particular divisions.

5. Once the DPS budget is approved by the Legislature, Commissioner Flynn spends considerable time monitoring the implementation of the budget during the fiscal year, which runs from July 1 to June 30, to ensure that funds are being expended within appropriated amounts. He generally meets several times a week with Chadwick to discuss the budget. If there are budget issues, the Commissioner sends directions to the division directors to address them. The Commissioner is the only person in DPS who has authority to move money from one DPS division budget line to a different DPS division budget line.

6. The process to discipline VSP members is the same for all employees and has remained unchanged for decades. Allegations of misconduct against VSP members are forwarded to the Director of Internal Affairs, a Lieutenant who reports directly to the DPS Commissioner on the results of investigations. Once the Director of Internal Affairs completes an investigation, the Director completes an investigation report which is sent to the investigated member's chain of command to review, comment on, and make recommendations regarding the level of discipline, if any, they conclude is appropriate. Only officers of higher rank than the investigated member, and in the investigated member's direct chain of command, participate in this process.

7. Once the chain of command review is complete, Commissioner Flynn receives the Director of Internal Affairs report and the chain of review comments and recommendations. Commissioner Flynn has established a practice where he first reads the investigative reports and provisions of the VSP Policies and Procedures alleged to have been violated. He does this purposely to form his own independent assessment of the matter. He then reads the chain of review comments and recommendations for different perspectives. He then provides the accused VSP member with the opportunity to meet with him in a *Loudermill* meeting before he makes the final decision on discipline. During this meeting, the Commissioner has the opportunity for personal contact with the employee to hear his or her account of the matter, can take into consideration extenuating circumstances, and can assess whether the employee is being truthful. Commissioner Flynn then decides whether to impose discipline and, if so, the level of discipline. The Commissioner is the only person with the authority to decide whether to impose discipline and the level of discipline to impose.

8. Commissioner Flynn also is the only person with the authority to decide whether to hire, promote, demote or transfer VSP members. If a vacancy in a position occurs, the supervisor of the position generally assembles an interview panel to interview candidates. The interview panel chooses and ranks three final candidates for the position and sends the recommendation up the chain of command. Usually, the Commissioner follows the recommendation of the panel as to whom to select for the position. A similar process has been followed for many years in selecting persons to fill vacant VSP positions.

9. VSP policies are generally memorialized in the VSP Rules and Regulations. The DPS Commissioner has largely delegated responsibility for approving VSP policies to the VSP Director except for major policies. The VSP Director approves all changes to VSP Rules and Regulations. Colonel Thomas L'Esperance has been VSP Director since 2009. Colonel L'Esperance functions as the chief executive commissioned officer in the VSP responsible for developing major operating policies and procedures, planning, coordinating, supervising, and managing VSP operations.

10. Colonel L'Esperance, along with the three VSP Majors, has represented the VSP at collective bargaining negotiations between: 1) the State and the Vermont Troopers Association, which represents employees in a bargaining unit of all sworn VSP officers below the rank of Lieutenant; and 2) the State and VSEA, which represents supervisory employees, including in recent negotiations the State Police Lieutenants (VSEA Exhibit 2).

11. Colonel L'Esperance is actively involved in collecting and preparing the information on VSP ultimately used by Commissioner Flynn and Joanne Chadwick to prepare the DPS budget. Colonel L'Esperance works closely in this regard with the three Majors who manage the three major sections of VSP and report directly to him: Major Goodell, Director of the Field Force section; Major Ledo, Director of the Bureau of Criminal Investigation; and Major William Sheets, Director of the Support Services section. Major Sheets is the most involved of the Majors in building the budget in his role as Executive Officer. Colonel L'Esperance and the three Majors have weekly staff meetings that typically last approximately four hours. During the period of the year when they are working on developing the budget for the next fiscal year, they use a portion of

their meetings to discuss the anticipated needs of the three sections. They then use that information and work with Joanne Chadwick on developing the VSP portion of the DPS budget. Commissioner Flynn then reviews and questions the information, revises the budget as he deems appropriate, and incorporates the information into the DPS budget (VSEA Exhibits 2, 3).

12. After the Legislature funds the DPS budget and the fiscal year begins for the approved budget, Colonel L'Esperance, the three Majors, and Chadwick actively monitor VSP spending. Throughout the fiscal year, ranks below the rank of Major are required to report up the chain of command most expenditures. Colonel L'Esperance and the three Majors review spending to assess whether it is staying within budgeted targets. If overspending is occurring, they investigate areas of concern, and send direction down the chain of command to correct spending over which there is discretion. Colonel L'Esperance and the Majors meet at least quarterly with Chadwick to review overtime usage and spending levels, and make adjustments as necessary. Colonel L'Esperance and Major Sheets have the authority to move funds from one VSP budgetary line to a different VSP budgetary line to account for unanticipated expenditures. They are the only persons with such authority other than the DPS Commissioner.

13. As the highest ranking uniformed member of the VSP, Colonel L'Esperance makes recommendations to the DPS Commissioner with respect to every disciplinary matter, and every hiring, promotion, demotion, reassignment or transfer decision involving VSP members. He has more input in these matters of personnel administration than any other rank in VSP.

14. Colonel L'Esperance is involved, with the three Majors, in making certain decisions pending a determination by the Commissioner whether discipline should be imposed on a VSP member. They review the charges made against the involved employee and determine whether to reassign the employee or place him or her on administrative leave pending completion of the internal affairs investigation. If VSP member are involved in alleged misconduct which has media interest, Colonel L'Esperance and the Majors decide how to respond to media inquiries.

15. The Field Force section is the largest of the three sections of the VSP. The Field Force section provides daily police services throughout the state. Major Goodell, as Director of the section, has approximately 230 uniformed officers under him in the section, plus civilian employees. The largest function within Major Goodell's area of responsibility is general policing responsibilities organized geographically under four troop areas in the state. Also included in Major Goodell's area of responsibility are traffic operations and recreational enforcement functions (VSEA Exhibit 1, State's Exhibit 8).

16. The Bureau of Criminal Investigations ("BCI") is the second largest section of the VSP. BCI Director Major Ledo has approximately 72 officers under him in the section, plus civilian employees. The BCI is responsible for investigation of major crimes such as homicides, armed robberies and sexual assaults. Detectives are assigned to four troop areas in the state, organized geographically. Also included in Major Ledo's area of responsibility are the Crime Scene Search Team, the Narcotics Investigation Unit, arson investigations, and investigation of internet crimes against children (VSEA Exhibit 1, State's Exhibit 8).

17. The Support Services section is the smallest of the three VSP sections. Support Services Director Major Sheets has approximately 23 officers under him in the section, two of whom are captains and seven of whom are lieutenants, plus civilian employees. The Support Services section includes the Office of Professional Development, the Office of Technology Services, the Executive Protection Unit, the Staff Operations / Professional Standards Unit, the Homeland Security Unit, and the Internal Affairs Unit (VSEA Exhibit 1, State's Exhibit 8).

18. Any VSP member can propose a policy change for VSP. Policies are typically vetted through a Policy Committee that consists of Troopers, Sergeants, Corporals and a Lieutenant. All ranks have equal opportunity to discuss and provide input regarding a proposed policy. The Policy Committee formats a proposed policy so that it complies with the Commission on Accreditation for Law Enforcement ("CALEA"), a national police accreditation organization. The proposed policy is then sent to the three Majors. Each Major has the opportunity to comment on and make proposed changes to each proposed policy. Colonel L'Esperance reviews the proposed policy and makes revisions as he deems appropriate. Once Colonel L'Esperance approves a proposed policy, it is included in VSP Rules and Regulations. The exception to this is that the DPS Commissioner reviews and approves major policies (VSEA Exhibit 12).

19. The VSP Rules and Regulations is a collection of hundreds of pages of directives governing in detail VSP operations. It includes provisions on code of conduct, disciplinary procedures, promotions, use of force, traffic enforcement, traffic and other accident investigations, patrols, criminal investigations, criminal procedures, work rules, crowd control, special departmental services, care and use of property and equipment,



personal appearance and military courtesy, physical fitness, field reporting procedures, hazardous materials, training, and training bulletins (VSEA Exhibit 14).

20. Immediately below the three Majors in the VSP chain of command are nine Captains. Prior to 2000, the Captains were included in the Supervisory Bargaining Unit represented by VSEA. In 2000, the Department of Human Resources re-designated the Captains as managerial employees and they were removed from the Supervisory Unit (VSEA Exhibit 4).

21. Each of the four troop areas in the state in the Field Force section is overseen by a Troop Commander Captain who reports to Major Goodell. Captains Troidl, Cloutare, Patch and Keefe are the four Troop Commanders. Each Troop has three stations in their geographic area and also may have one or two smaller outposts. The Troop Commander Captain acts as director of the troop area with the primary responsibility of managing the Field Force employees, equipment, structures and communication centers within the troop area. Each Troop Commander exercises direct supervision over three Station Commander Lieutenants. Below the Lieutenant in each station are three to five Patrol Commander Sergeants and seven to twenty Troopers (VSEA Exhibit 1, State's Exhibit 8).

22. In the last several years, the Troop Commander Captains have assumed supervision of all VSP dispatchers, who have worked during these years in regional Public Safety Answering Points ("PSAP's"). The dispatchers previously had worked in the various barracks in the state and been supervised by Station Commander Lieutenants (VSEA Exhibits 1, 6; State's Exhibit 8).

23. Captain Robert Evans is assigned to the Field Force section as the Assistant Field Force Commander. He reports directly to Major Goodell. He is responsible for all VSP Special Response Teams, including Tactical Support Unit, SCUBA Team, Bomb Squad, K-9 Teams, Search and Rescue, Crowd Control, Member Assistance Team, Critical Incident Dispatch Team, Accident Reconstruction Team, and Clandestine Drug Lab Team. He oversees the Traffic Operations unit, which is involved in road and highway safety; and the Recreational Enforcement unit, which enforces boating and other recreational vehicle laws. There are one lieutenant, four sergeants and 8 – 10 troopers in these units. Captain Evans also is the primary law enforcement liaison with Vermont's Emergency Operations Center and the Vermont Department of Health (VSEA Exhibits 1, 7; State's Exhibit 8).

24. Captain Covell is one of the two Captains working under Major Ledo in BCI as the Chief Criminal Investigator. He is responsible for the overall management of the major crime investigation branch of the VSP. He oversees the four troops in BCI involved in investigating major crimes. There is a Lieutenant in each troop reporting to him. Each troop has Detective Sergeants and Detective Troopers under the Lieutenant. Captain Covell also oversees the work of the Arson Investigation Unit, the Crime Scene Search Team, the Polygraph Unit and the Computer Crimes Unit. There are six lieutenants, 30 sergeants and 17 – 20 troopers under his oversight (VSEA Exhibits 1, 11; State's Exhibit 8).

25. Captain Glenn Hall also reports directly to Major Ledo in the BCI section as Special Investigation Commander. He heads the Narcotics Investigation Unit which is responsible for control and operations of the Vermont Drug Task Force, a multi-

jurisdictional group of law enforcement officers in Vermont that specialize in drug enforcement. He is responsible for overseeing and approving all covert investigations and operations. He monitors and approves expenditures, managing approximately \$2 million annually in federal grant funding, oversees the application and selection process for applicants to the Vermont Drug Task Force, and approves expenditures and reimbursement requests on local grants. There are two Lieutenants, seven Sergeants and five Troopers under his oversight in this unit (VSEA Exhibit 10).

26. Captain Edward Miller is one of two Captains working under Major Sheets in the Support Services section as the Staff Operations Officer. He has management responsibilities for the Office of Professional Development, the Office of Technology Services, the Executive Protection Unit, the Internal Affairs Unit and the Professional Standards Unit. The Office of Professional Development recruits and trains new Troopers, provides in-service training for existing VSP members and dispatchers, and conducts the physical fitness tests required of VSP members. The Office of Technology Services is responsible for researching, testing, deploying and supporting technology equipment for VSP law enforcement units. The Executive Protection Unit provides transportation, security and protection for the Governor and visiting dignitaries. The Professional Standards Unit reviews VSP proposed policies to ensure they are formatted in the manner required by the Commission on Accreditation for Law Enforcement (“CALEA”), and maintains and makes recommendations for changes in existing policies. The Internal Affairs Unit investigates allegations of misconduct made against VSP members; Captain Miller’s responsibility over this unit is limited to

administrative supervision. There are twelve VSP members under Captain Miller's oversight, four of whom are Lieutenants (VSEA Exhibits 1, 9; State's Exhibits 1, 8).

27. Captain Chris Reinfurt is the other of the two Captains who report to Major Sheets. He is the Director of Homeland Security. He is responsible for managing the state homeland security program which was developed after the terrorist attacks of September 11, 2001, and implementing a state strategy to prepare the state emergency response for a terrorist threat or incident. This includes coordinating with law enforcement and other response agencies in the state and providing support to them to ensure that the state is adequately prepared for a terrorist attack. He has responsibility over the Homeland Security Grant Program designed to build capabilities to minimize risks associated with potential terrorist attacks. He is responsible for the implementation of V-Com, an interoperable radio communications plan and system that connects all agencies into one communications system. In addition to his homeland security responsibilities, he oversees the Fusion Center, which gathers and shares information with other federal and state law enforcement agencies. There are three Lieutenants, 2 Sergeants and 2 Troopers under Captain Reinfurt's oversight (VSEA Exhibits 8, p. 35 – 40, 8).

28. The evidence does not indicate that Captains exercise significant discretion with respect to budgetary or policy matters. They exercise significant discretion in personnel administration through exercising the responsibility to direct employees under them to carry out operations in multiple programmatic areas.

29. There are 28 VSP Lieutenants. Their job responsibilities vary greatly. The class specification for the Lieutenants defines their duties as “supervisory and/or specialized law enforcement work as a field force or detective supervisor at an assigned geographic station, supervisor of a specialized investigative or support unit, or as a staff assistant at State Police headquarters.” Twelve Lieutenants serve as Station Commanders in the Field Force section; four Lieutenants are assigned as BCI Troop Commanders; and two Lieutenants are assigned to the BCI Narcotics Investigation Unit. The remaining Lieutenants each have different areas of responsibility and perform unique job functions (VSEA Exhibits 1, 15; State’s Exhibit 8).

30. The Lieutenants who serve as Station Commanders are the highest ranking members of their stations. There are between 10 and 23 Patrol Commanders and Troopers under each of the Lieutenants. Many of their duties have remained similar for at least two decades. During this period, they always have directed and evaluated the work of the Patrol Commander Sergeants who serve below them in the chain of command, and have provided supervisory feedback to subordinates. The Lieutenants also have conducted performance evaluations of civilian employees whom they supervise. The Patrol Commander Sergeants during this period always have evaluated the work of Troopers who serve below them, scheduled their shifts and assigned them work. Station Commander Lieutenants served as liaisons with local law enforcement officials, met with local citizen groups to discuss law enforcement, approved training for subordinates, approved overtime work, and referred potential Code of Conduct violations up the chain of command for possible referral to the Internal Affairs Unit throughout this period (VSEA Exhibit 1, State’s Exhibits 1, 8).

31. A significant change that has occurred during this period is that Station Commanders have supervised less employees during the last several years than they did previously because VSP dispatchers have been relocated from the individual stations where they were supervised by the Station Commanders. Instead, the VSP dispatchers now work at four regional Public Safety Answering Points and are supervised by Troop Commander Captains. Another significant change that has occurred is that Station Commanders have taken on additional duties since September 11, 2001, related to terrorism awareness and prevention. Border issues, uses of technology and investigative techniques are among the matters that have had significant impact since then. This has contributed to the evolution of the Station Commander position (VSEA Exhibit 1, State's Exhibits 1, 2, 8).

32. The various Field Force stations have special needs given their geographic location and demographics. For example, stations in northern Vermont have national border issues, the Brattleboro station has to be prepared to deal with a possible nuclear disaster involving Vermont Yankee, and the Williston station has to deal with a high volume of traffic. Station commanders operate similar to some local police chiefs in their station area. These different needs require Station Commander Lieutenants to use their independent judgment and decision-making abilities to capably perform their duties. Station Commanders are expected to develop plans for their stations to provide the most effective law enforcement. Meetings they have with community advisory boards and select boards in communities served by their stations assist them in developing and communicating these plans (State's Exhibit 1).

33. The Traffic Operations Lieutenant, Lieutenant John Flanigan, is the only Lieutenant in the Field Force section who is not a Station Commander. He has responsibility for state-wide enforcement of state traffic and highway safety laws and educational traffic safety programs. He applies for and implements traffic safety grants. He acquires highway safety equipment for VSP employees. He supervises the three Sergeants and 7 – 9 Troopers who enforce the state traffic and highway safety laws. He also supervises the one Sergeant and one Trooper who enforce the state's recreational laws. He conducts performance evaluations of the employees he supervises (VSEA Exhibit 1, State's Exhibits 1, 8).

34. There are eight Lieutenants who work in BCI. Four of them are assigned as to the Troops in BCI involved in investigating major crimes. There is a Detective Lieutenant assigned to each of the four Troops. The Detective Lieutenants are responsible for the investigation of major crimes and death investigations within a trooper area. There are between 7 and 14 Detective Sergeants and Detective Troopers under them. The Lieutenants perform performance evaluations of the detectives below them in the chain of command. It is not unusual for the Detective Lieutenants to work side by side at crime scenes with the Sergeants and Troopers they supervise. The Lieutenants have the authority to authorize call-outs and overtime for detectives in their troop without the approval of Captain Covell if it is warranted by the criminal investigation. The Detective Lieutenants also supervise detectives of Special Investigation Units who investigate crimes generally of a sexual nature. The Lieutenants have taken on expanded duties involving the investigation of bank robberies in the last several years. Previously, the

Federal Bureau of Investigation took charge of the investigation; now the Lieutenants have assumed this responsibility (VSEA Exhibit 1, State's Exhibits 1, 8).

35. Lieutenant James Cruise is assigned as Commander of the Fire Investigation Unit in BCI. He is responsible for coordinating all statewide response to requests for fire and explosion investigations. The unit is responsible for all fires in which fatalities and injuries occur, explosions, investigation of all suspicious fires, and all requests for fire investigation in support of local fire chiefs. Lieutenant Cruise supervises four Detective Sergeants in the unit. He ensures their proper training, assigns cases to them, monitors their cases, and reviews and approves their investigation reports (VSEA Exhibit 1, State's Exhibits 1, 8).

36. Lieutenant Jean Sinclair supervises individuals on the Crime Scene Search Team ("CSST"), a Special Team in BCI. The CSST is made up of 20 VSP members who work full-time for other supervisors in capacities other than on the CSST. The CSST is responsible for securing and processing all major crime scenes. The members of the CSST generally are activated for no more than 24 hours, though there are exceptions. Lieutenant Sinclair decides which team members will be activated; his decisions often are made on the basis of geography. He also serves as the liaison with the Forensic Laboratory, communicating with the Laboratory staff on the status of the investigation of evidence examined by the Laboratory. Lieutenant Sinclair also oversees the Computer Crimes Unit in BCI. One Sergeant and two Detective Troopers work in the unit and report to him (VSEA Exhibit 1, State's Exhibits 1, 8).



37. The remaining two Lieutenants in BCI are assigned to the Narcotics Investigation Unit. They work under the direction of Captain Hall, the head of the Unit. One of them is assigned to the southern part of the state and supervises two Detective Sergeants. The other Lieutenant covers the northern part of Vermont and supervises three Sergeants and five Detective Troopers. The primary responsibility of these positions is to oversee the Vermont Drug Task Force and drug investigations in Vermont. This includes supervision of four regional task force units consisting of VSP members, county sheriffs and local police departments (VSEA Exhibits 1, 10; State's Exhibits 1, 8).

38. There are seven Lieutenants assigned to the Support Services section of VSP. They work under the direction of Major Sheets and the two Captains in the section. Lieutenant David Nolte is assigned to the Office of Professional Development ("OPD"). The OPD recruits and trains new troopers and provides in-service training for existing VSP members and dispatchers. It also conducts the physical fitness tests required of VSP members as a condition of employment. Lieutenant Nolte supervises the four Training Sergeants and one Staff Operations Sergeant that work for OPD as well as three civilian employees. He works under the direction of Support Services Captain Miller (VSEA Exhibits 1, 8; State's Exhibits 1, 9).

39. Lieutenant Michael Macarilla is assigned to the Office of Technology Services and the Executive Protection Unit in the Support Services section. The Office of Technology Services is responsible for researching, testing, deploying and supporting technology equipment for VSP law enforcement units. Lieutenant Macarilla's job responsibilities include completing applications for grant money to purchase equipment. Applications that he completes have to be approved through the chain of command. His

applications consistently have been approved, and not changed, by the chain of command. If the grant is awarded, Lieutenant Macarilla seeks approval through the chain of command for purchase of specific equipment under the grant. If authorized, he has authority to purchase the equipment if it falls within the budgeted amount. He is responsible for ensuring that any purchases comply with conditions imposed by the grantor. Among the major equipment purchased through this process where Lieutenant Macarilla's recommendations have been followed were cruiser cameras, cruiser computers, and license plate readers for cruisers. During the past four to five years, he has been involved in the purchase of equipment valued at between \$5 – 10 million. Lieutenant Macarilla supervises one Sergeant and four civilian employees who work for the Office of Technology Services. He also supervises one Detective Sergeant and three Detective Troopers who provide transportation, security and protection for the Governor and visiting dignitaries. Lieutenant Macarilla works under the direction of Support Services Captain Miller (VSEA Exhibits 1,9; State's Exhibits 1, 8).

40. Lieutenant Heidi Barbic is assigned to the Staff Operations/Professional Standards Unit of the Support Services section in a newly created position. She reviews VSP proposed policies to ensure they are formatted in a manner consistent with standards of the Commission on Accreditation for Law Enforcement ("CALEA") and adhering to best practices of the International Association of Chiefs of Police. She also maintains an ongoing evaluation of the status of policies, and makes recommendations for changes. She has no employees who report to her. Lieutenant Barbic works under the direction of Support Services Captain Miller ((VSEA Exhibits 1, 9; State's Exhibit 8).

41. Lieutenant James Whitcomb is assigned as Director of the Internal Affairs Unit of the Support Services section. He investigates allegations of misconduct made against VSP members. He writes reports of his investigations and submits them to the accused employee's chain of command and the DPS Commissioner. Lieutenant Whitcomb also is responsible for supervising and overseeing any administrative investigations of VSP members assigned to other VSP members for completion. Since at least 1982 this position has been held by a Lieutenant who reports directly to the Commissioner. The Director of Internal Affairs has no supervisory authority over any other staff (VSEA Exhibits 1, 8; State's Exhibits 1, 9).

42. There are two Homeland Security Lieutenants assigned to work under Captain Reinfurt, the Homeland Security Director in the Support Services section. These positions were created subsequent to the September 11, 2001, terrorist attacks. One of the Lieutenants is on leave. The remaining Lieutenant, Lieutenant Michael Manning, now supervises four employees while the other Lieutenant is on leave. When the other Lieutenant was working, the two Lieutenants shared supervisory authority over the four employees (VSEA Exhibit 1, State's Exhibits 1, 8).

43. Lieutenant Manning has responsibility in numerous areas in assisting Reinfurt in operating the state Homeland Security program. Among his duties are writing grant requests to the federal Homeland Security Department to obtain Homeland Security grants for the purchase of equipment needed to further priorities established by the federal Homeland Security Department. If a grant is awarded to the Vermont Homeland Security Unit, the grant specifies what grant monies can be used for. Failure to use the

grant money for the purposes for which it is granted can result in the loss of the grant or a penalty (State's Exhibit 1).

44. Lieutenant Manning is the Interoperability Coordinator for Vermont. This involves the implementation of V-Com, an interoperable radio communications plan and system that connects all agencies into one communications system. In this role, he ensures compliance with federal interoperable communications priorities and funding strategies (State's Exhibit 1).

45. Lieutenant Manning also schedules VSP and local law enforcement officers to fill shifts on the federal Homeland Security program referred to as Operation Stone Garden. This program provides funding to hire law enforcement officers who live or work near the federal border to assist the United States Border Patrol in conducting border patrols. Any law enforcement officer who meets the jurisdictional requirements can work the details. Lieutenant Manning sends e-mails to various law enforcement agencies advertising available shifts. Sheriffs, local police officers and VSP members can volunteer. Once assigned a shift, they report to the federal border patrol authorities who assign them work. The federal Border Patrol processes any incident that falls within federal jurisdiction; local law enforcement officers process any incident that arises involving a violation of state law. Lieutenant Manning, other than scheduling the details, is not involved in the actual work conducted by officers working the details or the processing of any incidents. He has the ability to remove officers from the Stone Garden program if they do not abide by rules and regulations in operating orders. He has acted to remove one officer from the program (State's Exhibit 1).

46. One of the changes instituted by DPS Commissioner Flynn upon assuming office in January 2011 was to designate the Administrative Services Division headed by Joanne Chadwick as the entity in charge of administering all grants for every division in DPS. He did this to centralize review of grants to provide uniform compliance with grant requirements throughout DPS and ensure all available funding was secured. This has reduced to some extent the involvement of Lieutenants in grant administration.

47. Lieutenant Mark Lauer is assigned to work in the Vermont Information Analysis Center, originally known as the Fusion Center, in the Support Services section. The Fusion Center was created after the September 11, 2001, terrorist attacks. He reports to Captain Reinfurt. Lieutenant Lauer supervises one Detective Sergeant, two Detective Troopers and four civilian employees. He conducts performance evaluations of these seven employees. The Fusion Center is responsible for the exchange of information with other law enforcement agencies, within and outside the state including federal authorities, to prevent and detect crimes and assist in apprehending criminals. It also is responsible for triggering the Amber Alert system in the event of a missing child. Before triggering the Amber Alert system, the Fusion Center Lieutenant must contact and obtain approval from the State Duty Officer, who is either the VSP Colonel or one of the three Majors. The Fusion Center is evaluated by the federal Department of Homeland Security to ensure that its operations are in compliance with federal standards (VSEA Exhibit 4, p. 38 – 39, State's Exhibit 1).

48. At all times, either the VSP Colonel or one of the Majors is assigned to be the State Duty Officer. There also is either a VSP Captain or Lieutenant assigned to be the Northern Zone or Southern Zone Duty Officer. The purpose of these assignments is to

provide 24 hour coverage for the State in the event that an incident takes place during a time when there is no VSP coverage, generally from 2:30 a.m. to 7 a.m., or when local commanders are on vacation or otherwise unavailable to direct the work of responders. Each of the Captains and Lieutenants is assigned Zone Duty for approximately two and one-half weeks of the year. If an incident takes place during regular operating hours, it is handled by the VSP station in the area. If it takes place outside of regular hours, the Zone Duty Officer is contacted. The Zone Duty Officer then directs whatever staff is appropriate to respond to the incident. The nature of the incident and the special expertise and resources required to handle the incident generally determine who becomes the incident commander. At times, the local station commander assumes control of the matter. The Zone Duty Officer reports critical incidents to the State Duty Officer who can direct the Zone Duty Officer or others. Lieutenants have the same responsibilities as Captains when serving as Zone Duty Officer. The State Duty Officer rarely becomes directly involved in handling incidents.

49. There are a number of Special Teams within VSP that receive specialized training to respond to specific types of critical incidents. Among them are the Tactical Support Unit, SCUBA Team, Bomb Squad, K-9 Teams, Search and Rescue, Crowd Control, Member Assistance Team, Critical Incident Dispatch Team, Accident Reconstruction Team, and Clandestine Drug Lab Team. Since at least the early 1980's, these teams have been led by a VSP Lieutenant who provides expertise, training and direction to the other VSP members who serve on the team. The Lieutenants are overseen by the Captain who serves as the Assistant Field Force Commander and is the key

decision maker controlling the activation and deployment of the special response teams during critical incidents (VSEA Exhibit 4, State's Exhibit 1).

50. The evidence does not indicate that Lieutenants exercise significant discretion with respect to budgetary or policy matters. Any discretion they exercise on the budget is limited to implementing it within set amounts that they do not significantly influence. Lieutenants have a purchasing card allowing up to \$2,500 in purchases that must be made consistent with regulations. They can have significant input in policy matters, but they do not have discretion with respect to approving policies. They exercise personnel administration responsibilities if they have employees who report to them through supervising employees under them to carry out their duties. The Lieutenants review any disciplinary investigation report on VSP members under their supervision and make recommendations as to the appropriate discipline. They also review all performance evaluations of employees under them and conduct performance evaluations of employees who report directly to them.

51. Each of the 28 Lieutenants is expected to be able to assume the duties of any other Lieutenant. In the past nine years, a Lieutenant was transferred to another position within the Lieutenant rank across VSP sections an estimated ten times.

52. On June 29, 2011, VSP Lieutenant Matthew Birmingham submitted a Request for Review ("RFR") to the Vermont Department of Human Resources Classification Division. VSP Lieutenants previously had met and agreed to pursue the RFR as a means to increase the pay grade of their positions (State's Exhibit 1).

53. Molly Paulger, Chief of the Classification Division, conducted the review of the Lieutenants' positions. In conducting the review, she used the information provided on the RFR. She also reviewed the VSP organization chart and conducted interviews with some of the lieutenants and officers above them in the VSP chain of command. She conducted a point factor analysis using the *Willis Guide to Position Measurement*. She also reviewed pertinent federal and state statutes as well as Vermont Labor Relations Board decisions and publications. On November 1, 2011, Paulger issued a Notice of Classification Action increasing the pay grade of the Lieutenants from 26 to 27, and changing the designation of their positions from supervisory to managerial. She included the following comment in the Notice of Classification Action: "Based on a thorough review of all materials describing the job duties performed by Lieutenants as well as individual meetings with some incumbents it is clear that these positions have increased responsibility to justify a change in managerial designation from Supervisory to Managerial and a corresponding change to the bargaining unit designation" (State's Exhibits 1, 3, 6; VSEA Exhibit 13).

54. Upon the designation of the Lieutenants as managerial employees, the State has treated the Lieutenants as managerial employees no longer covered by the collective bargaining agreement between the State and VSEA for the Supervisory Unit. Among the impacts on Lieutenants is that they no longer receive overtime wages at one and one-half times their hourly rate of pay.



## OPINION

VSEA contests the designation by the Department of Human Resources of the State Police Lieutenants as managerial employees. VSEA requests that the Board order that Lieutenants return to their designation as supervisory employees.<sup>1</sup>

The State Employees Labor Relations Act contains a specific definition for managerial employees, as follows:

"Managerial Employee" is an individual finally determined by the board as being in an exempt or classified position which requires him to function as an agency, department or institution head, a major program or division director, a major section chief or director of a district operation.<sup>2</sup>

Individuals employed as managers are ineligible to be included in a collective bargaining unit.<sup>3</sup> The Board determines the managerial, confidential or supervisory status of all State employees that are disputed and brought before us, including State Police.<sup>4</sup>

The State contends that the Lieutenants meet the definition of managerial employees as either directors of district operations, major section chiefs or major program directors. The State asserts that Lieutenants serving as Station Commanders and BCI Detective Lieutenants function as directors of district operations or major section chiefs. The State maintains that other Lieutenants commanding programs such as Homeland Security, Fusion, Office of Technology Services, Crime Scene Search Team and other teams constitute directors of major programs. The State also contends generally

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<sup>1</sup> We note that, although there was general discussion at the hearings concerning whether the Lieutenant serving as Director of Internal Affairs possibly could be designated as a confidential employee, this issue is not properly before the Board for decision. The parties did not present specific evidence on this issue and it is not ripe for decision by the Board.

<sup>2</sup> 3 V.S.A. §902(18).

<sup>3</sup> 3 V.S.A. §902(5) (f).

<sup>4</sup> Department of Public Safety Personnel Designation Disputes, 5 VLRB 141, 160 (1982).

that, while not all Lieutenants have the same level of personnel, budgetary and policy administration responsibilities, all of them should carry the same managerial designation.

VSEA contends that the Lieutenants lack sufficient discretionary authority in the three central areas of management of budget administration, personnel administration and policy matters to be designated as managerial employees. VSEA asserts that their proper designation is as supervisory employees. §902(16) of SELRA defines “supervisory employee” as follows:

an individual finally determined by the board as 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".

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”.<sup>5</sup>

The supervisory authority defined in the statute is all clearly encompassed in managerial responsibility as well.<sup>6</sup> The two descriptions are not mutually exclusive; it is simply that, in terms of responsibility, some supervisors justify managerial designations, and some do not.<sup>7</sup>

An employee's discretionary authority in the central areas of management of budget administration, personnel administration and policy matters will be examined to

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<sup>5</sup> Id. at 163. Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980). Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60 (1982).

<sup>6</sup> In re Personnel Designations, 139 Vt. 91 (1980).

<sup>7</sup> Id.

determine if that employee is a manager.<sup>8</sup> The definition of "managerial employee" necessarily implies the employee will manage and monitor not only their own time and performance, but that of a significant number of other employees as well.<sup>9</sup>

The consequence of upholding managerial designations is that individuals in the affected positions would lose the rights to be represented by a union and engage in collective bargaining granted to most state employees pursuant to the provisions of the State Employees Labor Relations Act. Where an employer seeks to exclude individuals from a bargaining unit and collective bargaining rights as managers, a considerable amount of evidence must be advanced to warrant such exclusion.<sup>10</sup> The State must demonstrate by a preponderance of the evidence presented in a developed record that these individuals are managerial employees as defined in the State Employees Act.

The decision whether State Police Lieutenants should be designated as managerial employees or supervisory employees presents challenges different from most state government designations. This is due to the characteristics of the State Police as a paramilitary organization that has a chain of command and formal rank structure. The chain of command structure significantly impacts which State Police members possess sufficient discretionary authority in the areas of management of budget administration, personnel administration and policy matters to be designated as managerial employees.

The rank structure complicates designation decisions because State Police members of the same rank, such as Lieutenant, occupy many different positions with

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<sup>8</sup> United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB 1, 36 (2002). Department of Corrections Designation Dispute (Re: Corrections Information Systems Chief), 18 VLRB 323 (1995). Department of Public Safety Personnel Designation Disputes, 5 VLRB 141, 161 (1982).

<sup>9</sup> United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB at 36. VFT, AFT, AFL-CIO and Vermont State Colleges, supra.

<sup>10</sup> United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB at 39. Agency of Transportation Designation Dispute (Re: Transportation Senior Planner), 17 VLRB 135, 141 (1994).

widely varying responsibilities. However, neither party advocated considering them separately for managerial/supervisory status. This approach is not only undisputed, but we also find it reasonable. As the Board stated in a 1982 decision ruling on whether State Police Lieutenants should be designated as managerial or supervisory employees:

(A)s a policy matter, it is prudent all Lieutenants . . . be given the same designations as their equals in rank, given the nature of their employment. They work in an organization where all members of the same rank are of equal authority, and each individual is expected to be able to perform the jobs of all individuals of that rank. Throughout a career in the Department, individuals are rotated from position to position within the same rank. A Lieutenant can be transferred from and to any position occupied by another Lieutenant. . . Given such mobility, their job rights could fluctuate greatly if designations of positions differed. For example, a Lieutenant could move from a supervisory position covered by a collective bargaining agreement to a managerial position not covered by a collective bargaining agreement, and then be moved back to a supervisory position. Meanwhile, his rank would not change. To place equals of rank in different bargaining units would be to ignore the unique nature of State Police employment and would result in unsettled labor relations.<sup>11</sup>

In the 1982 decision, the Board reversed a decision by the Commissioner of Personnel designating State Police Lieutenants as managerial employees and instead determined that the Lieutenants were supervisory employees.<sup>12</sup> The structure and size of the State Police was significantly different in 1982 then it is now. The State Police chain of command in 1982 from DPS Commissioner through the rank of Lieutenant consisted of the DPS Commissioner, one Major, three Captains heading the three major sections of the State Police, and twelve Lieutenants. There was no State Police Colonel. The DPS Commissioner, the Major and the three Captains constituted all the managerial employees under this structure.<sup>13</sup>

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<sup>11</sup> Department of Public Safety Personnel Designation Disputes, 5 VLRB at 164.

<sup>12</sup> Id. at 161 – 164.

<sup>13</sup> Id.

The present State Police chain of command structure from DPS Commissioner through the rank of Lieutenant is Commissioner, Colonel, three Majors heading the three major sections of the State Police, nine Captains, and 28 Lieutenants. There are a total of approximately 327 sworn officers. Prior to the Department of Human Resources decision designating the Lieutenants as managerial employees, the Commissioner, Colonel, three Majors and nine Captains constituted all the managerial employees under this structure. The State, through the decision designating the Lieutenants as managerial employees, is seeking to expand the number of managerial employees in the State Police from 14 to 42.

We conclude that the Lieutenants lack sufficient discretionary authority in the central areas of management of budget administration, policy matters and personnel administration. The State has not demonstrated that it is appropriate to triple the number of managerial employees in the State Police by designating the Lieutenants as managerial employees.

Any discretion the Lieutenants exercise on the budget is limited to implementing it within set amounts that they generally do not significantly influence. The DPS Commissioner, DPS Director of Administrative Services, the State Police Colonel and the three State Police Majors exercise the discretionary authority on preparing, monitoring and adjusting the State Police budget, and this discretionary authority does not extend further down the chain of command to the Lieutenants. The fact that a few Lieutenants are involved in obtaining grants is far from sufficient to demonstrate that the Lieutenants as a group exercise discretionary authority in budgetary administration.

Lieutenants may provide significant input in policy matters, but they lack discretion with respect to approving policies. Any State Police member can propose a

policy change for the State Police. Policies are typically vetted through a Policy Committee that consists of Troopers, Sergeants, Corporals and a Lieutenant. All ranks have equal opportunity to discuss and provide input regarding a proposed policy. A policy is not implemented until it is reviewed by the three Majors and Colonel and approved by the Colonel. State Police policies generally are memorialized in Rules and Regulations which is a collection of hundreds of pages of directives governing in detail State Police operations. Given such evidence, the responsibilities of Lieutenants in policy matters are insufficient to demonstrate discretionary authority at a managerial level in this regard.

In personnel administration, there is a wide range in the number of State Police members under Lieutenants depending on their responsibilities and, in some cases, geographic location. The 12 Station Commanders are at one end of the spectrum with between 10 and 23 Patrol Commander Sergeants and Troopers under them. The four BCI Detective Lieutenants assigned to four troops in the state have between 7 and 14 Detective Sergeants and Troopers under them. Another BCI Lieutenant supervises eight Sergeants and Troopers. The Traffic Operations Lieutenant supervises 12 to 14 Sergeants and Troopers. The Office of Professional Development Lieutenant has eight employees under him. Two other Lieutenants in the Support Services section have nine and seven employees under their supervision, respectively. Five other Lieutenants supervise significantly fewer employees, having between two and four employees under them. Two lieutenants supervise no employees.

Lieutenants exercise personnel administration responsibilities if they have employees who report to them through assigning work to employees and directing them

to carry out their duties. The Lieutenants review any disciplinary investigation report on State Police members under their supervision and make recommendations as to the appropriate discipline, although their authority is limited since they cannot actually discipline State Police members. They also review all performance evaluations of employees under them and conduct performance evaluations of employees who report directly to them. They approve overtime for subordinate employees.

However, these responsibilities do not indicate they are managers. These are duties exercised by supervisory employees, and they do not rise to the level to justify a managerial designation. There are four management levels above the Lieutenants – Captains, Majors, Colonel, DPS Commissioner – and the evidence indicates that managerial responsibilities with respect to personnel administration is limited to these four levels.

In sum, the State has not presented sufficient evidence to demonstrate that the Lieutenants are managerial employees. Instead, we conclude based on the evidence that they should retain their designation as supervisory employees. Although their degree of supervisory authority differs, they generally have the responsibility to assign work to employees, direct them in the performance of their duties and approve overtime. Further, the exercise of such authority requires the use of independent judgment.<sup>14</sup>

We recognize that two of the Lieutenants (i.e., the Director of Internal Affairs, and the Lieutenant assigned to Staff Operations/Professional Standards Unit) have no employees reporting to them. The statute requires an employee have supervisory authority over employees to be considered a supervisor.<sup>15</sup> However, we are placing all

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<sup>14</sup> Id. at 163.

<sup>15</sup> 3 V.S.A. §902(16).

Lieutenants, including the occupants of the above two positions, in the supervisory unit for two reasons. First, the State Police is a quasi-military organization where chain-of-command assumes central importance. In such an organization, Lieutenants have practical supervisory authority over all subordinates in the organization. Second, as discussed earlier, it is prudent as a policy matter that all Lieutenants be given the same designation as their equals in rank given the unique nature of State Police employment.<sup>16</sup>

In reversing the State Department of Human Resource decision designating Lieutenants as managerial employees, we note that affirming the decision would result in 41 of 327 State Police members being designated managerial employees and no members being designated supervisory employees. This high percentage of managerial employees and dearth of supervisory employees would in our experience be an unprecedented organizational structure within state government.

Also, in determining that Lieutenants are supervisory employees and not managerial employees, we are not discounting the increased expertise and responsibilities required in their positions. The classification system has captured the evolution of their duties through upgrading their pay grades. However, the higher level of duties has not converted them from supervisory to managerial employees.

VSEA requests as a remedy that: 1) the designation making all State Police Lieutenants managerial employees be reversed, and they be designated as supervisory employees; 2) all members who served in the position of Lieutenant since the designation of the position as managerial be made whole for all losses they sustained as a result of the designation; and 3) all members who have served in the position of Lieutenant be retroactively credited and restored all rights, compensation, benefits and other privileges

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<sup>16</sup> Department of Public Safety Personnel Designation Disputes, 5 VLRB at 163-164.



lost as a result of the designation, including interest on such losses. We conclude this requested remedy is appropriate to redress the incorrect designation of the Lieutenants.

### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

- 1) The designations by the Department of Human Resources in the Department of Public Safety making the State Police Lieutenants managerial employees is reversed; they are supervisory employees and shall remain in the Supervisory Unit represented by the Vermont State Employees' Association;
- 2) All Vermont State Police members who served in the position of Lieutenant since the designation of the position as managerial shall be made whole for all losses they sustained as a result of the designation;
- 3) All Vermont State Police members who have served in the position of Lieutenant since the designation of the position as managerial shall be retroactively credited and restored all rights, compensation, benefits and other privileges lost as a result of the designation, including interest on such losses at the legal rate of 12 percent per annum; and
- 4) The parties shall file with the Board by August 30, 2012, a proposed order indicating the specific amount of back pay and other benefits due the Lieutenants; and if they are unable to agree on such proposed order, shall notify the Board in writing by that date of specific facts agreed to by the

parties, specific areas of factual agreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if any, shall be held on September 27, 2012, at 11 a.m., in the Labor Relations Board hearing room.

Dated this 2nd day of August, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ James C. Kiehle

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James C. Kiehle

/s/ Alan Willard

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Alan Willard