Resolving Unit Determination Issues

A. Generally

Employer challenges to the bargaining unit proposed by the union most often fall into two areas: 1) whether an individual or individuals are supervisors or confidential employees and, thus, ineligible to belong to a bargaining unit; or 2) whether the bargaining unit proposed by the union is an appropriate bargaining unit.[1] The Board Executive Director intervenes actively with the parties to seek to resolve any unit determination issues in dispute. The Executive Director will make the parties aware of Board case law precedents on the issue(s) in dispute, and will engage in telephone conference calls and/or meetings with the parties to seek to informally resolve issues. Unit disputes are informally resolved in many instances. If unit issues are not informally resolved, then a panel of three Board members will decide the matter through issuance of written findings of fact, opinion and order after a hearing and filing of briefs.

The VLRB is called upon to make unit determination decisions most often when employers challenge the bargaining unit proposed by a union petitioning to be exclusive bargaining representative of a group of employees. The Board must resolve the unit determination questions prior to conducting an election in which employees decide whether they wish to be represented by the union. The VLRB also may decide unit issues as a result of a unit clarification petition filed by an employer

[1] Note that unit determination issues do not arise under the Independent Direct Support Providers Labor Relations Act because the Act provides that the "bargaining unit for purposes of collective bargaining pursuant to this chapter shall be one statewide unit of independent direct support providers", and the definition of providers is specified by the Act. 21 V.S.A. §1631(6), (8), (9) and (10); §1635(c). The same is true under the Early Care and Education Providers Labor Relations Act because the Act provides that "(t)he bargaining unit shall be composed of licensed home child care providers, registered home child care providers, and legally exempt child care providers, as defined in this chapter, who have an agreement with the Department (for Children and Families) to accept a subsidy." 33 V.S.A. §3606(a).

or union in a situation where the union is the existing bargaining representative of employees, there is no question concerning the majority status of the union, and there is a dispute over the unit inclusion or exclusion of an employee or employees.

As indicated above, employer challenges to the bargaining unit proposed by the union most often fall into two areas: 1) whether an individual or individuals are supervisors or confidential employees and, thus, ineligible to belong to a bargaining unit; or 2) whether the bargaining unit proposed by the union seeking to represent employees is an appropriate bargaining unit. In this section, substantive case law precedents in these areas will be addressed.

B. Supervisors

Any treatment of the bargaining unit status of supervisors and managers under Vermont labor relations statutes first must recognize the diversity of treatment stemming from five different labor relations statutes in Vermont. Under the State Employees Labor Relations Act, which covers State employees, State Colleges employees and University of Vermont employees, supervisors who are not determined to be managers are entitled to collective bargaining rights as part of a separate supervisory unit.[2] Managers are not entitled to collective bargaining rights.[3] Managers are defined as "an agency, department or institution head, a major program or division director, a major section chief or director of a district operation".[4] Similar positions in the Vermont State Colleges and the University of Vermont are excluded from collective bargaining rights.[5]

[2] 3 V.S.A. §907.
[3] 3 V.S.A. §902(5).
[4] 3 V.S.A. §902(18).
[5] 3 V.S.A. §902(5)(D).

The Labor Relations for Teachers Act covers public school teachers and administrators. Under this statute, principals, assistant principals and administrators other than superintendent and assistant superintendent are entitled to collective bargaining rights in an administrators' organization or as a separate unit of a teachers' organization.[6]

Under the Municipal Employees Relations Act, which covers municipal employees, and the State Labor Relations Act, which generally covers private sector employees not covered under the National Labor Relations Act, no distinction is made between managers and supervisors. Under both acts, and the Judiciary Employees Labor Relations Act, supervisors are excluded from collective bargaining rights.[7] The definition of "supervisor" is identical under the State Employees Act, the Municipal Act, the State Act and the Judiciary Act:

> "an individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment".[8]

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".[9] The statutory test is whether or not an individual can effectively exercise the authority granted him or her; theoretical or paper power will

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[6] 16 V.S.A. §982(b).
[7] 21 V.S.A. §1502(6)(E); 21 V.S.A. §1722(12(B); 3 V.S.A. §1011(8).
[8] 3 V.S.A. §902(16); 21 V.S.A. §1502(13); 21 V.S.A. §1722(12)(B); 3 V.S.A. §1011(17).
[9] Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980).

not make one a supervisor. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor.[10]

The existence of actual power, rather than the frequency of its use, determines supervisory status.[11] However infrequently used, the power exercised must be genuine.[12] Also, the Board has discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are insignificant in comparison with overall duties.[13] Otherwise, an employer could circumvent the very spirit and intent of the statute by creating de minimus supervisory duties for the sole purpose of excluding classes of employees from union representation.[14]

The Board has issued numerous decisions concerning whether employees are supervisors. The vast majority of cases have been filed under the Municipal Act. Those cases largely have concerned whether higher level employees of police departments, fire departments or highway departments are supervisors.

In many cases, the dispute has focused on whether an employee's responsibility to assign work to employees or direct them rises to a level sufficient to make them supervisors. The key determination is whether the employee is exercising independent judgment, or is simply ensuring that standard operating procedures are followed. If an employee is relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor.[15]

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[10] Id. at 351.
[11] AFSCME Local 490 and Town of Bennington, 153 Vt. 318 (1989).
[12] Id.
[13] Id.
[14] Id.
[15] Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). City of Winooski and Winooski Police Employees' Association, 9 VLRB 85 (1986).

However, if an employee's duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing and assigning employees, then the employee meets the statutory definition of supervisor.[16] Exercise of independent judgment in assigning and directing employees must occur on a more than infrequent basis or be significant in comparison with overall duties to make one a supervisor.[17]

The determination whether supervisory status is met must be determined on a case by case basis, and does not turn on job titles. For example, the Board has found police sergeants to be supervisors in some cases,[18] but not in others.[19] It is appropriate to give great weight to a finding that sergeants perform the same duties as patrol officers a significant portion of the time in concluding that sergeants do not meet the statutory definition of supervisory employees.[20]

Similarly, fire lieutenants were found to be supervisors in one case,[21] but not in three other cases.[22] In fire department cases, the determination whether employees are supervisors often turns on directing fire scenes. The general rule applied has been

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[16] South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332 (1988). c.f., South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995).
[17] AFSCME Local 490 and Town of Bennington, 153 Vt. 318 (1989). Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991).
[18] New England Police Benevolent Association and City of Rutland, 34 VLRB 274 (2018). Colchester Police Officers Association and Town of Colchester, 5 VLRB 43 (1982).
[19] Colchester Police Officers Association and Town of Colchester, 26 VLRB 9 (2003). United Electrical, Radio and Machine Workers of America and Town of Springfield, 20 VLRB 5 (1997). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995). Milton Police Benevolent Association and Town of Milton, 13 VLRB 69 (1990). AFSCME Local 490 and Town of Bennington, 11 VLRB 89 (l988). Winooski, supra.
[20] Bennington, 153 Vt. at 323-24. Colchester Police Officers Association and Town of Colchester, 26 VLRB at 22-23.
[21] NAGE, National Association of Firefighters and City of Burlington, 1 VLRB 464 (1978).
[22] Burlington Firefighters Association and City of Burlington, 18 VLRB 137 (1995). Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987). Springfield Firefighters Association, Local 2750, IAFF and Town of Springfield, 3 VLRB 237 (1980).

that deputy chiefs, captains or lieutenants who direct firefighters at the scene of a fire are supervisors, but the Board also has recognized exceptions or qualifications to this general rule.[23] Lieutenants or captains who performed some directing duties at the fire scene were not supervisors under the following circumstances:

- Captains or lieutenants directed fire fighting work only in the absence of a superior officer.[24]

- Lieutenant only directed one firefighter at minor or routine fire.[25]

- Firefighting members of the Department generally knew what duties they were supposed to perform at a fire, and non-supervisory employees also served as persons in charge at a fire.[26]

- Infrequent assigning and directing responsibilities at major structural fire, combined with unhelpful general evidence on such responsibilities at other fires.[27]

In several cases, the Board has addressed whether assigning, directing and other responsibilities of working forepersons of public works departments are sufficient to make them supervisory employees. In two cases, the Board concluded that assigning and directing responsibilities of working forepersons were sufficient to result in supervisory status.[28] In two other cases, the Board determined that

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[23] South Burlington Career Firefighters Association and City of South Burlington, 15 VLRB 93, 103-104 (1992).
[24] Burlington Firefighters Association and City of Burlington, 18 VLRB 137 (1995). Springfield Firefighters Local #2750, IAFF, AFL-CIO and Town of Springfield, 3 VLRB 237 (1980). Brattleboro, 1 VLRB 248 (1978).
[25] Springfield, supra.
[26] Burlington Firefighters Association and City of Burlington, 18 VLRB 137 (1995). Local 1343, AFSCME, AFL-CIO and City of St. Albans Fire Department, 10 VLRB 99 (1987).
[27] City of Montpelier and Local 2287, IAFF, 18 VLRB 374 (1995). South Burlington Career Firefighters Association and City of South Burlington, 15 VLRB 93, 98, 103-104 (1992).
[28] AFSCME Local 1201, Fair Haven Town Employees Chapter and Town of Fair Haven, 23 VLRB 230 (2000). AFSCME Local 490 and Town of Bennington, 1 VLRB 239 (1978).

working forepersons were not supervisory employees because effective supervisory authority over public works employees resided with the public works director.[29]

In other cases, the ability of an employee to discipline, or effectively recommend discipline, has been at issue. The authority to take a specific disciplinary action or effectively recommend a specific disciplinary action must be demonstrated for supervisory status to be found.[30] If the employee can recommend disciplinary action, but the recommendation is not followed, then the employee is not a supervisor.[31] The authority to send an employee home for the remainder of the shift by itself is insufficient to constitute supervisory authority.[32]

The preparing of performance evaluations on both probationary and non-probationary employees has been cited by employers to justify a supervisory designation. The Board has indicated that, to prevail on such a claim concerning probationary employees, an employer must present sufficient evidence to demonstrate that the evaluations are given significant weight in determining whether a probationary employee attains permanent status, the preparing of such evaluations is done more than infrequently, and the recommendations made on the evaluations as to attainment of permanent status generally are followed.[33]

In addressing the issue of employees preparing performance evaluations on non-probationary employees, the Board has determined that an individual who prepares performance evaluations is not a supervisor where the individual is unable to take any adverse action against an employee being evaluated, such as placing an

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[29] City of St. Albans and Local 1343, AFSCME, AFL-CIO, 7 VLRB 48 (1984). AFSCME and Town of Windsor, 6 VLRB 197 (1983).
[30] New England Police Benevolent Association and City of Rutland, 34 VLRB 274, 286 (2018). Colchester Police Officers Association and Town of Colchester, 26 VLRB 9, 17 (2003). Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 85 (1986).
[31] Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987).
[32] IAFF and Town of Hartford, 146 Vt. 371 (1985).
[33] Burlington Firefighters Association and City of Burlington, 18 VLRB 137, 147-148 (1995).

employee in a warning period, or where the individual is unable to reward an employee who receives exemplary evaluations.[34]

In cases where the hiring authority of individuals is at issue, it must be demonstrated that an employee actually has taken the action or effectively recommended the action, on more than a rare or infrequent basis, to warrant a supervisory designation.[35] In the area of adjusting grievances, the employee must not only have the authority to hear grievances, but it also must be demonstrated the employee can actually settle or resolve a grievance for that employee to be considered a supervisor.[36] In the areas of promoting and transferring employees, it must be demonstrated an employee actually has taken the action or effectively recommended the action.[37]

An employee is not a supervisor if there is only one employee under his or her direction. The statutory language is in the plural, requiring supervisory authority over employees for an individual to be considered a supervisor.[38] Supervisory

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[34] Id. Colchester Police Officers Association and Town of Colchester, 26 VLRB 9, 17-18 (2003). Department of Motor Vehicles Designation Dispute (Re: Motor Vehicle Senior Inspection Specialist, 22 VLRB 349, 357-58 (1999). City of Montpelier and Local 2287, IAFF, 18 VLRB 374, 389-90 (1995). Department of Public Safety Personnel Designation Dispute (State Police Sergeants), 14 VLRB 176, 186 (1991).

[35] Designation Dispute (Re: Woodbeck, Vermont Agency of Transportation), 29 VLRB 91, 102 (2007). Colchester Police Officers Association and Town of Colchester, 26 VLRB at 16. Proctor Education Association/Vermont-NEA/NEA and Proctor School Board, 18 VLRB 174, 185 (1995). Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992).

[36] New England Police Benevolent Association and City of Rutland, 34 VLRB 274, 287 (2018). Colchester Police Officers Association and Town of Colchester, 26 VLRB at 18. AFSCME and Town of Windsor, 6 VLRB 197 (1983).

[37] Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205 (1992). Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 80-81 (1989). Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). Local 1343, AFSCME and City of St. Albans Fire Department, 10 VLRB 99 (1987).

[38] United Electrical, Radio and Machine Workers of America and University of Vermont, 20 VLRB 219, 262-64 (1997). Agency of Transportation Designation Disputes, 19 VLRB 267, 271 (1996). South Burlington Police Officers Association and City of South Burlington, 11 VLRB

responsibilities over two employees are sufficient to result in supervisory status as long as the supervisory responsibilities are significant in comparison with overall duties.[39]

In two cases, the Board decided whether responsibility over seasonal employees conferred supervisory status on town recreation directors. In one case, the Board concluded that the recreation director was a supervisor where she had complete autonomy in hiring 10-14 seasonal employees each year, including seeking and interviewing candidates for hire, determining which employees to hire, and evaluating employees for re-hire.[40] In the other case, the Board found supervisory status where the recreation director's hiring recommendations for seasonal employees were followed in all instances, and the director had the authority to effectively recommend the dismissal of employees.[41] In the latter case, the Board also determined that the town constable was a supervisor based on his authority to effectively recommend the hiring of part-time special police officers, and assign and direct them.

C. Managerial Employees

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

332, 338 (1988). Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 151 (1987). City of Winooski and Winooski Police Employees Association, 9 VLRB 85, 91 (1986). Health Dept. Personnel Designation Dispute (Re: Supervisory Chemist, Toxicology), 5 VLRB 245, 247 (1982).

[39] Designation Dispute (Re: Woodbeck, Vermont Agency of Transportation, 29 VLRB 91, 101-02 (2007). United Electrical, Radio and Machine Workers of America and University of Vermont, 20 VLRB 219, 261-62 (1997). Department of Motor Vehicles Designation Dispute (Re: Motor Vehicle Senior Inspection Specialist), 22 VLRB 349, 354-56 (1999).

[40] Local 1343, AFSCME, AFL-CIO and Town of Shelburne, 20 VLRB 15, 21-23 (1997).

[41] PACE International Union and Town of Pittsford, 23 VLRB 347 (2000).

> "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.[42]

Individuals employed as managers are ineligible to be included in a collective bargaining unit.[43] The VLRB has construed the managerial definition to apply to positions in the State classified service as well as to encompass similar positions in the Vermont State Colleges.[44]

The supervisory authority defined in the statute is all clearly encompassed in managerial responsibility as well.[45] The two descriptions are not mutually exclusive; it is simply that, in terms of responsibility, some supervisors justify managerial designations, and some do not.[46] An employee's discretionary authority in the central areas of management of budget administration, personnel administration and policy matters will be examined to determine if that employee is a manager.[47] 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.[48]

Where an employer seeks to exclude an individual from a bargaining unit as a manager, a considerable amount of evidence must be advanced to warrant such

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[42] 3 V.S.A. §902(18).
[43] 3 V.S.A. §902(5) (f).
[44] VFT, AFT, AFL-CIO and Vermont State Colleges, 8 VLRB 6, 18 (1985).
[45] In re Personnel Designations, 139 Vt. 91 (1980).
[46] Id.
[47] Vermont Department of Public Safety Designation Dispute (Re: State Police Lieutenants), 32 VLRB 145, 170-171 (2012). 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).
[48] Vermont Department of Public Safety Designation Dispute, 32 VLRB at 171. United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB at 36. VFT, AFT, AFL-CIO and Vermont State Colleges, supra.

exclusion.[49] In each case where the employer seeks to exclude the head of a section of a division within a state agency or a state college, the Board closely examines the structure of the particular section, the responsibilities of the employees within it, and the relationship of the section and its employees to the larger department or agency structure to determine whether the employee heading the section is a managerial employee.[50]

The Judiciary Employees Labor Relations Act also contains a specific definition for managerial employees, and individuals employed as managers are ineligible to be included in a collective bargaining unit.[51] The VLRB has had no managerial cases under this Act.

D. Confidential Employees

Under the State Employees Labor Relations Act, the Municipal Employee Relations Act and the Judiciary Employees Labor Relations Act, individuals who meet the statutory definition of "confidential employee" are ineligible to be included in a bargaining unit. The term "confidential employee" is defined in these statutes as an employee whose "responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters would make membership in or representation by an employee organization incompatible with . . . official duties".[52]

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[49] 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).

[50] United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB at 39. Department of Corrections Designation Dispute (Re: Corrections Systems Information Chief), 18 VLRB 323, 329 (1995). Agency of Transportation Designation Dispute (Re: Transportation Senior Planner), 17 VLRB at 143.

[51] 3 V.S.A. §1011(13), §1011(18).

[52] 3 V.S.A. §902(17); 21 V.S.A. §1722(6); 3 V.S.A. §1011(17).

A finding that a person assists or acts in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations is a necessary element under the labor nexus rule if an employee is to be classified as a confidential employee.[53] The essential issue is whether challenged employees have such a close relation to the employer's management of labor relations that the employer would be prejudiced by their inclusion in a bargaining unit with other employees.[54] Employers are entitled to rely upon employees who are not subject to divided loyalties, and employees should not be in a position where they must choose between their obligations to a union and to their employer.[55]

Employees who do not have access to confidential information as part of their regular duties do not meet these tests. Employees whose duties require only occasional access to confidential material and which could be reassigned, or employees who occasionally substitute for confidential employees, do not meet the definition of confidential employee.[56] Further, an employer must demonstrate not only access to confidential information, but that such access would adversely impact on the employer's conduct of its labor relations policies if employees are included in a bargaining unit.[57]

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[53] In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983).
[54] Harwood Union High School District and Harwood Education Association, 172 Vt. 167, 176 (2001).
[55] Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 68 (1982).
[56] Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). American Federation of Teachers, Local 333 and Washington Central Supervisory Union, 1 VLRB 288 (1978).
[57] Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 78 (1989).

The Board has often examined whether secretaries to primary and secondary public school principals and other school administrators are confidential employees. In applying the standards delineated above, in most cases the Board has found confidential duties to be absent, or only occasional or intermittent, and thus has concluded the secretaries were not confidential.[58] In three of these cases, the VLRB concluded that secretaries who typed classroom observations and/or performance evaluations, which were confidential materials, would not be excluded from the bargaining unit as confidential employees because the employer had demonstrated no harm if such employees were included in the bargaining unit.[59] In a minority of school cases, the VLRB has concluded that secretaries' access to confidential information as part of their regular duties warranted a confidential designation.[60]

The Board also has decided several cases involving the confidential status of secretaries and administrative assistants outside of the primary and secondary public school context. The Board has found secretaries to be confidential employees in

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[58] Green Mountain-NEA (ESP Unit)/Vermont-NEA/NEA and Jericho Elementary School Board, Green Mountain-NEA (ESP Unit)/Vermont-NEA/NEA and Mount Mansfield Union High School Board 27 VLRB 265 (2004). Ferrisburg Central School Board and Ferrisburg Educational Support Personnel Association, 24 VLRB 104 (2001). Harwood Union High School District and Harwood Education Association/Vermont-NEA/NEA, 22 VLRB 53 (1999); *Affirmed*, 172 Vt. 167 (2001). Proctor Education Association/Vermont-NEA/NEA and Proctor School Board, 18 VLRB 174 (1995). Addison Northwest Education Association, Vermont-NEA, 12 VLRB 199 (1989). Colchester, supra. Orange Southwest Supervisory Union, et al. and Orange Southwest Teachers' Association, 11 VLRB 285 (1988). Grand Isle Staff Association, Local 136, Vermont-NEA and Alburg Board of School Directors, 6 VLRB 108 (1983). Windsor, supra. Rutland City School Department, supra.

[59] Colchester, supra. Proctor, supra. Harwood, supra.

[60] Mount Mansfield, supra. Vergennes Union High School and Custodian / Maintenance Workers / Secretaries/Paraeducators Association of Vergennes Union High School, 24 VLRB 104 (2001). Rutland City School Department, supra. Castleton, supra. Washington Central, supra.

some of these cases.[61] The Board concluded that the duties of secretaries and administrative assistants did not warrant a confidential designation in other cases.[62]

Another job function area that the VLRB has frequently examined for confidential status concerns employees serving in a fiscal role, such as bookkeepers, accountants, financial analysts, payroll clerks or accounts payable clerks. In many cases, the VLRB concluded that the employees were privy to confidential information as part of their regular duties, which information was not available to the public and the union, that would make membership in, or representation by, a union incompatible with their duties.[63] However, employees with fiscal duties who need only occasional access to confidential materials, which duties can be feasibly reassigned, have been held not to be confidential employees.[64]

In one case, the Board rejected an employer's contention that employees should be deemed confidential because their access to budgetary information on the computer meant they could gain access to confidential collective bargaining information such as proposed salary increases. The Board noted that the employees'

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[61] International Union of Operating Engineers, Local 98, AFL-CIO, 28 VLRB 117 (2006). United Steelworkers of America, AFL-CIO and Town of Barre, 27 VLRB 229 (2004). United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB 1, 47-54 (2002). Village of Essex Junction and Local 1343, AFSCME, 12 VLRB 211 (1989). City of Burlington and Local 1343, AFSCME, 9 VLRB 116 (1986). Vermont State Hospital Personnel Designation Disputes, supra.

[62] International Union of Public Employees and Town of Springfield, 32 VLRB 368 (2013). United Professions of Vermont/AFT and Vermont State Colleges, supra. AFSCME Council 93, Local 1201 and Rutland Housing Authority, 18 VLRB 1 (1995). IBEW Local 300 and Morristown Police Department, 15 VLRB 66 (1992).

[63] City of Rutland and AFSCME Council 93, Local 1201, 33 VLRB 101 (2014). United Steelworkers of America, AFL-CIO and Town of Barre, 27 VLRB 229 (2004). Colchester, supra. Washington South District Teachers' Association, Vermont-NEA and Washington South Supervisory Union Board of School Directors, 12 VLRB 22 (1989). Orange Southwest, supra. AFSCME Local 490 and Town of Bennington, 11 VLRB 89 (1988). Personnel Designation Dispute of Calderara, 10 VLRB 261 (1987). Vermont Federation of Teachers, AFT, AFL-CIO and Vermont State Colleges, 7 VLRB 6, 21-22 (1984). United Steelworkers of America, Local 8774 and City of Barre, 5 VLRB 3 (1982). Rutland City School Department, supra.

[64] Essex Junction, supra. Colchester, supra. Orange Southwest, supra.

actual job functions with respect to the budget were limited to non-confidential data entry, and indicated extreme reluctance to exclude employees from collective bargaining units because an employer's computer software was not sophisticated enough to limit employee access to information.[65]

In two other cases, the Board determined whether information technology employees were confidential employees. One case involved information technology employees at each of the four campus-based colleges of the Vermont State Colleges. The Board determined that the director of computer services, as the chief administrator of the campus computer system, and the network administrator, as the chief "hands-on" person maintaining the campus computer system and access to it, at each of the colleges effectively acted in a confidential capacity to managers carrying out labor relations policies and were confidential employees. The Board determined the remaining information technology employees at the colleges were not confidential employees.[66] In the other case, the Board concluded that two technology assistants employed by a school district should not be excluded from a bargaining unit as confidential employees where the exclusion of two other information technology employees from the bargaining unit sufficed to ensure that the confidentiality interests of the employer were met.[67]

The Board has excluded employees from bargaining units as confidential employees even though they had yet to perform sufficient confidential duties where the Board was persuaded that the employees would be performing confidential duties on a regular basis once they engaged in full performance of their duties.[68] The

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[65] Orange Southwest, supra.
[66] United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB 1, 41-45 (2002).
[67] Hartford School District and Hartford Education Association/Vermont-NEA/NEA, 30 VLRB 1 (2008).
[68] City of Rutland and AFSCME Council 93, Local 1201, 33 VLRB 101 (2014). Washington South District Teachers' Association, Vermont-NEA and Washington South Supervisory Union

Board determined that it would be unreasonable and prejudicial to the employer to allow an employee to remain in the bargaining unit until the full performance of their duties included work of a confidential nature.[69] In so ruling, the Board added the qualifier that a unit clarification petition could be filed if actual experience demonstrated that the employees were not performing confidential duties.[70]

E. Appropriate Bargaining Units

The Municipal Employee Relations Act and the State Employees Labor Relations Act provide similar criteria for the VLRB to take into consideration in determining the appropriateness of bargaining units. The Municipal Act provides the Board shall take into consideration the following criteria:

1) The similarity or divergence of the interests, needs and general conditions of employment of all employees within the proposed bargaining unit. The board may, in its discretion, require that a separate vote be taken among any particular class or type of employee within a proposed unit to determine specifically if the class or type wishes to be included. No bargaining unit shall include both professional employees and other municipal employees unless a majority of such professional employees vote for inclusion in such unit.

2) Whether overfragmentation of units will result from certification to a degree which is likely to produce an adverse effect on the effective representation of other employees of the municipal employer or upon the effective operation of the municipal employer.

Board of School Directors, 12 VLRB 22 (1989). Personnel Designation Dispute of Calderara, 10 VLRB 261 (1987). City of Burlington and Local 1343, AFSCME, 9 VLRB 116 (1986).

[69] Rutland, 33 VLRB at 115. Calderara, 10 VLRB at 266.

[70] Rutland, 33 VLRB at 115. Washington South, 12 VLRB at 28. Calderara, 10 VLRB at 266-67.

3) In determining whether a unit is appropriate the extent to which the employees have organized is not controlling.[71]

Based on these criteria, the Board's primary concerns are to group together only employees who share a similar "community of interests", while at the same time guarding against overfragmentation of units and allowing individuals to exercise rights guaranteed under the Act.[72] There is nothing in the statute requiring that the unit for bargaining be the only appropriate unit or the most appropriate unit; the Act only requires that the unit be appropriate.[73] This clearly contemplates that more than one unit configuration involving a particular group or groups may be appropriate.[74]

The State Employees Act provides that the VLRB shall take the following criteria into consideration in determining the appropriateness of a collective bargaining unit:

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

2) The similarity or divergence of the interests, needs and general conditions of employment of the employees to be represented. The Board may, in its discretion, require that a separate vote be taken among any particular class or type of employees within a proposed unit to determine specifically if the class or type wishes to be included.

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 efficient operation of State government.[75]

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[71] 21 V.S.A. §1724(c).
[72] AFSCME and Town of Middlebury, 6 VLRB 227, 231 (1983). Local 1201, AFSCME, AFL-CIO and Town of Middlebury, 14 VLRB 93, 105 (1991).
[73] Id.
[74] Id.
[75] 3 V.S.A. §941(f).

The State Employees Act also provides that "in determining whether a unit is appropriate . . . the extent to which the employees have organized is not controlling."[76]

The VLRB has interpreted the appropriate unit language in the State Employees Act as a whole as demonstrating a clear legislative intent to allow employees the fullest freedom in selecting the composition of the unit that will best represent their interests as long as the unit is appropriate and will not result in over-fragmentation of units.[77] Similar to the Municipal Act, the bargaining unit approved by the Board need not be the most appropriate unit, only an appropriate unit.[78]

Under both the Municipal Act and the State Employees Act, the criteria appropriate unit decisions most often turn on are community of interests and overfragmentation of units. The following factors are relevant in determining whether a community of interests exists among employees: differences and similarities in method of compensation, hours of work, employment benefits, supervision, qualifications, training, job functions and job sites; and whether employees have frequent contact with each other and have an integration of work functions.[79] A group of employees must at least be a readily identifiable and homogenous group apart from other employees to be an appropriate unit.[80]

The community of interests criterion must be considered together with whether overfragmentation of units will result to a degree which is likely to produce an adverse effect on the effective representation of other employees or upon the

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[76] 3 V.S.A. §927.
[77] Petition of VSEA re: Separate Bargaining Unit for Community Correctional Center Employees, 5 VLRB 82 (1982).
[78] Petition of the VSEA, 143 Vt. 636, 642 (1983).
[79] Middlebury, 6 VLRB at 232.
[80] Id. at 231.

effective operation of the employer. It is Board policy that public rights generally are protected by broader units.[81] As stated by the Board in one case:

> The case against proliferation of public sector bargaining units includes at least these considerations: 1) the difficulty the employer would have in maintaining a tradition of uniformity in the wages, benefits and working conditions provided to similarly-situated employees, 2) possible adverse effects of excessive competition among rival employee organizations which results in Balkanization of employee groups and whipsaw bargaining; and 3) institutional complications of bargaining with a multiplicity of units in view of the need to incorporate the financial impact of negotiated agreements into the budgetary process of the governmental unit, which is usually put to the voters on one statutory date.[82]

However, this does not preclude the Board from carving out an additional bargaining unit from a large bargaining unit if the Board concludes there is not an adverse effect on the operation of government. The conclusion that fewer units "would be preferable as a matter of time and expediency falls far short of establishing an adverse effect upon the effective operation of the . . . employer."[83]

In interpreting the statutory provision that "in determining whether a unit is appropriate . . . the extent to which the employees have organized is not controlling", the Board has held that the extent to which employees have organized may be given weight, provided there are other substantial factors on which to base the unit determination and so long as the extent of organization is not the controlling factor.[84]

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[81] Petition of Vermont State Employees' Association (Re: Agency of Transportation Highway and Maintenance Employees), 24 VLRB 37 (2001). Teamsters Local 597 and Champlain Valley Union High School Board of Directors, 7 VLRB 1 (1984). Champlain Valley Union High School Staff Association, VEA/NEA Local 325 and Champlain Valley Union High School Board of Directors, 3 VLRB 426 (1980).

[82] Champlain Valley, 3 VLRB at 434-435.

[83] International Association of Firefighters, Local 2287 v. City of Montpelier, 133 Vt. 175, 178 (1975). Petition of VSEA, 143 Vt. 636, 645 (1983).

[84] Teamsters Local 597 and University of Vermont, 19 VLRB 64, 82-84 (1996). United Electrical, Radio and Machine Workers of America and University of Vermont, 20 VLRB 219, 258-259 (1997). Teamsters Local 597 and Town of Richmond, 21 VLRB 169, 176-77 (1998). *See also* Local 300, IBEW v. Burlington Electric Light Department, 133 Vt. 258, 261 (1975).

Employee and union choices as to the extent of organizing for collective bargaining purposes can be a significant factor underlying unit determinations, but this factor alone cannot be the controlling factor.[85]

A series of VLRB decisions in 1980 concerning non-teaching staffs in the schools are perhaps most indicative of the effect of the Board policy favoring broader units, particularly when employing units are relatively small, as long as a community of interests exists among employees. The Board decided the cases under the Municipal Act, which covers non-teaching staff of schools.[86] In one case, the petitioning union proposed a bargaining unit consisting of secretaries, aides, cafeteria workers and an attendance officer. The employer objected, contending that the unit should include all eligible non-teaching staff. The VLRB agreed with the employer, and added bus drivers and custodians to the unit.[87]

In three other cases, it was the employer seeking restricted units, while the petitioning associations sought broader units. Again, the VLRB approved the broader units. In two cases, the employers sought to have custodians placed in separate bargaining units than other non-teaching staff. In each case, the Board placed the custodians in the same unit with the other employees.[88] In the remaining case, the Board placed all teacher aides and assistants employed in several schools by a supervisory union in one bargaining unit, rejecting an attempt by the employer to exclude the aides in one of the schools from the unit.[89] In other cases under the Municipal Act, the VLRB has cited its policy favoring broader units and has

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[85] Id.
[86] 21 V.S.A. §1722(12)E; Vermont Education Association and Rutland City School Department, 2 VLRB 108, 110 (1979).
[87] Champlain Valley Union High School Staff Association, supra.
[88] Bellows Falls Union School District, Rockingham School District, 3 VLRB 167 (1980).
[89] Windham Northeast Supervisory Union, 3 VLRB 354 (1980).

uniformly rejected employer attempts to exclude dispatchers from bargaining units with police officers.[90]

The Board has recognized that police department employees have a distinct community of interests from other employees, and has approved union-proposed bargaining units placing police department employees in separate bargaining units from other employees.[91] The Board stated that "law enforcement employees' interests may be better served by having their own bargaining unit given the primary commitment to law enforcement and the obvious hazards and risks inherent in such work distinct from other lines of work."[92] Due to the distinctive nature of law enforcement, it is not unusual for police department employees to have their own bargaining unit; there are numerous municipal police department bargaining units throughout the state.[93] In an early appropriate unit decision of the Board under the Municipal Act, which was approved by the Supreme Court, the Board placed police and fire fighters in separate bargaining units.[94]

Nonetheless, in three cases involving relatively small employers where the Board was asked to determine whether it was appropriate to place police department employees in the same bargaining unit as non-police employees as proposed by the petitioning union, the Board concluded that it was appropriate.[95] In so concluding,

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[90] United Paperworkers International Union and Town of Wilmington, 19 VLRB 308 (1996). Local 200, SEIU, AFL-CIO and Town of Wilmington Police Department, 9 VLRB 166 (1986). AFSCME and Town of Manchester, 9 VLRB 5 (1986). AFSCME and Town of Middlebury, 6 VLRB 227 (1983).

[91] New England Police Benevolent Association and AFSCME Council 93 and Town of Brandon, 34 VLRB 371 (2018). Teamsters Local 597 and University of Vermont, 19 VLRB 64 (1996); *Affirmed*, 167 Vt. 564 (1997). AFSCME and Town of Middlebury, 6 VLRB 227 (1983).

[92] Teamsters Local 597 and University of Vermont, 19 VLRB at 83.

[93] New England Police Benevolent Association and AFSCME Council 93 and Town of Brandon, 34 VLRB at 382. Teamsters Local 597 and University of Vermont, 19 VLRB at 78.

[94] IAFF, Local 2287 and City of Montpelier, 133 Vt. 175 (1975).

[95] United Paperworkers International Union and Town of Wilmington, 19 VLRB 308 (1996). Local 1201, AFSCME, AFL-CIO and Town of Middlebury, 14 VLRB 93 (1991). Local 1369, AFSCME, AFL-CIO and Town of Barre, 12 VLRB 7 (1989).

the Board noted that the petitioned-for unit only has to be an appropriate unit, not the most appropriate unit.[96] In each of those cases, the police department employees were placed in a bargaining unit with a significant number or percentage of other employees of the municipality eligible to be represented by a union.

In another case, the Board concluded that a bargaining unit of three police officers and two water and sewer department employees of a town was not appropriate where five Department of Public Works employees and other town employees were not included in the bargaining unit.[97] The Board concluded that this unit proposed by the union did not guard against overfragmentation of units given that the majority of employees eligible to be represented by a union in a town of 18 employees would be excluded from the bargaining unit.[98] The Board indicated that if the union's proposed unit was approved, the Board would be giving improper weight to the extent of the union's organizing.[99]

In a municipal case, the Board determined that it was not appropriate to place electric department employees of a town in the same bargaining unit as other town employees.[100] The Board relied on the autonomous and separate nature of electric department operations. The Board determined that the separate supervision, wage systems and budget processes, as well as limited interaction between electric department employees and other town employees, warranted separate bargaining units. In an early appropriate unit decision of the Board under the Municipal Act, which was approved by the Supreme Court, the Board decided that employees of

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[96] Wilmington, 19 VLRB at 306. Middlebury, 14 VLRB at 105. Barre, 12 VLRB at 17.
[97] Teamsters Local 597 and Town of Richmond, 21 VLRB 169 (1998).
[98] Id. at 176.
[99] Id. at 176-77.
[100] IBEW Local 300 and Town of Stowe, 23 VLRB 264 (2000).

one of the two operating plants of an electric light department constituted an appropriate bargaining unit.[101]

In five cases where involved employees had been included in a bargaining unit with extensive bargaining history, the Board determined whether it was appropriate to grant petitions filed by unions to carve out a smaller separate bargaining unit from the larger existing unit.

In three of these cases, the Board indicated that a petitioner seeking to carve out a smaller bargaining unit from a larger unit must present a compelling case to justify disrupting the existing unit structure.[102] This is done by presenting specific evidence that the interests of petitioned-for employees have not been effectively represented in negotiations or otherwise.[103] The Board concluded in these three cases that the petitioning union had not presented a compelling case to justify disrupting the existing unit structure.

Two of these three cases did not involve police department employees so there was no consideration of the distinctive nature of law enforcement when the Board decided the cases.[104] The third case, Petition of Vermont State Employees' Association (Re: Sworn Law Enforcement Officers), did involve law enforcement employees. VSEA sought to remove the sworn law enforcement officers of the Vermont Department of Fish & Wildlife, the Vermont Department of Liquor Control and the Vermont Department of Motor Vehicles from the broadly-based Non-Management Unit represented by VSEA, and organize the law enforcement officers into a separate bargaining unit.

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[101] Local 300, IBEW and Burlington Electric Light Department, 133 Vt. 258 (1975).
[102] Petition of Vermont State Employees' Association (Re: Sworn Law Enforcement Officers), 32 VLRB 1, 18 (2012). Petition for Election of Collective Bargaining Representative (Re: Burlington Airport Employees), 28 VLRB 87, 99 (2005). Petition of VSEA (Re: Agency of Transportation), 24 VLRB 37, 48 (2001).
[103] Id.
[104] Burlington Airport Employees. Highway and Maintenance Employees.

In dismissing the VSEA petition. the Board determined that approving the proposed unit of law enforcement officers would result in over-fragmentation of units to a degree which was likely to produce an adverse effect on the effective representation of other employees and upon the efficient operation of the employer.[105] In so concluding, the Board relied on the fact that the proposed unit constituted just one percent of the state employees eligible to be represented by an employee organization. The Board stated: "If we were to allow a bargaining unit such as is proposed here, the precedent established would create the potential of setting into motion a significant expansion of bargaining units in state government and resulting complications of dealing with a multiplicity of bargaining units."[106] The Board also distinguished its previous decisions approving union-proposed bargaining units placing police department employees in separate bargaining units, stating: "(I)n those cases, the result was one police unit per employer. A decision approving the VSEA-proposed unit would result in two law enforcement units for the State – this one and the State Police Unit. This would create an inappropriate over-fragmentation of units."[107]

In the fourth case in which the Board determined whether it was appropriate to grant a petition filed by a union to carve out a smaller separate bargaining unit from a larger existing unit, the Board granted the petition of a union to create a separate unit of state correctional center employees and remove these employees from a broader unit consisting of non-management employees of state government.[108] In so ruling, the Board credited the general rule that evidence of a meaningful and effective history of negotiations can be a dispositive factor retaining

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[105] 32 VLRB at 17.
[106] Id.
[107] Id. at 18.
[108] Petition of VSEA re: Separate Bargaining Unit for Community Correctional Center Employees, 5 VLRB 82, 96-97 (1982).

an established overall unit and against breaking off a separate unit from the broader unit. However, the Board also credited "(a)nother general rule" which "recognizes that the primary commitment to law enforcement and the obvious hazards and risks creates a specific police community of interest which is likely to produce negotiating demands of little or no concern to other employees and, therefore, put the two in conflict." The Board determined it was evident that such a conflict existed between the correctional employees and the other employees in the broader unit.[109]

In the fifth case, involving whether it was appropriate to grant a petition to remove town police department employees from a larger unit of town employees, the Board determined that the circumstances of the case were much more similar to the correctional center employees case than the other three cases. The Board held that the distinct community of interests among police employees from other employees was sufficiently strong under the circumstances of this case to override a reluctance to disturb a long-established broader bargaining unit. The Board further concluded that over-fragmentation of units would not result to a degree which was likely to produce an adverse effect upon the effective operation of the employer.[110]

In another appropriate unit case decided under the Municipal Act, the Board in a split decision denied a request by a union to combine employees of the Village of Northfield and the Town of Northfield into one bargaining unit. The Town and Village objected to the union's position. The Board concluded that, although harmonious and productive labor relations would best be served by placing the employees in a single bargaining unit, the Municipal Act prohibited the Board from placing the employees of two distinct government entities in one bargaining unit.[111]

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[109] Id. at 97.
[110] New England Police Benevolent Association and AFSCME Council 93 and Town of Brandon, 34 VLRB 371 (2018).
[111] Local 300, International Brotherhood of Electrical Workers and Village and Town of Northfield, 8 VLRB 183, 188-190 (1985).

The Board stated that if "citizens are unwilling to . . . merge(e) Town and Village governments, we believe (the Municipal Act) prohibits us from imposing a single bargaining unit on the Town and Village.:[112]

The Board determined in a 2014 decision that a one person bargaining unit is not appropriate under the Municipal Act. A union filed a petition for election of collective bargaining representative to represent the one police officer employed by a town. The Board determined that collective bargaining presupposes that bargaining is conducted on behalf of more than one employee, and that a one-person unit is explicitly made inappropriate by the Municipal Act's definition of "bargaining unit".[113]

Appropriate unit determinations under the Municipal Act may be affected by the professional status of employees since a bargaining unit may not include professional employees unless the professional employees vote to be included in the unit.[114] "Professional" employee is specifically defined in statute, and the Board requires that the specific criteria contained in the definition must be met before the Board will find professional status.[115] For instance, the Board has concluded that knowledge acquired from a general college education does not meet the requirement of "professional" status that an employee needs "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital".[116]

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[112] Id. at 189.
[113] New England Police Benevolent Association and Town of Weathersfield, 33 VLRB 139 (2014).
[114] 21 V.S.A. §1724(c) (1).
[115] Woodstock Union High School Teachers Organization, Educational Support Personnel Unit and Woodstock Union High School District, 22 VLRB 186, 193-94 (1999).
[116] Id. at 194-95.

Under the State Employees Labor Relations Act, all classified employees of state government eligible to be included in bargaining units are included in four bargaining units: the Supervisory Unit, the State Police Unit, the Corrections Unit and the Non-Management Unit. The Supervisory Unit, which includes all classified employees in state government designated as supervisors, was established by statute.[117] The State Police Unit, which includes state police who are not supervisors, was approved as an appropriate unit by the Board in 1977.[118]

The Corrections Unit includes eligible non-supervisory employees in the state correctional facilities, and results from a 1982 decision of the Board that was affirmed by the Supreme Court.[119] In 1990, the Board decided that it was appropriate to add employees of probation and parole district offices to the Corrections Unit, and affected employees approved the expanded unit.[120]

All remaining classified employees in state government eligible to be represented by an employee organization are included in the Non-Management Unit pursuant to a decision by the Board in 1969, which included all employees in state government eligible to be included in a bargaining unit in a single bargaining unit. Employees in three of the four bargaining units are represented by the same union, the Vermont State Employees' Association. The exception is that employees in the State Police Unit are represented by the Vermont Troopers Association.

A fifth bargaining unit, containing eligible non-supervisory employees of the state liquor stores, previously existed in state government pursuant to approval by the Board and the Supreme Court.[121] However, in 1989, employees in the Liquor

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[117] 3 V.S.A. §907.
[118] Vermont State Policemen, Dept. of Public Safety, 1 VLRB 127 (1977).
[119] Petition of VSEA re: Separate Bargaining Unit for Community Correctional Employees, 5 VLRB 82 (1982). *Affirmed*, 143 Vt. 636 (1983).
[120] Petition of VSEA (re: Bargaining Unit for Department of Corrections Employees), 13 VLRB 287 (1990).
[121] In re Liquor Control Department Non-Supervisory Employees, 135 Vt. 623 (1978).

Unit voted to abolish the unit and the employees were included in the Non-Management Unit.[122]

In a 2001 appropriate unit decision, the Board dismissed a petition filed by VSEA to remove Agency of Transportation highway and maintenance employees from the Non-Management Unit represented by VSEA and organize them into a separate bargaining unit.[123] The Board concluded that the highway and maintenance employees are a sufficiently distinct group apart from other employees in the Non-Management Unit to support a determination that a community of interests exists among them.[124] Nonetheless, in balancing community of interests against overfragmentation of unit considerations, as well as evidence of a meaningful and effective history of negotiations for all unit employees, the Board concluded that the petitioned-for unit was inappropriate.[125] The Board stated:

> The proposed unit, consisting of employees of a division of an agency of state government, is too small a grouping to be appropriate. The four existing units in state government are organized on no less than a department-wide basis. If we were to allow a divisional bargaining unit such as is proposed here, the precedent established would create the potential of setting into motion a significant expansion of bargaining units in state government and resulting complications of dealing with a multiplicity of units. VSEA has not presented a compelling case to justify disrupting the existing unit structure in state government. VSEA has not demonstrated that the interests of AOT highway and maintenance employees have not been adequately accommodated through the existing negotiation process.[126]

In a 2011 appropriate unit decision, the Board dismissed a petition filed by VSEA to remove Vermont State Police Lieutenants from the Supervisory Unit

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[122] VLRB Docket No. 89-22.
[123] Petition of VSEA (Re: Agency of Transportation Highway and Maintenance Employees), 24 VLRB 37 (2001).
[124] Id. at 47.
[125] Id. at 48.
[126] Id. at 48-49.

represented by VSEA and place them in their own bargaining unit. The Board interpreted the provisions of the State Employees Act to provide for a single supervisory unit in state government.[127]

In 2012, the Board dismissed a petition filed by VSEA to remove sworn law enforcement officers of the Vermont Department of Fish & Wildlife, the Vermont Department of Liquor Control, and the Vermont Department of Motor Vehicles from the Non-Management Unit represented by VSEA and place them in a separate bargaining unit. In considering the community of interests criterion together with the overfragmentation of units consideration, the Board concluded that the proposed bargaining unit constituting just one percent of the state employees eligible to be represented by an employee organization would result in overfragmentation of units to a degree which is likely to produce an adverse effect on the effective representation of other employees and upon the effective operation of the employer. The Board held that if the proposed bargaining unit was allowed, the precedent established would create the potential of setting into motion a significant expansion of bargaining units in state government and resulting complications of dealing with a multiplicity of units.[128] The Board reaffirmed this ruling in a 2015 decision, dismissing a petition filed by the New England Police Benevolent Association to represent the same grouping of employees involved in the 2012 decision.[129]

In addition to the four bargaining units containing classified state employees, there are state employees excluded from the state classified service who are included in two bargaining units represented by VSEA. Secretaries, administrative assistants and accountants employed by the Office of Defender General voted in a 1999

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[127] Petition of VSEA (Re: State Police Lieutenants), 31 VLRB 331 (2011).
[128] Petition of VSEA (Re: Sworn Law Enforcement Officers), 32 VLRB 1 (2012).
[129] Petition of New England Police Benevolent Association (Re: Sworn Law Enforcement Officers), 33 VLRB 246 (2015).

election conducted under the State Employees Labor Relations Act to be represented by VSEA.[130]

In 2000, employees of the Vermont Supreme Court eligible to be represented by an employee organization pursuant to the Judiciary Employees Labor Relations Act elected VSEA as their representative.[131] In 2012, the Board granted a joint unit clarification petition filed by VSEA and the Judiciary Department to amend the certification order issued by the Board in 2000. The Board determined that it was appropriate to add probate registers to the bargaining unit without a representation election based on an accretion. The probate registers had been excluded from the definition of employees covered by the Judiciary Employees Act when VSEA became the representative of employees. The probate registers were placed under coverage of the Act in 2011 as part of a court system restructuring. Given this change in statute and the similarity of duties of registers with employees in the existing bargaining unit, the Board determined it was appropriate to add them to the bargaining unit through an accretion.[132]

Six represented bargaining units presently exist in the Vermont State Colleges. In 1973, the Board approved as an appropriate unit all full-time faculty and ranked librarians employed by the State Colleges. The Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, has represented faculty in that unit since 1973. This means that full-time faculty at the Colleges' four campus-based colleges are in the same unit.

In a 1987 decision, the Board determined that the community of interests among full-time faculty and certain part-time faculty was sufficient to include them

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[130] VLRB Docket No. 99-46.
[131] VLRB Docket No. 00-16.
[132] VSEA and Judiciary Department of the State of Vermont, 32 VLRB 21 (2012).

in the same unit.[133] The Supreme Court disagreed, however, concluding that a lack of community of interests existed.[134] The Vermont State Colleges Faculty Federation subsequently filed a petition to represent part-time faculty in a separate bargaining unit. The Board concluded that the bargaining unit was appropriate, and the part-time faculty then voted to approve the bargaining unit and be represented by the Federation.[135] The Supreme Court affirmed the Board decision.[136]

In concluding that it was appropriate for certain part-time faculty of the State Colleges to be represented by a union, the Board had to determine that they met the definition of "state employee" under the State Employees Labor Relations Act of "any individual employed on a permanent or limited-status basis by the State of Vermont, or Vermont State Colleges, including permanent part-time employees."[137] The Board held that certain adjunct faculty were employed on a "limited status" basis, and thus met the definition of "state employee" eligible to be represented by a union. The Board determined that employment on a limited status basis refers to individuals who have a reasonable expectation of continued employment for at least a limited time period and have more than just a tenuous employment relationship.[138]

The Board concluded that part-time faculty who meet the following requirements are employed on a limited-status basis: 1) employed for at least three semesters, or who currently are in their third teaching semester, 2) teach at least six credit hours per academic year, 3) notwithstanding the first two requirements, part-time faculty who have not taught during one academic year, past or present, meet

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[133] VSCFF v. Vermont State Colleges, 10 VLRB 39 (1987).
[134] 152 Vt. 343 (1989).
[135] Vermont State Colleges Faculty Federation, Local 3180, AFT, AFL-CIO and Vermont State Colleges, 14 VLRB 52 (1991).
[136] 159 Vt. 619 (1992).
[137] 3 V.S.A. §902(5).
[138] Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO and Vermont State Colleges, 10 VLRB 39, 47 (1987).

the definition of limited status provided they otherwise regularly teach at least six credit hours per academic year and have been employed for at least three semesters, or who are currently in their third teaching semester; and 4) are not otherwise employed by the Colleges in a full-time position as an administrator or manager.[139]

In a split decision issued in 2018, a Board majority concluded that a petition by the Vermont State Colleges Faculty Federation to add part-time faculty employed in the Distance Learning program at Johnson State College to the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system did not result in an appropriate bargaining unit to the extent it proposed inclusion of part-time faculty exclusively teaching on-line courses in such a unit. Instead, the majority held that a separate unit of distance learning faculty exclusively teaching on-line courses constituted an appropriate unit, and an appropriate unit also resulted if part-time faculty teaching both on-line and campus based courses are added to the existing part-time faculty unit. The dissenting opinion disagreed that the proposed inclusion of distance learning faculty in the existing part-time faculty bargaining unit was inappropriate.[140]

In a 2008 decision, the Board addressed whether it was appropriate to place instructors of the Northeast Kingdom School Development Center, which is collaboration between Lyndon State College and the nine supervisory unions of the Northeast Kingdom to provide professional development for area teachers, in existing full-time and part-time State Colleges faculty bargaining units. The Board determined that the instructors were jointly employed by the Northeast Kingdom School Development Center and Lyndon State College. In reaching this conclusion, the Board determined that the Center and the College were separate legal entities

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[139] Id. at 47-48.

[140] Vermont State Colleges Faculty Federation, AFT Local 3180 and Vermont State Colleges, 34 VLRB 289 (2018).

that chose to jointly handle certain aspects of their employer-employee relationship and that both entities had sufficient control over the work of the instructors to qualify as their employer.[141]

Given this joint employer relationship, the Board needed to decide whether it was appropriate to grant the Vermont State Colleges Faculty Federation petition to add such instructors to existing bargaining units of State Colleges faculty members over the objection of the Colleges. The Board concluded that an appropriate bargaining unit would not result, stating:

> If we added NEKSDC instructors to existing Colleges faculty bargaining units, this would require the combination of employees solely employed by one employer with employees who are jointly employed by that employer and another entity. This would inappropriately require the bulk of bargaining unit employees, the full-time and part-time faculty of the Colleges, being subject to negotiations and (collective bargaining contract) administration not only with their employer, the Colleges, but also with supervisory unions with whom they have no employment relationship. At the same time, the Colleges would be inappropriately required to combine in negotiations and administration with supervisory unions over terms and conditions of employment for the bulk of bargaining unit employees solely employed by the Colleges and concerning whom the supervisory unions have no interest.[142]

In 1979, the VLRB approved a bargaining unit consisting of non-faculty employees of the State Colleges, excluding supervisory, confidential and professional employees.[143] The Staff Federation had sought to include professional employees in the bargaining unit, but the Board concluded that the interests of the professional employees were more closely aligned with the faculty.[144] The Board found persuasive that the professional employees were independent, worked closely

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[141] Vermont State Colleges Faculty Federation, UPV/AFT Local 3180 and Vermont State Colleges, 30 VLRB 92, 121-122 (2008).
[142] Id. at 122.
[143] Vermont State Colleges Staff Federation, VFT, AFT, AFL-CIO, 2 VLRB 40 (1979).
[144] Id. at 44.

with students, performed various intellectual tasks, exercised discretion and judgment, had close relations with faculty and were required to have a degree.[145] The Board concluded that those employees should have the option of joining the faculty unit or some other unit.[146] As discussed below, the professional employees became part of a bargaining unit with technical and administrative employees in 2002.

The Staff Federation represented the bargaining unit of non-faculty employees from 1979 to 1993. The employees voted to replace the Staff Federation with the Vermont State Employees' Association as bargaining representative in an October 1993 election.[147]

In 2002, the Board found appropriate two more bargaining units in the State Colleges. The Board approved a bargaining unit consisting of supervisory employees of the four campus-based colleges of the State Colleges system, and also found appropriate a unit consisting of professional, technical and administrative employees of the campus-based colleges.[148] The employees in the units voted to be represented by the United Professions of Vermont/AFT.

In 1985, the VLRB concluded that employees of the Community College of Vermont constituted an appropriate bargaining unit.[149] The Board concluded that a greater community of interests existed among a unit of CCV professional and non-professional employees than would exist if those employees were grouped with other Colleges employees in a system-wide unit. The Board so concluded due to the unique nature of CCV where, unlike the campus-based colleges, CCV has no

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[145] Id.
[146] Id. at 44-45.
[147] VLRB Docket No. 93-52.
[148] United Professions of Vermont/AFT and Vermont State Colleges, 25 VLRB 1 (2002).
[149] VFT, AFT, AFL-CIO and Vermont State Colleges, 8 VLRB 6 (1985).

permanent faculty, no campus and is primarily geared to "life-long learners".[150] In considering the overfragmentation of units criterion, the Board concluded that the unit would not produce adverse effects on the Colleges' operations or the representation of Colleges employees generally.[151] Subsequent to the Board decision, CCV employees voted not to be represented by a union.

In 2017, after agreement by the parties on the bargaining unit composition, the Vermont State Colleges Faculty Federation, AFT Local 3180, prevailed in an election to represent CCV Instructors who met certain requirements.[152]

The Board has issued three appropriate unit decisions involving University of Vermont employees. The Board concluded in 1996 that a bargaining unit of University dispatchers, service officers and police officers is an appropriate unit, a decision affirmed by the Vermont Supreme Court.[153] The Board held that the distinctive nature of law enforcement work overrode any general community of interests which the police department employees shared with other University employees. The Board stated it was sensitive to concerns with respect to the overfragmentation of units given the small size of the police department, but indicated that the potential problems which may arise given a multiplicity of units could be guarded against in future cases.[154] The Board also gave significant weight, although not controlling, to the extent to which the employees had organized.[155] The employees in the unit voted to be represented by Teamsters Local 597.

In a 1997 decision, the Board concluded that a bargaining unit of full-time and part-time non-supervisory service and maintenance employees of the University

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[150] Id. at 23-26.
[151] Id. at 26-28.
[152] VLRB Docket No. 17-29.
[153] Teamsters Local 597 and University of Vermont, 19 VLRB 64 (1996); *Affirmed*, 167 Vt. 564 (1997).
[154] Id. at 80-81.
[155] Id. at 82-83.

constituted an appropriate bargaining unit.[156] The Board determined that a community of interests existed among the employees, deriving from the primarily blue-collar nature of their work, and that the community of interests was sufficiently distinct from other non-exempt University employees. The Board also concluded that the relatively large grouping of employees would not result in overfragmentation of units to a degree likely to produce an adverse effect on the effective representation of other employees or upon the efficient operation of the employer.[157] The employees voted to be represented by the United Electrical Workers.

The Board determined in 2012 that a union-proposed unit of administrative support and clerical employees of the University was not an appropriate unit, and dismissed the union's election petition to represent these employees. The Board concluded these employees did not share a distinct community of interests apart from other employees and that overfragmentation of units would result if the proposed unit was approved. The Board concurred with the University that a unit consisting of these employees, and technical and specialized employees of the University that are not supervisory or confidential employees, would be appropriate.[158]

There are two other represented bargaining units at the University of Vermont. In 2001, after agreement by the parties on the bargaining unit composition, full-time faculty at the University voted to be organized into a unit and be represented by United Academics-AAUP/AFT.[159] In 2003, after agreement by the parties on the bargaining unit composition, certain part-time faculty at the University voted to be

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[156] United Electrical, Radio and Machine Workers of America and University of Vermont, 20 VLRB 219 (1997).
[157] Id. at 251-258.
[158] University Staff Union/Vermont-NEA/NEA and United Staff and University of Vermont, 32 VLRB 121 (2012).
[159] VLRB Docket No. 00-75.

organized into a collective bargaining unit and be represented by United Academics-University of Vermont, AAUP/AFT.[160]

The VLRB has made no appropriate unit decisions under the State Labor Relations Act. The Board has no authority over the composition of bargaining units under the Labor Relations for Teachers Act.[161]

[160] VLRB Docket No. 03-28.

[161] 16 VSA §1992(d). American Federation of Teachers Local 3333, AFL-CIO and Washington Central Supervisory Union, Union 32 High School Board of Directors, 1 VLRB 288, 291-92 (1978); Election Petition re: Fayston Elementary School Teachers, 9 VLRB 206 (1986).