

VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES	)	
ASSOCIATION	)	
	)	
and	)	DOCKET NO. 19-29
	)	
JUDICIARY DEPARTMENT OF THE	)	
STATE OF VERMONT	)	

FINDINGS OF FACT, OPIONION AND ORDER

Statement of Case

The Vermont State Employees’ Association (“VSEA”) filed a unit clarification petition on August 9, 2019, seeking clarification of the Judiciary Bargaining Unit to include some employees who are currently designated by the Judiciary Department of the State of Vermont (“Employer” or “Judiciary”) as temporary employees. The employees are either a Court Officer B, a Docket Clerk B, or a Guardian Ad Litem (“GAL”) Coordinator. Each of these three job titles is included in the Judiciary Bargaining Unit. VSEA contends that the employees qualify as statutory employees because they are, or have been, working in long-term positions offering a reasonable expectation of continued employment, and their employment relationship is more than tenuous. The Employer contends that the employees are properly designated as temporary employees.

The Labor Relations Board conducted a video hearing through the Microsoft Teams platform on July 16, 2020, before Board Members Richard Park, Chairperson; David Boulanger and Karen Saudek. VSEA General Counsel Timothy Belcher represented VSEA. Assistant Attorney General Jacob Humbert represented the Employer. VSEA and the Employer filed post-hearing briefs on August 10, 2020.

## FINDINGS OF FACT

1. On July 21, 2000, the Vermont Labor Relations Board issued an order certifying VSEA as the representative of a bargaining unit of eligible employees of the Vermont Supreme Court (VLRB Docket No. 00-16, July 21, 2000, VSEA Exhibit 2).

2. The Board amended the unit definition in response to a joint petition for unit clarification filed by VSEA and the Employer in *VSEA and Judiciary Dept. of the State of Vermont*, VLRB Docket No. 11-34. In a February 16, 2012, Memorandum and Order issued by the Board, the Board defined the amended unit to include “all employees of the Judiciary Department of the State of Vermont who are eligible for representation by a labor organization pursuant to Title 3, Vermont Statutes Annotated, Chapter 28, as the same may be amended from time to time.” [Id. at 25]. An Appendix to the decision lists “current bargaining unit titles” including, among other titles, Court Officer B, Docket Clerk B, and Guardian Ad Litem Coordinator (VSEA Exhibit 1).

3. As late June, 2020, the Judiciary employed the following employees in the identified job titles and locations, but designated them as “temporary” employees and therefore ineligible for representation under the Judiciary Employees Labor Relations Act, 3 V.S.A. § 1010 *et seq.* :

<b><u>Name</u></b>	<b><u>Position</u></b>	<b><u>Location</u></b>
Krulikowski, Anthony	Guardian Ad Litem Coordinator	Bennington
Shamas, Diane S.	Guardian Ad Litem Coordinator	Brattleboro
Barry, Mildred	Docket Clerk B	Brattleboro/Newfane
Bean, Jeffrey L	Court Officer B	Burlington
Calista Jr., Donald J.	Court Officer B	Burlington
Provost, James K.	Court Officer B	Burlington
Hess, Melody J	Docket Clerk B	Burlington
Rich, Pamela J	Docket Clerk B	Burlington
Sherry, Judith A	Guardian Ad Litem Coordinator	Burlington
Dexter, Kimberly	Docket Clerk B	Chelsea

Strickland, Sherri	Docket Clerk B	Montpelier
Emch, Beverly A.	Court Officer B	St Albans
McDonald, Heather	Docket Clerk B	St Albans
Ackermann, Karen	Guardian Ad Litem Coordinator	St Johnsbury
Eck Jr., William L	Court Officer B	White River Junction

4. At the July 16, 2020, hearing, the Board granted the VSEA's Motion to Amend the Petition to seek inclusion of the above listed positions in the bargaining unit.

5. The collective bargaining agreement between VSEA and the Employer in effect at the time of the hearing included the following provisions:

#### ARTICLE I: RECOGNITION

The Judiciary recognizes the VSEA as the exclusive representative of those Judiciary employees eligible for representation by a labor organization pursuant to Title 3, Vermont Statutes Annotated, Chapter 28, in the form in effect as of the date of execution of the Agreement....

#### ARTICLE 2: MANAGEMENT RIGHTS

It is understood and agreed that Ch. 2, Secs. 4 and 5 of the Vermont Constitution provides as follows:

Sec. 4 Judiciary - the judicial power of the Judiciary will be vested in a unified judicial system which shall be composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may from time to time ordain and establish.

Sec. 5 Departments to be Distinct- The Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercises the powers properly belonging to the others.

Consequently, except as specifically set forth herein, as required by law or otherwise specifically agreed to in writing between the parties, the Judiciary possesses the sole right and authority to operate its Department and direct the Judiciary employees in all aspects including, but not limited to, the right:

- To plan, direct and control Judiciary activities, to determine Judiciary policies and to establish standards of service offered to the public;
- To schedule and assign work to employees;
- To determine the means, methods, processes, materials and equipment utilized by the Judiciary, and to introduce new or improved methods, equipment or facilities;

- To determine the qualifications and staffing of jobs;
- To create, revise and eliminate jobs, or to furlough or lay off employees due to lack of work or funds or for other legitimate reasons in accordance with the procedures set forth in Article 19 hereof;
- To contract out work, and discontinue services or programs, in whole or in part...
- To hire and terminate employees, including the right to hire temporary employees;
- To maintain order, and to suspend, discipline and discharge permanent status employees for just cause;
- To make, publish and require observance of reasonable rules and regulations, it being understood and agreed that except to the extent specifically modified by this Agreement, the Judicial Personnel Policy which was last revised in March of 1998 all Appendices and subsequent amendments thereto, shall remain in full force and effect and be applicable to employees. However, if a particular subject is covered in both the Agreement and the Personnel Policy, covered employees shall look only to this Agreement and shall not be allowed to rely on the provisions of both documents.

...

#### ARTICLE 11: PROBATIONARY EMPLOYMENT

1. A newly hired employee shall serve a six (6) month probationary period. The probationary period may be extended at the discretion of the Judiciary....

...

#### ARTICLE 34: DEFINITIONS

Unless a different meaning is plainly required by the context, the following words and phrases mean:

....

CLASS – one or more positions sufficiently similar as to the duties performed, degree of supervision exercised or received, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same test of fitness, and the same pay grade may be applied to each position.

CLASSIFIED EMPLOYEE – an employee of the Judiciary who is hired in the classified service.

CLASSIFICATION PLAN – the arrangement of positions into separate classes and the ranking of the classes in relative order.

CLASSIFIED POSITION – a position in the Judicial Branch which is assigned to a class.

...

EMPLOYEE – as defined in Chapter 28 of T. 3 V.S.A., as the same may be amended from time to time.

...

LACK OF WORK – when (1) there is insufficient funds to permit the continuation of current staffing; or (2) there is not enough work to justify the continuation of current staffing.

LAY OFF – the separation of a classified employee due to lack of work or otherwise pursuant to management rights.

...

LIMITED STATUS – that condition which applies to an employee who has completed an original probationary period and is occupying a limited service classified position. An employee with limited status is entitled to all the rights and privileges of a permanent status employee except reduction in force and reemployment.

...

PERMANENT STATUS – that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position.

POSITION – a group of current duties and responsibilities normally requiring the fulltime or part-time employment of only one person.

ORIGINAL PROBATIONARY PERIOD – that working test period, normally six months from effective date of appointment, plus any extensions, during which the employee is expected to demonstrate satisfactory performance of job duties.

...

(VSEA Exhibit 3

6. The Vermont Judiciary Personnel Policy, last revised in March of 1998, includes the following provisions governing temporary employees:

...

E. Temporary Employees

1. Purpose

During the course of business, it may become necessary to obtain additional help for short periods of time. There are generally six reasons for requesting temporary help.

- a. Vacations - to replace an employee who is on annual leave.
- b. Sickness - to replace an employee who is on extended sick leave.
- c. Leave of Absence - to replace an employee who has been granted an extended leave of absence.
- d. Peak or increased workload - to add employees to compensate for an abnormally high workload.
- e. Special assignment - to replace an employee who has been assigned to a special project which prevents that employee from accomplishing the normal duties of the employee's position.
- f. Special project - to add employees for the purpose of accomplishing a special task not normally included in the duties of existing personnel.

These procedures set forth in this section apply to all temporary positions regardless of funding source.

2. Procedure

a. Approval

No temporary employees may be hired without prior approval of the Court Administrator or designee. Prior approval is considered as given to the program manager if there is sufficient money to pay for temporary employees in the program's budget.

- 1) Vacation or sick leave replacements where the program manager believes additional funding may be necessary - a request for temporary employees should be directed to the Director of Administrative Services. These requests may be made by telephone; however, a written explanation may be required. The Director of Administrative Services will establish the starting and ending dates of employment at the time of approval.
- 2) All other requests for temporary positions where program funding is not sufficient - requests for a temporary position for any reason other than that contained in subsection (1) must be submitted in writing to the Court Administrator. The request should include:
  - a) an explanation of the reason for the request,
  - b) the type of duties which will be performed by the temporary employee,
  - c) the time period for which the position is needed, and
  - d) whether consideration should be given to making the position a permanent position in the future.

b. Recruitment

At the time of approval, the approving authority will designate the recruitment procedure to be followed.

Generally, the recruitment of temporary employees will be at the discretion of the supervisor. Where a position or employee may be made permanent, the open recruitment procedure for permanent positions should be used so the employee can be transferred to permanent status without having to initiate a recruitment.

c. Employment Conditions

The rules governing temporary employment are different from those for permanent employees.

- 1) Salary - each temporary position will be assigned to a pay grade equivalent unless otherwise decided by the Court Administrator. This provision does not apply to salaries established prior to the issue date of this policy.
- 2) Holidays - A temporary employee will not be paid for holidays unless work is actually performed on that day.
- 3) Group Health, Dental, Disability and Life Insurance - No temporary employees will be eligible for the State of Vermont group health, dental, disability and life insurance plans.
- 4) Retirement - Temporary employees are not eligible to join the Vermont State Employees' Retirement System.
- 5) Credit Union - Temporary employees are not eligible to join the Vermont State Employees' Credit Union.
- 6) Rights - Temporary employees do not have job tenure rights. The employee may be dismissed without cause.

- 7) Travel Expenses - Temporary employees will be reimbursed travel expenses at the same rate as permanent employees.

3. Exceptions

Exceptions to this procedure shall be made only upon the written approval of the Court Administrator.

4. Temporary Service Credit

A permanent status employee, who worked as a temporary employee during the two year period immediately prior to their most recent date of hire as a permanent employee, may request in writing credit for the period of temporary service. The request must be made following successful completion of the probationary period. The employee must have at least 1,000 hours of temporary service in the first year immediately preceding the date of hire. If this time requirement is met, the employee may be eligible for temporary service credit in the 2nd year immediately preceding such date of hire if they have worked at least 1,000 hours of temporary service in such 2nd year. Temporary Service Credit becomes effective the month after the completed application is approved.

(Judiciary Exhibit 1)

7. There is no specific time limitation on how long temporary employment can last under the Personnel Policy. Although the majority of temporary employees are employed for a few months, there have been instances of individuals designated as temporary being employed for years. The Employer does not recognize any temporal dimension, whether duration of employment or hours worked, in its designation of temporary employment. The Judiciary does not convert a temporary position to a permanent one until the legislature approves the position as permanent.

8. There are some temporary employees of the Judiciary who are retired permanent state employees collecting pensions from their permanent state employment. Most of these retired state employees work less than two or three days a week as temporary employees.

9. The Judiciary Employees Labor Relations Act (“JELRA”) defines “employee” as follows:

3 V.S.A. § 1011. Definitions

As used in this chapter:

...

(8) "Employee," means any individual employed and compensated on a permanent or limited status basis by the Judiciary Department, including permanent part-time employees and any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of an unfair labor practice.

"Employee" does not include any of the following:

...

(E) an individual employed on a temporary, contractual, seasonal, or on-call basis, including an intern; (F) an employee during the initial or extended probationary period;

..

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10. The Vermont state budget for fiscal year 2020 provides as follows, in relevant part:

...

Sec. A.107 NEW POSITIONS

(a) Notwithstanding any other provision of law, the total number of authorized State positions, both classified and exempt, excluding temporary positions as defined in 3 V.S.A. § 311(11), shall not be increased during fiscal year 2020 except for new positions authorized by the 2019 session. Limited service positions approved pursuant to 32 V.S.A. § 5 shall not be subject to this restriction, nor shall positions created pursuant to the Position Pilot Program .

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Sec. A.108 LEGEND

(a) The bill is organized by functions of government. The sections between B.100 and B.9999 contain appropriations of funds for the upcoming budget year.

...

Sec. B.204 Judiciary

Personal services 42,107,083

Operating expenses 9,655,475

Grants 121,030

Total 51,883,588

Source of funds

General fund 45,651,954

Special funds 3,248,649

Federal funds 887,586

Interdepartmental transfers 2,095,399

Total 51,883,588

(An Act Relating to Making Appropriations for the Support of Government, 2019, No.

72),



11. The Employer budgeted \$750,000 out of the funds appropriated above to employ persons it designates as temporary employees. Approximately 93 percent of funds devoted to personal services are spent by the Employer on permanent employees and approximately 7 percent are spent on temporary employees. Some of the funds used for temporary employees are directed to special projects, such as expungement projects directed by the legislature. Expungement projects are devoted to expunging criminal convictions from records in certain situations.

12. The Employer's process of securing a permanent employee position begins with the budget process. If the Employer seeks an additional permanent position, it makes such request in the annual budget request. If the legislature funds the position, the Vermont Department of Human Resources provides a position number for the position. The Employer then goes through the recruitment and hiring process to fill the position. The Employer has approximately 350 permanent employees.

13. The Judiciary has a few limited service positions and is adding more this year with coronavirus relief funding through the end of December 2020. Limited service positions are not supported by General Fund appropriations, but rather are typically supported by time-limited federal grant funds, which are available for a limited duration. When funding for these positions ends, the positions are discontinued.

14. Patricia Gabel, State Court Administrator, sent a report on temporary employees on January 15, 2020, to chairpersons of legislative committees. In the report, she indicated that: 1) nine individuals employed on a temporary basis with the Judiciary Department, excluding certain employees specified in statutory provisions, worked more than 1,280 hours during

calendar year 2018; and 2) eight such individuals worked more than 1,280 hours during calendar year 2019 (Judiciary Exhibit 7).

#### Guardian ad Litem Coordinators

15. Guardians ad Litem (“GALs”) are volunteers brought in by the Judiciary to help with juvenile matters, particularly child in need of care cases. There are typically around 300 to 400 GALs working at any given time. GALs essentially speak for the juvenile during the court hearing. The Judiciary is also planning to expand the GALs’ role to include working in Probate Court when there are questions regarding a party’s competency.

16. The network of GALs is overseen by GAL Coordinators, who recruit, train and generally support those volunteers. The GAL program started approximately 15 years ago. At that time, methods of selecting GALs varied by county, some of which were very informal. The GAL Coordinators are also available to Court staff to assist with docketing and troubleshooting cases. The GAL Coordinator function has been staffed by both permanent employees and temporary employees.

17. Throughout its history, the Program has seen significant turn-over in management and strategic direction. A few years ago, the Judiciary looked at the model employed by some other states of securing a non-profit to operate such a program, and explored potentially bringing that model to Vermont. Ultimately, the Judiciary was not successful in finding a non-profit agency to operate the GAL Program on a statewide basis. Only in Lamoille County was the Employer able to contract with a nonprofit entity to provide program services.

18. Last fall, the Judiciary hired three new GAL coordinators as full-time permanent bargaining unit employees. The current Program goal is to move to a regional model, from a

county model, for delivering GAL Coordinator services. The newly hired full-time permanent employees serve as regional coordinators. They work in several counties, not just one.

19. As of the hearing date, the GAL Program was also staffed by four part-time GAL Coordinators who are designated as temporary employees. The Judiciary's plan is that these employees will over time no longer be needed to serve in the GAL Coordinator role.

20. Anthony Krulikowski was a part-time permanent employee with the Judiciary until his retirement in 2017. He continued as a part-time temporary GAL Coordinator in Bennington County after his retirement. In relevant part, Krulikowski's offer letter stated: "This letter is to confirm your rehire as a temporary Guardian Ad Litem Coordinator with the Bennington Unit. You will be paid at the same rate as when you retired, \$29.48/hour, with the anticipation that you will work up to ten (10) hours per week. This temporary position will accrue sick leave, but does not offer any other benefits." The Employer identified the reason for his rehire as "increased workload" (VSEA Exhibit 6; Employer Exhibits 2 and 6).

21. Krulikowski worked as few as 10 hours and as many as 40 hours per pay period worked. A pay period for Judiciary employees is two weeks. For the first half of calendar 2020, Krulikowski averaged 17.33 hours per pay period worked. At the time of the hearing in this matter, Krulikowski's temporary employment was scheduled to end on or about August 1, 2020. The permanent GAL Coordinator hired to work in the part of the state that includes Bennington County is based in Rutland, and it was intended that this permanent Coordinator would assume Krulikowski's duties upon the end of his employment.

22. Diane Shamas was previously a contracted family mediator with the Judiciary in Windham County. Shamas was hired as a temporary GAL Coordinator in Brattleboro as of the pay period ending November 25, 2017 and was still working in that capacity as of the pay period ending June 20, 2020. The Employer identified the reason for her hire as “increased workload”. During her employment, Shamas has worked as few as six hours and as many as 55 hours per pay period worked. During the period June 9, 2018, through June 20, 2020, Shamas averaged 26.5 hour per pay period for the pay periods in which records were entered into evidence (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3 and 4).

23. The records introduced into evidence do not include the time worked by employees at issue in this case after the pay period ending October 12, 2019, through the pay period ending January 4, 2020. The parties acknowledge that, for any employee at issue in this case who worked both during the pay period ending October 12, 2019, and during the pay period ending January 18, 2020, it is reasonable to assume such employment continued during the period for which no data was provided.

24. The Judiciary hired Judith Sherry to work as a GAL Coordinator designated as a temporary employee, beginning during the pay period ending October 1, 2016, and she remains employed in that capacity. Sherry was a retiree from State government Executive Branch employment. Sherry’s offer letter, dated August 30, 2016, stated in relevant part: “This temporary non-exempt position is not eligible for employer-sponsored benefits or paid days off.” Over the course of her employment, Sherry has worked as few as 39 and as many as 80 hours per pay period worked. During the period June 9, 2018, through June 20, 2020, Sherry averaged 64 hours per pay period for the pay periods in which records were entered into evidence. The Judiciary anticipates that Sherry’s hours will soon be reduced as responsibilities she has for Addison

County are being transferred to one of the three full-time permanent GAL Coordinators. It is anticipated that Sherry will then provide services only in Chittenden County (VSEA Exhibits 6, 8, 9; Judiciary Exhibits 2, 3, 4, 6).

25. Karen Ackermann is a GAL Coordinator assigned to St. Johnsbury designated by the Employer as a temporary employee. Ackermann is a retiree from the Judiciary. Ackerman began working as a GAL Coordinator in St. Johnsbury during the pay period ending January 10, 2015 and has continued in that position through the pay period ending June 20, 2020. The Employer indicated “increased workload” as a reason for Ackermann’s hire. Ackermann has worked as few as four hours and as many as 64 hours per pay period worked. During the period June 9, 2018, through June 20, 2020, Ackermann averaged 38.7 hours per pay period for the pay periods in which records were entered into evidence (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3 and 4).

#### Docket Clerk Bs

26. Sherri Strickland began work as a temporary Docket Clerk B in Montpelier as of the pay period ending February 29, 2020. She was hired to backfill work left by a permanent Judiciary employee who was reassigned to the NG-CMS project, which involves installing a new computer system (the Odyssey case management system) throughout the entire Judiciary that would make court records more paperless. This is a multi-year project expected to continue until February or March 2021. Strickland’s responsibilities include recording in the courtroom, filing of documents, docketing of cases or filings that come in and providing customer service to the public whether on the phone or at the counter. She has worked no fewer than 40 hours and no more than 79.5 hours per pay period worked. During the period February 16, 2020, through June 20, 2020, Strickland averaged 58 hours per pay period. Once the NG-CMS project is complete,

there is not expected to be a need for Strickland's employment to continue (VSEA Exhibit 9; Judiciary Exhibit 4).

27. Heather McDonald has served as a Docket Clerk B designated by the Employer as a temporary employee during two separate periods in the Franklin County courts. McDonald's first period of employment as a Docket Clerk B began during the pay period ending October 29, 2016. McDonald's offer letter, dated September 23, 2016, stated in relevant part that "[t]his will confirm our offer of the temporary Docket Clerk B position" and that "[t]his temporary nonexempt position is not eligible for employer sponsored benefits or paid days off." During this first employment period, McDonald was hired due to increased workload. Such employment assignment ceased during or after the pay period ending October 12, 2019.

28. On or before the pay period ending January 18, 2020, McDonald began a second period of employment as a Docket Clerk B designated by the Employer as a temporary employee assigned to the Judiciary's expungement project. This project involves additional work brought about by legislative changes that expanded convicted defendants' ability to have certain convictions expunged or sealed based on established criteria. McDonald was still working in that capacity as of the pay period ending June 20, 2020. Once the work related to the expungement project ends, McDonald's temporary employment may end.

29. During both periods of employment, McDonald worked as few as 27.3 hours and as many as 87.25 hours per pay period worked. During the period January 5, 2020, through June 20, 2020, McDonald averaged 52 hours per pay period (VSEA Exhibits 6, 9; Judiciary Exhibits 4, 6).

30. Mildred Barry is a Docket Clerk B designated by the Employer as a temporary employee assigned to Newfane, who began employment during pay period ending July 22, 2017.

The recruitment notice identified such position as a “[l]ong term temporary opening for . . . Docket Clerk position in the Windham Unit. . . stationed in Newfane, Vermont.” The recruitment notice further provided that “[t]emporary employment is typically for variable hours up to 30 hours per week” and that “[t]here are no benefits associated with this position.” Barry’s offer letter, dated June 26, 2017, stated in relevant part that “[t]his will confirm our offer of the temporary Docket Clerk B position” and that “[t]his temporary non-exempt position is not eligible for employer sponsored benefits or paid days off.” The Employer identified the reason for her hire as “increased workload” (VSEA Exhibits 7; 8; Judiciary Exhibits 2, 5, 6).

31. At the time of Barry’s hire in 2017, the Newfane courts shared a Civil Division judge with Bennington courts on a monthly rotation, whereby in one month the judge would sit in Bennington Tuesday through Friday, and in Newfane on Monday, and then the next month would do the inverse. Barry was initially assigned to record hearings. There were only two permanent Docket Clerks assigned to the Newfane courthouse; and having one of the Docket Clerks assigned to just record hearings would have been difficult due to existing workload needs.

32. Starting at some point in 2017 or 2018, Barry’s continued employment has been based on a different increase in workload, which was a byproduct of changes in the juvenile docket due to the opioid crisis. The judge in Newfane who presides over both domestic and juvenile cases has seen an increase in juvenile case days from one day per week to three days per week. This has created workload pressures on the domestic docket, which has resulted in Newfane no longer sharing a Civil Division judge with Bennington. The Civil Division judge in Newfane is now consistently presiding over domestic and civil cases three to four days per week.

33. During her employment, Barry’s primary responsibility has been recording of hearings. When not recording, she performs filing work and assists with transcript requests by

uploading the hearing recording for the transcribing company. Barry has been based largely in Newfane, but occasionally has recorded hearings in Brattleboro.

34. Barry continued to work in this capacity until the pay period ending March 14, 2020. The COVID 19 pandemic resulted in a reduction of hours. The Newfane courthouse was not then having many hearings; and Barry's primarily responsibility was recording hearings in Newfane. Barry then began to work again as of June 22, 2020, once the courts started to reopen and more hearings were being conducted. The managers had some hope that the increase in hearings would abate, but there is no expectation at this time that her position will end in the foreseeable future.

35. During her employment, Barry has worked as few as 7.75 hours and as many as 58.25 hours per pay period worked. During the period June 9, 2018, through March 14, 2020, Barry averaged 35.6 hour of work per pay period for the pay periods in which records were entered into evidence (VSEA Exhibit 9; Judiciary Exhibits 2, 3, 4).

36. Kimberly Dexter was hired as a Docket Clerk B designated by the Employer as a temporary employee in Chelsea with a starting date of December 30, 2019. The recruitment notice for such position identified a "[l]ong term temporary opening for a Docket Clerk B position at the Orange Unit" in Chelsea and stated that "[t]emporary work is typically for variable hours up to 40 hours per week" and that "[t]here are no benefits associated with this position." Dexter's offer letter, dated December 19, 2019, provided that "[t]his will confirm our offer of the temporary Docket Clerk B position with the Orange Unit" and that "[t]his temporary non-exempt position is not eligible for employer sponsored benefits beyond sick leave." During the period January 5, 2020, through June 20, 2020, Dexter averaged 58 hours per pay period (VSEA Exhibit 9; Judiciary Exhibits 3, 4, 5, 6).



37. The reason for Dexter's hire was to temporarily cover work left when a permanent Docket Clerk B was reassigned to the NG-CMS project. The permanent employee will return to her normal Docket Clerk B duties in Chelsea once the NG-CMS project is complete, which is estimated to be around February or March 2021. At the conclusion of the NG-CMS project, it is expected that Dexter's temporary employment will end.

38. Melody Hess began working as a Docket Clerk B designated by the Employer as a temporary employee in Burlington in the Criminal Division during the pay period ending February 6, 2016. She was hired to work on an expungement project. At times, she staffs the counter, which frees up other people to also do expungement work. She had previously worked in the Criminal Division as a permanent employee, resulting in the Judiciary not needing to provide her much training, especially related to the Judiciary's case management system.

39. The demands of the expungement project have evolved over time. Every year, for the past few years, the Legislature has expanded the period someone could go back and file for expungement of criminal conviction records. This has resulted in a significantly increased workload for Judiciary staff. In Burlington, there are five employees working on expungements. To complete an expungement, staff need to access the Judiciary case management system to delete all the previously entered information associated with the criminal conviction to be expunged. The work also involves collecting physical records that had been sent to public records/archives so staff can expunge the original files.

40. Hess did not work during the early stages of the COVID-19 pandemic from the pay period ending March 28, 2020, through the pay period ending May 23, 2020. During the pay periods she worked, Hess worked as few as 16 hours and as many as 64.5 hours per pay period. During the period June 9, 2018, through March 14, 2020, Hess averaged 31.7 hours of work per

pay period for the pay periods in which records were entered into evidence. There is no expectation that Hess's employment will end in the near future (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3, 4).

41. Pamela Rich has served as a Docket Clerk B designated by the Employer as a temporary employee during two separate periods in Chittenden County. Rich's first period of employment as a Docket Clerk B began during the pay period ending March 4, 2017. During this period, Rich was hired to work on a special project that required categorizing and boxing approximately one thousand boxes of case records. Rich's first period of employment ceased during the pay period ending June 9, 2018.

42. In the pay period ending November 24, 2018, Rich began a second period of employment as a Docket Clerk B. During this period of employment, Rich has been assigned to the Chittenden County Probate and Civil and Divisions. The Judiciary is down two full-time permanent positions in those Divisions due to budgetary concerns and a hold on filling those positions. Rich assists in the Probate Division with safekeeping of wills and with processing matters in the Civil Division. Rich is also working on a special project in the Civil Division dealing with records management issues like those she had worked on during her first period of employment.

43. Rich did not work at all during the pay period ending March 28, 2020 in the early stage of the COVID-19 pandemic. During her second period of employment, Rich worked as few as 10 hours and as many as 33 hours per pay period worked. During the period November 11, 2018, through June 20, 2020, Rich averaged 20.36 hours of work per pay period for the pay periods in which records were entered into evidence. It is uncertain when Rich's employment will end (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3, 4).

### Court Officer B's

44 White River Junction has one of the larger courthouses in the state. It encompasses Windham, Windsor and Orange Counties. It contains the Criminal Division, Family Division and Judicial Bureau. Criminal and Family proceedings can be volatile, meaning security services are essential for the safety of Court staff and other individuals entering the White River Junction courthouse. Security services at the courthouse are currently provided by the Windsor County Sheriff's Department under contract and by Judiciary employees. There are multiple permanent Court Officer Bs and one Court Officer designated as a temporary employee, William Eck

45. Eck was hired to address an increased workload created by the Windsor County Sheriff's Department's inability to provide another Deputy for needed security services. Eck is also assigned to periodically fill in for the permanent Court Officer Bs when they are on vacation or on sick leave. Eck has further been assigned to fill in for a permanent Court Officer B stationed in Woodstock. Eck has been the sole Court Officer B designated by the Employer as a temporary employee working in White River Junction since the pay period ending September 17, 2016.

46. Eck has worked as few as three hours and as many as 67.5 hours per pay period worked. During the period June 9, 2018, to March 14, 2020, Eck averaged 27 hours of work per pay period for the pay periods in which records were entered into evidence (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3, 4).

47. Eck did not work as a Court Officer B during pay periods ending August 22, 2015, September 3, 2016, December 24, 2016, and January 18, 2020. Eck also did not work from the pay period ending March 28, 2020, through the pay period ending June 6, 2020, due to the

COVID-19 pandemic. Eck worked a total of three hours during the pay period ending June 20, 2020. There is no plan for Eck's employment ending (Judiciary Exhibit 4).

48. Beverly Emch began work as a Court Officer B designated by the Employer as a temporary employee in St. Albans during the pay period ending February 21, 2015. She was a Judiciary retiree who was hired to help cover for employees on vacation and sick leave, as well as cover case recording and court officer duties when the contracted Sheriff's Department could no longer cover security in the magistrate hearing room. In 2016, Emch also was assigned to cover an additional courtroom that had been added due to an increase in the Court's juvenile docket (particularly termination of parental rights cases) attributable to the growing opioid crisis in Vermont. It took the Franklin County courts about a year and a half to work through such backlog.

49. Since approximately 2019, Emch also has been assigned to cover increased judge time in the domestic docket, particularly related to cases concerning modification or establishment of parental rights and responsibilities. Emch has further continued to cover sick leave and vacations taken by other employees, including one employee who as of the hearing date had been out for an extended period.

50. During her employment, Emch has worked as few as 3.5 hours and as many as 76.5 hours in pay periods in which she has worked. During the period June 9, 2018, to March 14, 2020, Emch worked an average of 26.6 hours per pay period for the pay periods in which records were entered into evidence. Emch did not work during the pay period ending March 28, 2020 through the pay period ending June 6, 2020. Emch returned to work during the pay period ending June 20, 2020. The period when she did not work resulted from a significant reduction

in the number of in-person hearings due to the COVID-19 pandemic (VSEA Exhibit 3 8, 9; Judiciary Exhibits 2, 3, 4).

51. The Burlington courthouses employ seven full-time permanent Court Officer Bs. There are periods of increased workload at the Burlington courthouses due to a variety of factors such as jury draws, assignment of additional judge time, and the need to cover for permanent Court Officer Bs who are on leave. To address these increases in workload and understaffing issues, the Judiciary requested additional permanent Court Officer B positions from the Legislature in fiscal years 2018, 2019 and 2020. The Judiciary did not obtain any new permanent positions funded from any of those requests. As a result, there are three Court Officer Bs designated as temporary employees also currently assigned to the Burlington courthouses. Those employees are James Provost, Jeffrey Bean and Donald Calista.

52. James Provost began working as a Court Officer B in Burlington during the pay period ending July 21, 2018. Provost's offer letter, dated June 12, 2018, stated in relevant part that "[t]his will confirm our offer of the temporary Court Officer B position" and that "[t]his temporary non-exempt position is not eligible for employer sponsored benefits or paid days off." The Employer identified the reason for his hire as "increased workload". Provost has worked as few as 2.5 hours and as many as 74.25 hours per pay period worked. During the period July 8, 2018, to June 20, 2020, Provost worked an average of 49 hours per pay period for the pay periods in which records were entered into evidence (VSEA Exhibits 6, 8, 9; Judiciary Exhibits 2, 3, 4, 6).

53. Jeffrey Bean began work as a Court Officer B in Burlington during the pay period beginning April 28, 2019. Bean's offer letter, dated April 18, 2019, stated in relevant part that "[t]his will confirm our offer of the temporary Court Officer B position" and that "[t]his

temporary non-exempt position is not eligible for employer sponsored benefits or paid days off.” The Employer identified the reason for his hire as “increased workload”. Bean has worked as few as five and as many as 76 hours per pay period worked. During the period April 28, 2019, to March 14, 2020, Bean worked at average of 35.7 hours per pay period. Bean did not work from the pay period ending March 28, 2020 through the pay period ending May 23, 2020 during the early stages of the COVID-19 pandemic. Bean worked an average of 10.5 hours per pay period during the period May 23, 2020, to June 20, 2020 (VSEA Exhibits 6, 8, 9; Judiciary Exhibits 2, 3, 4, 6).

54. Donald Calista began work as a Court Officer B in Burlington during the pay period beginning September 1, 2019. The recruitment notice related to Calista’s position provided that “[t]he Vermont Judiciary is looking for several temporary security staff to work a flexible schedule.” The Employer identified the reason for his hire as “increased workload”. Calista has worked as few as four hours and as many as 45 hours per pay period worked. During the period September 1, 2019, to March 14, 2020, Calista worked an average of 30.5 hours per pay period for the pay periods in which records were entered into evidence. Calista did not work from the pay period ending March 28, 2020 through the pay period ending April 11, 2020, and from the pay period ending May 9, 2020 through the pay period ending June 6, 2020, during the early stages of the COVID-19 pandemic. Calista worked 8 hours during the pay period ending June 20, 2020 (VSEA Exhibits 8, 9; Judiciary Exhibits 2, 3, 4, 5).

## OPINION

VSEA seeks clarification of the bargaining unit of Judiciary employees that it represents to include all employees working in classifications that have been included in the bargaining unit certified by the Board but who have been improperly classified by the Employer as temporary employees. VSEA contends there are fifteen employees so working. VSEA asserts that the fifteen employees are employed on either a permanent or limited status basis, and that they therefore qualify as statutory employees properly represented by VSEA.

VSEA asserts that the Employer's contention that the positions are temporary fails given the admission by the Employer that there is no necessary limit on the duration of the employment of employees in the positions. VSEA contends this is contrary to the common meaning of the word "temporary" which necessarily incorporates some limitation in the dimension of time. VSEA cites the Labor Relations Board decision, Vermont State Colleges Faculty Federation, AFT Local 3180 and Vermont State Colleges, 10 VLRB 39 (1987), to support VSEA's contention that the employees at issue are statutory employees entitled to collective bargaining rights as limited status employees. Although that case was decided under the State Employees Labor Relations Act, VSEA asserts that the standards in that decision apply to this case because the Judiciary Employees Labor Relations Act also includes the term "limited status" in defining individuals included within the definition of "employee" covered by the Act.

VSEA further asserts that the Judicial Branch Personnel Policy and the collective bargaining agreement between VSEA and the Employer, although instructive in the inquiry here, do not control the Board's interpretation of the statute. Also, VSEA contends that the Employer's reliance on 3 V.S.A. § 331, addressing temporary employment in the Executive Branch of State government, is misplaced as it is not applicable to this matter.

The Employer contends that each of these employees is not an employee under the Judiciary Employee Relations Act, and has been hired and is employed as a temporary employee in a manner consistent with the Vermont Judicial Branch Personnel Policy. The Employer contends that there is no evidence that any of the employees have a reasonable expectation of continued employment. Moreover, the Employer asserts that the mere fact that one has been employed as a temporary employee for an extended duration cannot create a reasonable expectation of continued employment because the Personnel Policy specifically accommodates long-term temporary employment.

The Employer further points to the temporary service credit provision of the Personnel Policy, providing that a temporary employee moving into a permanent status position may request a temporary service credit for up to two years of temporary employment, as demonstrating that at a minimum the policy justifies temporary employment lasting for a two-year period and, in the case of special projects and assignments, for even longer durations. The Employer also cites 3 V.S.A. § 331, addressing temporary employment in the Executive Branch of State government, to assert that the long-term temporary employment permitted by the Personnel Policy is consistent with how temporary employment is defined elsewhere in State government.

The Board has certified VSEA as the exclusive bargaining representative of all employees of the Judiciary Department who are eligible for representation by a labor organization pursuant to the Judiciary Employees Labor Relations Act, 3 V.S.A. §1010 *et seq* (“JELRA”). VSEA and Judiciary Department of the State of Vermont, 32 VLRB 21, 25 (2012). Employees eligible for representation by a labor organization are those who meet the definition of “employee” under JELRA. “Employee” is defined in JELRA as “any individual employed and compensated on a permanent or limited status basis by the Judiciary Department, including



permanent part-time employees”. 3 V.S.A. §1011 (8). “Employee” does not include any of the following: . . . (E) an individual employed on a temporary, contractual, seasonal, or on-call basis . . . ; (F) an employee during the initial or extended probationary period”. Id.

A permanent status employee under this definition is one whom occupies a permanent position and has successfully completed a probationary period. A permanent position is established during the annual budget process through the Employer requesting that the Vermont General Assembly approve and fund a permanent position. A permanent position is not created unless it is approved by the legislature.

Given these characteristics signifying a permanent status employee, it is evident that none of the disputed fifteen employees meet this definition. None of them occupy a position that has been approved and funded by the Legislature as a permanent position. Further, there is no evidence that any of them served and completed a probationary period.

This leaves the question whether the fifteen employees are temporary or limited status employees. JELRA does not define “an individual employed on a temporary . . . basis”. The Board has had no previous cases under JELRA concerning the meaning of “temporary” employees. The Board has addressed the meaning of “temporary” employee under the State Employees Labor Relations Act which also does not define “temporary employee”. In Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO and Vermont State Colleges, 10 VLRB 39, 47 (1987), the Board stated that the “meaning of temporary employee necessarily refers to those individuals with no reasonable expectation of continued employment”. We conclude that this meaning of temporary employee applies equally under JELRA which similarly contains no definition of “temporary” employee.

Although not controlling the meaning of “temporary” employee under the statute, the Vermont Judicial Branch Personnel Policy provides some guidance in this inquiry in its section

entitled “Temporary Employees” that is reproduced in Finding of Fact No.6. The policy is consistent with the meaning of temporary employee in the Vermont State Colleges decision to the extent that it limits temporary employment to “short periods of time”. The Personnel Policy lists “generally six reasons” for temporary employment. Three of the reasons are implicated in this case: 1) “peak or increased workload – to add employees to compensate for an abnormally high workload”; 2) “special assignment – to replace an employee who has been assigned to a special project”; and 3) “special project – to add employees for the purpose of accomplishing a special task not normally included in the duties of existing personnel.”

Given the temporal aspect of temporary employment limiting it to “short periods of time” in which the employee has “no reasonable expectation of continued employment”, the potential exists in each of these categories for employment to become more than temporary. An increased workload that is “abnormal” transitions into “normal” at some point in time. Similarly, a special assignment or special project may become more than temporary at some time. In these cases, there is a transition from no reasonable expectation of continued employment to a reasonable expectation that the employment will continue.

We note that, in determining which employees are temporary, we reject the Employer’s reliance on 3 V.S.A. § 331, which addresses temporary employment in the Executive Branch of State government. The Employer asserts that the long-term temporary employment permitted by the Personnel Policy is consistent with how temporary employment is defined under 3 V.S.A. § 331. The Employer’s reliance on this statutory provision covering Executive Branch employees is misplaced.

Section 331 is part of Chapter 13, Classification of State Personnel, of Title 3 of Vermont Statutes. Chapter 13 applies to the “classified service to . . . include all positions and categories of employment by the State, except as otherwise provided by law”, and except specific

exceptions set forth in 3 V.S.A. § 311(a). One specific exception is “all . . . officers and employees of a court”. Id. at (a)(5). Thus, employees of the Judiciary Department are specifically excluded from coverage of 3 V.S.A. § 331. Further, the Employer has demonstrated no evident basis for Section 331 to provide any guidance with respect to a determination whether employees of the Judiciary Department are temporary employees.

VSEA alleges that those employees with a reasonable expectation of continued employment are employed on a “limited status” basis resulting in them being employees covered by JELRA. “Limited status” is not defined in JELRA. The Board has had no previous cases under JELRA concerning the meaning of “limited status” employees.

The Board decision in Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO and Vermont State Colleges, supra, again provides guidance in addressing this issue. “Limited status” was nowhere defined in SELRA, and the Board had to determine whether the phrase was sufficiently broad to include part-time faculty of the Vermont State Colleges. The Board stated:

The most logical construction of the phrase “limited status” is that the legislature intended to grant employee status to a category of employees retained on a less-than-permanent, but more-than-temporary, basis. The meaning of temporary employee necessarily refers to those individuals with no reasonable expectation of continued employment. Permanent status refers to employment in a permanently-established position with no expectation under normal circumstances that employment will cease. It follows 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. 10 VLRB at 47.

We conclude that this definition of “limited status” applies equally under JELRA which likewise contains no definition of “limited status”. The Vermont State Colleges decision also is instructive in indicating the length of employment and the amount of time worked , with appropriate qualifications, that suffice to delineate 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.

The Board held in that case that certain part-time 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 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 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. 10 VLRB at 47-48. On appeal, the Vermont Supreme Court upheld the Board’s conclusion that these part-time faculty were employed on a “limited status” basis, and thus met the definition of “state employee” eligible to be represented by a union. Vermont State Colleges Faculty Federation and Vermont State Colleges, 152 Vt. 343 (1989).

Similarly here, we conclude that the disputed Judiciary employees who meet the following requirements are employed on a limited-status basis: 1) regularly employed for at least two years, 2) averaged at least 20 hours per two-week pay period during the preceding two years; 3) notwithstanding the first two requirements, employees who were on an approved leave of absence during the previous two years meet the definition of limited status provided they otherwise were regularly employed and averaged at least 20 hours per two-week period exclusive of the period of the approved leave of absence; and 4) employees who did not work during one or more of the pay periods in the previous two years meet the definition of limited

status provided they averaged at least 20 hours per two-week period exclusive of the period of the approved leave of absence. These individuals have a reasonable expectation of continued employment for at least a limited time period and have more than just a tenuous employment relationship.

In reaching this conclusion, we recognize that the collective bargaining agreement between the Employer and VSEA contains a definition of “limited status” that differs from the one set forth above. It defines “limited status” as “that condition which applies to an employee who has completed an original probationary period and is occupying a limited service classified position. “ The evidence indicates that the Judiciary has a few limited service positions that are supported by time-limited federal grant funds, rather than General fund appropriations, and the positions are discontinued when the funding for the positions end.

Nonetheless, the definition set forth in the collective bargaining agreement that just includes employees occupying a limited service classified position is not exclusive of other employees also coming within the meaning of a “limited status” employee. Parties to a collective bargaining agreement do not control the interpretation of statutory language. The Vermont General Assembly has granted the Labor Relations Board that authority in designating the Board as the body administering JELRA. Further, the fact that one category of employees meets the requirements for “limited status” does not preclude another group of employees from also coming within the scope of limited status employment.

We turn to discussing which of the fifteen disputed employees meet the requirements of employment on a limited status basis. We have set forth in the Findings of Fact the specific periods of employment for the employees, as well as the average hours worked per pay period during the preceding two years for the pay periods in which records were entered into evidence.

This allows us to determine which individuals were employed on a limited status basis as of June 20, 2020, the last date for which we have evidence as to hours worked by employees.

Based on this data, the following seven employees should be considered as employed on a limited status basis assuming they are still employed as of the date of this decision: Diane Shamas, Judith Sherry, Karen Ackermann, Mildred Barry, Melody Hess, William Eck and Beverly Emch. Also, James Provost should be considered as employed on a limited status basis assuming he continued to be employed as of July 19, 2020, and is still employed as of the date of this decision. In making these determinations, we have considered the period during which the above employees did not work due to the COVID-19 pandemic as an approved leave of absence.

The employment of one of the remaining seven employees, Anthony Krulikowski, was scheduled to end on or about August 1, 2020. Based on this evidence, we cannot consider him employed on a limited status basis. The other six employees have not worked the requisite two years, and thus do not meet the requirements of employment on a limited status basis at this time.

In sum, we grant the unit clarification petition to the extent that some employees are added to the bargaining unit represented by VSEA as employed on a limited status basis, and denied to the extent that some petitioned-for employees are not added to the bargaining unit due to not being employed on a limited status basis. In so holding, we are not ordering that the terms of the collective bargaining agreement be extended to these employees. The agreement was negotiated when this category of limited status employees was not included in the bargaining unit. The parties are only required to negotiate in good faith with respect to required subjects of bargaining for these employees.

Finally, we provide guidance to the parties on how bargaining unit status should be determined in the future for the category of limited status employees we have identified in this decision. The employees who we have determined are limited status employees as of June 20,

2020, and the employee who met the limited status requirement on July 19, 2020, should be reviewed on an annual basis (from the date they met the necessary requirements) to determine whether they still meet the requirements. Other employees designated as temporary employees should be added to the bargaining unit as limited status employees upon meeting the necessary requirements. They should be reviewed on an annual basis from the date they met the necessary requirements to determine whether they still meet the requirements.

In its post-hearing brief, VSEA requests that the Board order provide that the parties meet and confer before any adverse action is taken against any affected employee as a result of this unit clarification, and that the Board retain jurisdiction in the event the parties are unable to agree on measures to mitigate any potential harm to the employee. This is an appropriate request given the change in employment status of certain employees based on this decision.

### ORDER

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

1. The unit clarification petition filed by the Vermont State Employees' Association in this matter is granted to the extent set forth in the Opinion and is denied in all other respects.
2. The following employees are added to the bargaining unit of Judiciary Department employees represented by the Vermont State Employees' Association based on their employment on a limited status basis effective as of the date of this decision, provided they are still employed as of the date of this decision: Diane Shamas, Judith Sherry, Karen Ackermann, Mildred Barry, Melody Hess, William Eck, Beverly Emch and James Provost.

3. The parties shall meet and confer before any adverse action is taken against any affected employee as a result of this unit clarification, and the Board shall retain jurisdiction in the event the parties are unable to agree on measures, if any, to mitigate any potential harm to any affected employee.

Dated this 21st day of October 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ David R. Boulanger

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David R. Boulanger

/s/ Karen D. Saudek

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Karen D. Saudek