VERMONT LABOR RELATIONS BOARD

PETITION OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION (RE: STATE POLICE LIEUTENANTS)	)	DOCKET NO. 11-25
	)	
	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont ("State") to dismiss a petition for election of collective bargaining representative filed by the Vermont State Employees' Association ("VSEA"). VSEA filed a petition on April 14, 2011, to remove Vermont State Police Lieutenants from the Supervisory Unit represented by VSEA and place them in their own bargaining unit.

The State filed a response to the petition on May 16, 2011, contending among other things that the petition should be dismissed because only a single supervisory unit is authorized by the State Employees Labor Relations Act ("SELRA").[1] The Board investigated the petition and directed the parties to file briefs on the issue of whether SELRA requires that there be a single supervisory bargaining unit in State government. The parties filed such briefs on August 5, 2011.

Factual Background

The factual background for deciding whether to dismiss this petition is based on legislative history and facts brought forth during the Board's investigation of this petition. SELRA was enacted in 1969. The relevant provisions of SELRA when it was enacted are as follows:

. . .

Section 902. Definitions

[1] 3 V.S.A. § 901 *et seq.*

In this chapter, the following words and phrases shall have the following meanings unless the context requires otherwise:

(1) "Board," the state employee labor relations board.

. . .

(3) "Collective bargaining unit", the employees of an employer being either all of the employees, the members of a department or agency or such other unit or units as the board may determine are appropriate to best represent the interests of employees.

(4) "Employee" means a state employee as defined by subsection (5) of this section except as the context requires otherwise.

(5) "State employee" means any individual employed on a permanent status basis by the State of Vermont . . . but excluding an individual:

(A) Exempt or excluded from the state classified service under the provisions of section 311 of this title,

(D) Employed as a department or agency head or deputy officer not included in section 311 of this title, head of an institution or as a division director in the department of administration . . .

. . .

Section 903. Employees rights and duties; prohibited acts

(a) Employees shall have the right to self-organization; to form, join or assist employee organizations; to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

. . .

Section 927. Appropriate Unit

(a) The board shall decide the unit appropriate for the purpose of collective bargaining in each case and those employees to be included therein, in order to assure the employees the fullest freedom in exercising the rights guaranteed by this chapter.

(b) In determining whether a unit is appropriate under subsection (a) of this section, the extent to which the employees have organized is not controlling.

(c) The board may decline recognition to any group of employees as a collective bargaining unit if, upon investigation and hearing, it is satisfied that the employees will not constitute an appropriate unit for purposes of collective bargaining or if recognition will result in over-fragmentation of state employee collective bargaining units. . .

. . .

Section 941. Unit determination, certification, and representation

(a) The board shall determine issues of unit determination, certification, and representation in accordance with this chapter.

(b) No bargaining unit or collective bargaining representatives shall be recognized by the employer until formally certified by the board.

(c) A petition may be filed with the board, in accordance with procedures prescribed by the board:

(1) By an employee or group of employees, or any individual or employee organization purporting to act their behalf, alleging that not less than thirty percent of the employees, wish to form a bargaining unit and be represented for collective bargaining, or assert that the individual or employee organization currently certified as bargaining agent is no longer supported by at least fifty-one percent of the employees in the bargaining unit, or now included in an approved bargaining unit wish to form a separate bargaining unit under board criteria for purposes of collective bargaining.

. . .

(d) The board, a member thereof, or a person or persons designated by the board shall investigate the petition, and

(1) if it finds reasonable cause to believe that a question of unit determination or representation exists, an appropriate hearing shall be scheduled before the board . . . or

(2) dismiss the petition, based upon the absence of substantive evidence.

(e) Whenever, as a result of a petition and an appropriate hearing, the board finds substantial interest among employees in forming a bargaining unit, a secret ballot election shall be conducted by the board to be taken in such manner as to show separately the wishes of the employees in the voting group involved as to the determination of the collective bargaining unit, including the right not to be organized. In order for a collective bargaining unit to be recognized and certified by the board, there must be at least a fifty-one percent affirmative vote of all employees within such proposed bargaining unit.

(f) In certifying an appropriate bargaining unit the board shall take into consideration but not be limited to the following criteria:

(1) The authority of governmental officials at the unit level to take positive action on matters subject to negotiation.

(2) The appropriateness of the proposed unit to represent all employees within the unit having regard for similarity or divergence of their interests, needs, and general conditions of employment. . .

(3) Whether over-fragmentation of units among state employees will result from certification to a degree which is likely to produce an adverse effect either on effective representation of state employees generally, or upon the effective operation of state government.

(g)(1) In determining the representation of state employees in a collective bargaining unit the board shall conduct a secret ballot of the employees and certify the results to the interested parties and to the state employer. The original ballot shall be so prepared as to permit a vote against representation by anyone named on the ballot. No representative will be certified with less than a fifty-one percent affirmative vote of all the employees in the bargaining unit.

As originally enacted in 1969, SELRA did not define "managerial" or "supervisory" employees. Shortly after SELRA was enacted in 1969, VSEA filed a petition with the Labor Relations Board to represent a single bargaining unit of all state employees eligible to be represented by an employee organization. In responding to the petition, the State requested that supervisory employees be excluded from any unit which includes non-supervisory employees. The Board concluded that one unit for all eligible state employees was an appropriate unit, and certified VSEA as the exclusive bargaining representative of employees in the bargaining unit.

SELRA was amended by Act No. 193 of the 1971 Adjourned Session of the Vermont General Assembly, effective April 3, 1972. SELRA was amended in pertinent part as follows:

> **Section 902 was amended in pertinent part to provide:**
> . . .
> (5) "State employee" means any individual employed on a permanent status basis by the state of Vermont . . . but excluding an individual:
> (A) Exempt or excluded from the state classified service under the provisions of section 306 of Title 3, except the uniformed state police in the department of public safety are included within the meaning of "state employee,"
> . . .
> (F) Employed in a management level position, except as provided in 3 V.S.A. §§ 906 and 908.
> . . .
> (13) "Management positions" are those positions in any one of the following four levels:
> (A) Positions in state government exempt from the classified service and responsible for a total service area which require incumbents to plan, organize, implement, and control major programs within broad policy guidelines established by the governor.
> (B) Positions in state government including those in the classified service which require incumbents to plan, organize, implement, and control a major function or program within a service area and within broad policies and objectives established by the service area manager.
> (C) Positions in state government including those in the classified service which require incumbents to plan, organize, and direct a primary activity (either

service or support) in a major function or program, to achieve established goals and objectives; or to provide staff support in an administrative function.

(D) Positions in state government including those in the classified service which require incumbents to supervise an activity or activities (either service or support) in a specific function or program to achieve specific objectives; or to provide staff support in an administrative function.

. . .

Section 906 was added to provide in pertinent part:

(a) The commissioner of personnel shall determine those positions in the classified service which he believes should be designated as B level management positions as defined in 3 V.S.A. §902(13) . . .

(b) A person in the classified service whose position is determined to be a B level management position in accordance with subsection (a) of this section, who believes the determination as it relates to his position is incorrect, may appeal the determination as it relates to his position by a petition to the board . . . The board . . . may direct that the position be designated in accordance with the commissioner, or as a C or D management level position, or that it does not belong in any management level position.

. . .

Section 907 was added to provide in pertinent part:

(a) The commissioner of personnel shall determine those positions in the classified service which he believes should be designated as C and D level management positions as defined in 3 V.S.A. §902(13) . . .

(b) A person in the classified service whose position is determined to be a C or D level management position in accordance with subsection (a) of this section, who believes the determination as it relates to his position is incorrect, may appeal the determination as it relates to his position by a petition to the board . . . The board . . . may direct that the position be designated in accordance with the commissioner, or as a B level management level position, or that it does not belong in any management level position.

. . .

Section 908 was added to provide in pertinent part:

(a) Notwithstanding the provisions of § 902(5)(F) of this title, persons in the classified service employed in C and D level management positions may form a combined independent collective bargaining unit subject to the provisions of section 941 of this title.

(b) Unless and until C and D level management level employees exercise their rights to organize independently for purposes of collective bargaining as authorized under subsection (a) of this section, the Vermont state employees association may continue to represent such C and D level management employees

> as a separate bargaining unit for independent collective bargaining and other functions permitted or required of a duly certified representative, provided that the association restructures its organization and methods of operation as follows:
>
> 1. The association shall reorganize into two separate and distinct bargaining units, the one to consist solely of C and D level management employees, and the other to consist solely of nonmanagement level employees. . .
>
> 2. Each bargaining unit shall act independently of the other unit and in its own interests for all purposes under this chapter, including but not limited to separate contract negotiations with the employer and grievance proceedings on behalf of its members. . .
>
> . . .
>
> (c) This section shall not be construed to limit or prohibit the right of any employee or group of employees who are otherwise authorized to do so, to petition the board for the certification as an independent collective bargaining unit and for the designation of a representative of their choice.
>
> . . .

Section 1004 was amended to provide:

> The provisions of this chapter shall apply to the uniformed state police in the department of public safety except for matters of discipline, disciplinary action, transfer or suspension and those items, including any plan of compensation, specifically covered by statute.

Subsequent to passage of Act No. 193, employees designated as Levels C and D managers were included in a separate bargaining unit, and VSEA continued to represent these employees. The Board did not issue an order certifying this action.

SELRA was further amended by Amendments to SELRA by Act No. 109 of the 1977 Session of the Vermont General Assembly. It was amended in pertinent part as follows:

Section 902, subsections (3) and (5), were amended to provide:

> (3) "Collective bargaining unit," means the employees of an employer, being either all of the employees, the members of a department or agency or such other unit or units as the board may determine are most appropriate to best represent the interests of employees.
>
> . . .
>
> (5) "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont . . . but excluding an individual:

(A) Exempt or excluded from the state classified service under the provisions of section 311 of this title, except that the state police in the department of public safety are included within the meaning of "state employee",

. . .

(F) Employed as a managerial employee,

. . .

Section 902, subsection (13) was deleted.

Section 902, subsections (16), (17) and (18) were added to provide:

(16) "Supervisory employee" means an individual finally determined by the board as having authority in the interest of the employer to hire, transfer, suspend, layoff, 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.

(17) "Confidential employee" means an employee finally determined by the board as having responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters that would make membership in or representation by an employee organization incompatible with his official duties.

(18) "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.

Section 906 was amended to provide:

The commissioner of personnel shall determine those positions in the classified service whose incumbents he believes should be designated as managerial, supervisory or confidential employees. Any disputes arising therefrom shall be finally resolved by the board.

Section 907 was amended to provide:

Classified employees in the management unit certified by the board, who are determined to be supervisory employees as defined by section 902 of this title and who are not determined to be managerial or confidential employees as defined by section 902 of this title, shall remain members of that unit, which shall hereinafter be referred to as the "supervisory" unit. Employees who are determined to be supervisory employees under the provisions of section 906 of this title shall

> become members of the supervisory unit. A representative election shall not be required as a result of this change.
>
> **Section 908 was repealed.**
>
> **Section 1004 was amended to provide:**
>
> The provisions of this chapter shall apply to the state police in the department of public safety except for matters of discipline, disciplinary action, transfer or suspension and those items specifically covered by statute.

Subsequent to passage of Act No. 109, the Labor Relations Board took no action certifying VSEA as the representative of employees in the supervisory unit. There have been no substantive changes since 1977 to the provisions of SELRA which are material to considering the motion to dismiss this petition.

Discussion

We consider the State's motion to dismiss this petition pursuant to Section 941(d) of SELRA, which provides that the Board "shall investigate the petition, and (1) if it finds reasonable cause to believe that a question of unit determination or representation exists, an appropriate hearing shall be scheduled before the board . . ., or (2) dismiss the petition, based upon the absence of substantive evidence." The State contends that the petition filed by VSEA to remove Vermont State Police Lieutenants from the Supervisory Unit represented by VSEA, and place them in their own bargaining unit, should be dismissed because SELRA only authorizes a single supervisory unit in state government.

VSEA contends that, under SELRA, all individuals who are defined as "state employees" are guaranteed the right to create and join collective bargaining units, and elect representatives of their own choosing for purposes of collective bargaining. VSEA asserts that Sections 903(a), 927(a) and 941 of SELRA, by their express terms, guarantee

these rights to all employees eligible for union membership, including supervisors. VSEA contends that the Legislature did not create Section 907 of SELRA to deny supervisory employees the right to create multiple bargaining units, but created it to address management's concern that a perceived conflict of interest existed at a time when supervisory employees previously belonged to the same VSEA bargaining unit as the employees they supervised. VSEA requests that the Labor Relations Board allow State Police Lieutenants to move forward with their petition so that the Board can determine after a hearing whether they constitute an appropriate bargaining unit.

In considering the motion to dismiss, we follow the rules of statutory construction set forth by the Vermont Supreme Court. The primary objective in interpreting statutes is to give effect to the intent of the Legislature, which we attempt to discern first by looking to the language of the statute.[2] In determining legislative intent, we look beyond the language of a particular section, standing alone, to the whole statute.[3] Provisions that are part of the same statutory scheme must be read in context and the entire statutory scheme read together so the legislative intention can be ascertained from the whole of the enactments.[4]

In applying these rules of statutory construction, the statutory scheme set forth in SELRA on composition of bargaining units can only be understood if the evolution of the pertinent statutory language and related developments are examined. When originally enacted in 1969, SELRA did not define "managerial" or "supervisory" employees. It provided generally in Section 927(a) that the "board shall decide the unit appropriate for collective bargaining in each case and those employees to be included therein, in order to

[2] Grievance of West and Cray, 165 Vt. 445, 449 (1996).
[3] Id.
[4] In re Grievance of Danforth, 174 Vt. 231, 238 (2002).

assure the employees the fullest freedom in exercising the rights guaranteed by this chapter." It further provided in Section 941(a) that "(n)o bargaining unit or collective bargaining representatives shall be recognized by the employer until formally certified by the board." Shortly after SELRA's enactment, the Board certified VSEA as the bargaining representative of state employees, which included non-supervisory employees and employees who had supervisory responsibilities, in one bargaining unit.

The Legislature then amended SELRA in 1972 to define "managers" and to designate four levels of management positions – A, B, C and D. Managers in Levels A and B were excluded from collective bargaining rights. Managers in Levels C and D were granted such rights and were allowed to form a combined independent bargaining unit separate from non-management employees. Alternatively, VSEA was allowed to continue to represent C and D level managers as a separate bargaining unit from non-management employees if such employees did not organize independently.

These provisions were supplemented by the following language: "This section shall not be construed to limit or prohibit the right of any employee or group of employees who are otherwise authorized to do so, to petition the board for the certification as an independent collective bargaining unit and for the designation of a representative of their choice." Subsequent to this 1972 amendment of SELRA, employees designated as Levels C and D managers were included in a separate bargaining unit, and VSEA continued to represent these employees. The Board did not issue an order certifying this action.

The 1972 amendments cited in the above paragraph were then completely revised by further amendment of SELRA in 1977. The Legislature rescinded its designation of

four management levels, and replaced them with definitions of “managerial employee”, “supervisory employee”, and “confidential employee”. Managerial employees were prohibited from inclusion in a bargaining unit and representation by an employee organization. The Commissioner of Personnel was given the responsibility in a revised Section 906 to determine the designation of positions as managerial, supervisory or confidential; the Board was charged with resolving any disputes which arose from such designations. The Legislature enacted the following language in section 907:

> Classified employees in the management unit certified by the board, who are determined to be supervisory employees as defined by section 902 of this title and who are not determined to be managerial or confidential employees as defined by section 902 of this title, shall remain members of that unit, which shall hereinafter be referred to as the “supervisory” unit. Employees who are determined to be supervisory employees under the provisions of section 906 of this title shall become members of the supervisory unit. A representative election shall not be required as a result of this change.

Further, the Legislature repealed the language in the 1972 legislation providing: “This section shall not be construed to limit or prohibit the right of any employee or group of employees who are otherwise authorized to do so, to petition the board for the certification as an independent collective bargaining unit and for the designation of a representative of their choice.” Neither the 1972 nor 1977 amendments to SELRA changed the general provisions on determination of bargaining units contained in Sections 927 and 941 as originally enacted in 1969. Since 1977, there have been no substantive changes to the provisions of SELRA which are material to deciding whether to dismiss the petition in this matter.

This evolution of the pertinent statutory language allows us to place in context the provisions that are part of the statutory scheme on bargaining unit determinations, and enables us to better read the entire statutory scheme together to determine legislative

intent. It is particularly notable that the Legislature enacted Section 907 providing explicitly for a single supervisory bargaining unit eight years after the general unit determination provisions contained in Sections 927 and 941 were enacted.

The Legislature is presumed to make changes in light of existing law.[5] Where two statutory provisions cover the same subject and one is more specific than the other, they are harmonized by giving effect to the more specific provision according to its terms.[6] Also, newer statutory provisions will be enforced over older statutory provisions if there is a conflict.[7]

The Legislature presumably knew of the existing general provisions of Sections 927 and 941 when it enacted the more specific provisions of Section 907 in 1977 creating a single supervisory unit by legislative act without review and certification by the Board. Since these statutory provisions cover the same subject of determination of bargaining units, they are harmonized by giving effect to the more specific Section 907.

Moreover, the provision in Section 927 that the Board shall decide the appropriate unit in each case appears to conflict with Section 907's creation of a supervisory bargaining unit without Board involvement. Also, the provision in Section 941 that no bargaining unit or collective bargaining representatives shall be recognized by the employer until formally certified by the Board similarly appears to conflict with Section 907's creation of a supervisory bargaining unit without a union representation election and certification by the Board. Since Section 907 is a newer statutory provision than Sections 927 and 941, the provisions of Section 907 are enforced over Sections 927 and

[5] In re Grievance of Danforth, 174 Vt. at 238.
[6] Our Lady of Ephesus House of Prayer, Inc. v. Town of Jamaica, 178 Vt. 35 (2005).
[7] Id.

941. In sum, the broader, general provisions of Sections 927 and 941 yield to the more specific and later enacted provisions of Section 907.

In interpreting the provisions of Section 907, we again apply rules of statutory construction created by the Vermont Supreme Court. Where the meaning of a statute is plain and unambiguous, it must be enforced according to its terms.[8] Presumably, statutory language is inserted advisedly, and with intent that it should be given meaning and force.[9] Where a statute's meaning is plain and is directed toward a rational result, arguments that sound policy requires a contrary construction have no weight.[10]

In applying these rules of construction here, we conclude that Section 907 plainly and unambiguously provides for a single supervisory bargaining unit in state government. It provides that employees who previously were included in the single management unit in state government "who are determined to be supervisory employees shall" be placed in "the 'supervisory' unit". It further states that "employees who are determined to be supervisory employees . . . shall become members of the supervisory unit." This latter provision covers individuals who previously were not included in the management unit but who are designated supervisors after the effective date of the 1977 amendments to SELRA. Section 907 consistently refers to "the" supervisory unit, and consistently refers to the supervisory "unit" in the singular. This specific statutory language presumably was inserted with the intent that that it should be given meaning and force.

The meaning of Section 907 is plain and directed toward the rational result of creating a single supervisory unit in state government. Any arguments that sound policy

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[8] Petition of the VSEA, Inc., 143 Vt. 636, 640-41 (1983).
[9] Vermont State Colleges Faculty Federation, AFL Local 3180, AFL-CIO and Vermont State Colleges, 138 Vt. 451, 455 (1980).
[10] Id. at 456.

requires typical Board review of this petition under appropriate unit standards carries no weight under these circumstances. The Legislature has explicitly provided for a statutorily-created bargaining unit outside of typical unit determination processes. This Board decision cannot deviate from the existing statutory intent.

Based on the foregoing reasons, it is ordered that the petition for election of collective bargaining representative filed in this matter is dismissed.

Dated this 22nd day of August, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Gary F. Karnedy

Gary F. Karnedy

/s/ Louis P. Lacroix

Louis P. Lacroix

/s/ Linda P. McIntire

Linda P. McIntire

/s/ Alan Willard

Alan Willard