VERMONT LABOR RELATIONS BOARD

DOCKET No 15-42, 15-44, and 15-45

IN THE MATTER OF FACT FINDING BETWEEN:

STATE OF VERMONT

&

VERMONT STATE EMPLOYEES ASSOCIATION

Non-Management Bargaining Unit

Corrections Bargaining Unit

Supervisory Bargaining Unit

FACT FINDER'S REPORT AND RECOMMENDATIONS

Introduction

The Vermont State Employees Association ("Association" or "VSEA") is the exclusive bargaining agent for three bargaining units; the Non-Management Unit, ("NMU") the Corrections Bargaining Unit ("CU") and the Supervisory Bargaining Unit ("SU"). Each of the three bargaining units has a separate collective bargaining agreement with the State of Vermont ("State"). The bargaining units cover approximately 6,000 employees with the largest unit being the non-management unit of approximately 5,000 employees. The VSEA and the State have been negotiating over the terms of successor collective bargaining agreements to the ones that will expire on June 30, 2016. After reaching impasse in their negotiations, the parties engaged in mediation but were unable to reach a successor Agreement.

By agreement of the parties, Gary D. Altman was appointed to serve as the Fact Finder for the unresolved issues. A Fact Finding hearing was held on January 11, and 15, 2016. Gary Hoadley, Director of Labor Relations for the

VSEA, presented the Association's case at the hearing. Joseph McNeil and Colin McNeil of the firm of McNeil, Leddy, and Sheahan presented the State's case. During the two days of hearings, a number of witnesses presented testimony on the parties' proposals. In addition, the parties introduced written materials and submitted post-hearing briefs.

Analysis and Recommendations

Under the State Employees Labor Relations Act, the Fact Finding process is utilized when the Union and Public Employer are unable to reach a successor agreement within a reasonable period of time after impasse. In reaching the recommendations in the present Report, the Fact Finder has considered the criteria set forth in the statute, which includes the wages and benefits paid to State employees and in commerce and industry for comparable work within the State, work schedules, general working conditions, as well as other pertinent factors.

The fact-finding process is a continuation of the collective bargaining process. It is not meant to supplant direct negotiations between the parties. Nevertheless, at times, parties cannot reach a successor agreement and it is necessary for a neutral to offer recommendations, hopefully, to settle the unresolved issues, and bring a measure of finality to the impasse. It must also be noted that large gains or major concessions are not achieved in the format of fact-finding and interest arbitration. A neutral fact finder is reluctant to modify contract provisions where the parties in past years have already reached agreement, the contract article has been in the contract for a considerable period of time and there has been no ascertainable problem with the contract language.

In making the recommendations in the present Report, I have considered the statutory criteria, and have attempted to make reasonable recommendations that are both fair and acceptable to the parties. The Association and the State brought the following issues to fact finding:

1 SALARY AND WAGES

ASSOCIATION POSITION

Non-Management Salary Proposal (Article 45)

2016-2017 - 4% Across the Board Increase Plus Step Advancement

2017-2018 - 4% Across the Board Increase Plus Step Advancement

Supervisory (Article 49) and Correction (Article 49)

2016-2017 - 3% Across the Board Increase Plus Step Advancement

2017-2018 - 3% Across the Board Increase Plus Step Advancement

The Association contends that its wage proposals are fair and reasonable and should be adopted by the Fact Finder. The Association argues that the facts demonstrate that State employees are paid nearly 13% less than workers in the same or comparable occupations in the State of Vermont, and that supervisory employees are paid almost 40% less than workers in comparable positions. The Association contends that wages of State workers have fallen relative to rising personal income for residents of Vermont.

The Association maintains that the State's data, which shows that the wages of State workers in the non-management unit are higher than comparable positions in the private sector, is of limited value. Specifically, the Association states that the State's analysis only considered 25 occupations in the non-management unit, and only consisted of selected occupations, and the State did no analysis of positions in the Corrections or Supervisory Units. The Association maintains that the facts certainly warrant the pay increases proposed by the Association.

The Association argues that reasonable pay increases should not be dictated by the State's purported deficit, as this would result in State workers having to bear the brunt of the State's fiscal troubles, as opposed the State having to raise taxes to balance the State budget. In fact, the Association contends that the State has actually reduced its tax revenue by granting additional tax deductions. Moreover, the Association asserts that the State has the financial ability to pay the wages proposed by the Association, and certainly the ability to pay wages higher than currently proposed by the State in its wage proposals. The Association points to the testimony of State economist Jeffrey Carr, who projected personal income growth of 2.9%

to 3.1%, coupled with State revenue growth projected to be in the range of 3.1% for the next fiscal year.

The Association also disputes the State's attempt to compare the so-called total compensation of State workers with workers in the private sector. Specifically, the Association asserts that such total compensation comparisons are not called for under the statutory criteria, and have been rejected by prior fact finders. Moreover, the Association states that the State did not introduce any figures regarding total compensation of private workers, thus the State's argument that total compensation of State workers is higher than private sector workers is flawed. The Association argues that the evidence presented fully supports its wage proposal for the duration of this two- year contract.

STATE POSITION

The State's wage proposal for all VSEA bargaining units is as follows:

2016-2017 No across the board increase; Continue Step advancement

2017-2018 1% across the board increase; Continue Step advancement

The State contends that its proposal is affordable and sustainable now and into the future. The State maintains that it is presently faced with a budget deficit of approximately $68 million for the upcoming fiscal year. The State also contends that its wage proposals providing step increase for the upcoming fiscal year is more than the current rate of inflation, which, for the past twelve months has between minus .1% and plus .5%. The State points to the fact that Social Security recipients are receiving

no cost of living increase, and that retirees under the State of Vermont Retirement System, because of the nearly zero inflation rates, are also receiving no cost of living adjustment for this fiscal year.

The State also points to testimony of its witnesses that the overall wages and benefits provided to State employees compare very favorably to wages and benefits paid to comparable employees in the private sector. The State argues that wage increases of the magnitude proposed by the Association are not necessary to retain and attract employees. The State asserts that not only must the costs of this Agreement be considered but what also must be considered is the sustainability of continuing to increase wages and benefits for State employees into the future. The State points to a letter from the Chairs of the Appropriations Committee urging the Executive Branch to slow the growth of the State's labor costs and provide sustainable and reasonable compensation and benefits for State employees. The State concludes that it is very supportive of its employees but it can only propose a wage increase that is fiscally responsible for all Vermont citizens.

Discussion

Determining the "appropriate" salary increase is not an exact science. In general, fact finders consider the cost of living, wages and benefits of comparable employees, the ability of the employer (or citizens) to pay for an increase in wages, the bargaining history of the parties and recent contract settlements. The issue, then, is what is the appropriate wage increase, if any, to the existing wage schedule. It is necessary to recommend an increase that, while considering the existing wage levels, also

reflects the present financial circumstances of the State, the wage increases that have been agreed to for private and public sector employees, and the cost of living.

The parties introduced many documents, testimonial evidence and presented arguments in support of their respective positions. The one matter in which there is no disagreement is that employees, who are eligible for step advancement, should receive their step increment on the appropriate date, for both years of this successor Agreement.

There can be no dispute that step increases cost real dollars and the costs of step increases must also be considered when considering the overall across the board increases. There was some dispute about the cost of step increase for the upcoming fiscal year. In general, the historical cost of implementing step increases each year is approximately 1.7%; for fiscal year 2017, due to reduced number of state employees on the pay roll the actual cost of step advancement is a little over four million dollars, or approximately 1%, less than what was originally believed to cost. It must also be remembered that under the existing step schedule, in which not all employees advance a step every year, in the State's proposal for the first year of the Agreement a number of employees will receive no increase. In the second year it appears that the cost will again be in the range of overall 1.7%.

The disagreement is over the so-called cost of living adjustment for the upcoming two fiscal years. The Association maintains that the wages of State employees are considerably behind the wages paid to comparable positions in the private sector. The State, on the other hand, maintains that the wages of State employees compare

favorably with their private sector counterparts, and if benefits are included, the total compensation of State employees exceeds the total compensation of employees in the private sector. The assertions of both parties have a certain degree of accuracy. With so many positions in State Government there are bound to be positions that are underpaid and some that are overpaid.

What is relevant is what had occurred over the past five years with respect to wage growth in the private and public sector. Jeffrey Carr the State Economist concluded:

> … through FY 2009-2015 period, State Government employees in Vermont experienced wage growth that roughly matched that of the Private Sector in the State. On average, Private Sector wages experienced average annual increases of 2.1 %. State Government Sector wages increased at the rate of 1.9% per year. Both Private Sector and State Government wages grew at a rate that was higher than the 1.6% annual rate of CPI inflation.

This conclusion shows that over the past six years, the parties, in their negotiations, have done a good job in matching wage increases for State employees with the wage increases that have occurred for private sector employees in Vermont. Thus, the notion that State employees should now receive no increases because they are paid too high, or that large equity adjustments are warranted to catch up to wages paid in the private sector, is not based on the parties' bargaining history over the past six years.

Unlike many fact-finding or interest arbitration proceedings, which generally look in the rear view mirror at already agreed upon contracts to ascertain wage patterns, the dispute in the present case is for wage adjustments for the next two fiscal years. Mr. Carr, the

State Economist testified about fiscal challenges facing the State, but nonetheless indicated that revenues for the current fiscal year remain on target. It is true, that the State has a deficit that it must close, but this is not due to the fact that State employees' wages are too high, but appears to have more to do with unforeseen Medicaid expenses facing the State.

The two other public sector entities covered under the State Employee Labor Relations Act, the University of Vermont and the Vermont State College reached contract settlements for their employees. In particular, the University of Vermont agreed with the full time Faculty Unit to a 2% across the board increase, and an additional 2% merit pool for FY 2017. Service and Maintenance employees of the University agreed to a 3% increase effective July 1, 2017, and Part-Time Faculty agreed to 3% increase for FY 2017. Similarly, the Vermont State Colleges agreed to 11% increases over a five-year period.

The State's proposal of no across the board increase for FY 17 and a 1% across the board increase for FY 18, cannot be recommended. This wage proposal is reflective of a recessionary economy, which is not supported by the facts, of low unemployment and continued job growth in the State. Moreover, there is no evidence that there have been no wage increases in the private sector for the up-coming two-year period. The undersigned Fact Finder also serves as mediator and fact finder for other public sector collective bargaining impasses in the State of Vermont and familiar with agreed upon wage increases for the upcoming fiscal year; although wage increases have been modest, I am not aware of any recent settlements in which there were no

across the board increases, as has been proposed by the State for FY 17.

It must also be stated that there is insufficient justification to provide higher wage increases to non-management employees than to correction employees and supervisory employees. There is no evidence that there has been a practice of divergence of wage increases among VSEA bargaining units.

RECOMMENDATION – WAGE INCREASES

Based on the totality of facts, the parties should agree to a two-year agreement. The recommended across the board salary increases should be a 2% increase effective the first pay period in July 1, 2016 and 2.25% effective the first pay period in July 1, 2017. In addition, as stated above, employees should receive step increments each year of the two-year agreement in the manner set forth in the Agreement.

2. STEPS (GROUP C EMPLOYEES - NON-MANAGEMENT AGREEMENT)

All three agreements have the same step pay plan. The current Step Plan is as follows:

Step 1 (probation) - normally, 6 months

Step 2 (EOP) - one year	Step 9 - two years
Step 3 - one year	Step 10 - two years
Step 4 - one year	Step 11 - two years
Step 5 - one year	Step 12 - two years
Step 6 - two years	Step 13 - three years
Step 7 - two years	Step 14 - three years
Step 8 - two years	Step 15 - final step

ASSOCIATION POSITION

The Association proposes to modify the step pay plan for those employees who are covered under Group C of the Vermont State Employee Retirement System (VSERS). Under the

Association's proposal the number of years to reach the top step would be reduced, and an employee could reach top step after thirteen and one half years. The step advancement plan under the Association proposal would be as follows:

Step 1 (probation) - normally, 6 months	
Step 2 (EOP) - one year	**Step 9 - one year**
Step 3 - one year	**Step 10 - one year**
Step 4 - one year	**Step 11 - one year**
Step 5 - one year	**Step 12 - one year**
Step 6 - one year	**Step 13 - one year**
Step 7 - one year	**Step 14 - one year**
Step 8 - one year	**Step 15 - final step**

The Association contends that its proposal to compress the step schedule for all law enforcement officers working for the State is long overdue. The Association states that originally, only State Police were required to retire at age 55. The Association states that over the years the State Legislature required other sworn law enforcement officers to also have a mandatory retirement age at fifty-five.

The Association states that at one time the State Police had the same step plan as all other State employees; employees would reach maximum top after twenty-four and a half years of service. In 2001, State Police and the State agreed to shorten the time needed to reach top step to twenty years, and then in 2012, the State Police and the State again agreed to shorten the time period to thirteen and one half years. This compression of the schedule was also applied to State Police supervisors covered by the Supervisory bargaining unit.

The Association contends that other sworn law enforcement officials working for the State of Vermont also have a mandatory retirement age of 55, but unlike State

Police Officers, they cannot reach the top step of the salary schedule unless they have worked twenty-four and a half years. The Association contends that this means that many of these law enforcement officers will not be able to reach the maximum step of the schedule at the time they retire. The Association states that as a matter of fairness and equity, sworn police officers covered under the NMU Agreement should be treated the same as State Police in terms of having the ability to reach top step in the same period of time.

STATE POSITION

The State opposes the Union's proposal. The State contends that the Association's proposal would cost approximately $180,000, as employees would reach top step ten years sooner than under the current step plan. The State further maintains that the Association's proposal would also require additional expenses for the State Retirement System, as a number of employees would have higher salaries at the time they retire. The State also argues that the changes to the step plan for the State Police did not happen all at one time, as it took a number of years for shortening the step plan, and further, the State Police agreed to various concessions, that saved the State money. The State argues that in the present case, the Association has not offered any concessions, but simply wants the more advantageous step schedule.

Discussion

There is insufficient justification to recommend the Association's proposal. The fact that some employees may not have sufficient number of years of service to reach the top step of the current pay plan when they retire is not a compelling argument to reduce the number of steps for this

category of employees. Moreover, the testimony was that for State Police to obtain a step plan with a lower number of steps, the State Police agreed to lower wage increases when the changes in step plan were agreed upon; no concessions have been suggested for this group of employees at this time that would warrant reducing the number of steps for these employees.

RECOMMENDATION – GROUP C STEPS

The Association's proposal to reduce the number of steps for employees now covered by Group C Retirement is not recommended. The parties' should retain the status quo.

3. DISCIPLINARY ACTION (ARTICLE 14 - NON-MANAGEMENT AGREEMENT)

At issue is the subject of the length of time the State may have to conduct disciplinary investigations. The Association seeks to change the language of Article 14 paragraphs 9, 12 and 13.

ASSOCIATION POSITION

The Association proposes the following changes to the current contract language.

> 9. An appointing authority may relieve employees from duty temporarily with pay for a period of up to thirty (30) workdays:
>
> (a) to permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning the employee; or
>
> (b) if in the judgment of the appointing authority the employee's continued presence at work during the period of investigation is detrimental to the best interests of the State, the public, the ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under the State's care. The period of temporary relief from duty may be extended by the

appointing authority **for a period of up to thirty (30) workdays**, with the concurrence of the Commissioner of Human Resources. **In any event, no employee shall be temporarily relieved from duty for more than sixty (60) workdays. The employee shall receive a written explanation of the request for the extension and the progress of the investigation, including the anticipated date of completion.** Employees temporarily relieved from duty shall be notified in writing within twenty-four (24) hours with specific reasons given as to the nature of the investigation, charges and allegations. Notices of temporary relief from duty with pay shall contain a reference to the right of the employee to request representation by VSEA, or private counsel, in any interrogation connected with the investigation or resulting hearing.

12. A personnel investigation shall be initiated within 30 days of the date that management knew or should have known of the complaint(s) or alleged misconduct being investigated.

13. A personnel investigation shall be completed, and the employee shall be sent notice of the conclusion of the investigation, within 90 days from the date on which management knew or should have known of the complaint(s) or alleged misconduct. The parties may agree to extend the 90-day time limit only in instances where felony charges are implicated.

The Association maintains that employees have been notified that they are under investigation for potential criminal or disciplinary matters, and some of the investigations have been ongoing for more than two years, without any type of hearing. The Association contends that it is unfair and unreasonable for employees to be under investigation for such long periods of time, and the Employer should either take action or clear an employee, but not continue investigations for unlimited periods of time.

STATE POSITION

The State opposes the Union's proposal. The State asserts that at times investigations are being conducted by outside law enforcement organizations and the State does not always have control over the length of investigations. The State asserts that is is possible that some of the investigations are complicated and require a lengthy period of time to complete. The State contends that it does not extend investigations beyond the time necessary and does not want to have an arbitrary time period by which to complete investigations.

Discussion

The Association seeks to impose fixed time periods for the State to complete disciplinary investigations. I cannot recommend the Association's proposals. It must first be stated that fixed time periods for investigations are not often found in collective bargaining agreements. Certainly, disciplinary investigations should be completed in as short of period of time as necessary. On the other hand, not all investigations are the same, and some matters may take longer to complete than others. There may also be instances in which outside law enforcement agencies are involved. State employees have some degree of protection in that the Employer cannot deprive an employee of pay without a Loudermill hearing, and if disciplinary action is ultimately taken, the employee has access to the grievance arbitration provisions of the parties' Agreement.

RECOMMENDATION – DISCIPLINARY ACTION

The Association's proposal is not recommended. The parties should make no changes to Article 24, Sections 9, 12 or 13.

4. GRIEVANCE PROCEDURE (ARTICLE 15 ALL AGREEMENTS)

All of the Agreements now provide that the final step of the grievance procedure is before the Vermont Labor Relations Board.

ASSOCIATION POSITION

The Association proposes to modify the current contract language by adding binding arbitration as an alternative to submitting all grievances to the Vermont Labor Board. In addition, under the Association's proposal, dismissals of classified employees could also be submitted to arbitration. The Association argues that binding grievance arbitration is the almost universal process for resolving grievances between unions and management in both the private and public sector. The Association contends that adding arbitration as an alternative forum would provide advantages to both the State and the Association, as most often arbitration would be quicker, and less costly than the costly and lengthy discovery process that often exists now for grievances that are submitted to the Vermont Labor Board for final disposition. Moreover, the Association states that both the Association and State would have the ability to select the arbitrators, and agree upon procedures for the issuance of timely decisions.

STATE POSITION

The State maintains that it is not necessarily opposed to adding binding arbitration as an alternative means for resolving grievances. The State contends that there are still a number of details that have to be negotiated with the Association before it will agree to arbitration as an option in the parties' grievance procedure. The State claims that the parties should further work on these details for a future agreement.

Discussion

There can be little dispute that final and binding arbitration is universally recognized as the last step in the grievance procedure for collective bargaining agreements in both the public and private sector. Thus, there is certainly ample justification for the parties to add binding arbitration as an additional alternative to the Labor Board as the last step in the grievance procedure. Moreover, there are certainly some advantages, as the parties will be able to select their arbitratators, and thus can have more say in the procedures, and can even agree to an expedited process to obtain a decision in a more timely manner.

I would recommend that the parties adopt arbitration as an additional alternative for the final step in the grievance procedure. The language set forth by the Association is reasonable and should be the basis for adding grievance arbitration to the parties' Agreement. In addition, disputes submitted to arbitration are processed by certain procedural and substantive rules. The American Arbitration Association has adopted rules for submitting cases to arbitration, and also rules for expedited arbitrations. I would suggest that the parties review the Rules of the American Arbitration Association and agree upon those rules that they believe are approproiate to their process. The parties should also agree upon a panel of arbitrators to hear cases, as this would expedite the time for obtaining an award, and lower costs. In addition to utlizing the American Arbitration Association for their panel of arbitrators, the parties should also consider the roster of arbitrators maintained by the Federal Mediation and Concilation Service, as this would be less costly.

As there is still more work to be done before agreeing to arbitration as an alternative forum, the parties should continue their negotiations with a goal of implementing arbitration as the final step commencing July 1, 2017.

RECOMMENDATION – GRIEVANCE ARBITRATION

The parties should agree to add binding arbitration as an additional option as the final step in the grievance procedure. The parties should continue negotiations on the parameters of arbitration as set forth above, and implement this final step for grievances filed after July 1, 2017.

5. WEEKEND SHIFT DIFFERENTIAL (ARTICLE 19 - NON-MANAGEMENT AGREEMENT Fish and Wildlife Wardens)

At the present time there is no weekend shift differential for Fish and Wildlife Wardens.

ASSOCIATION POSITION

The Association proposes a weekend shift differential of 50¢ an hour for the Fish and Wildlife Wardens. The Associations proposal reads as follows:

> **Commencing with the first full pay period starting after July 1, 2016, a weekend differential shall be paid at the rate of fifty cents ($0.50) per hour, which shall apply to regularly scheduled shifts beginning after 10 PM on Friday, excluding shifts beginning after 10 PM on Sunday night. (Weekend differential will be added to any other shift differential and to the basic hourly rate before cash overtime is computed.)**

The Association maintains that the Wardens are the only law enforcement employees working for the State who receive no shift differential or weekend differential. The Association states that its proposal would treat the Wardens in a manner similar to other law enforcement

officers who work for the State of Vermont. The Association maintains that the overall cost of $18,000, is minimal and is fully justified.

STATE POSITION

The State opposes the Association's proposal to add a weekend shift differential for the Fish and Wildlife Wardens.

Discussion

There is insufficient justification to add this new benefit for this group of employees. Available funds should be utilized for the across the board increases for all employees.

RECOMMENDATION ARTICLE 19 - NON-MANAGEMENT AGREEMENT

The Association's proposal is not recommended.

6. WEEKEND & SHIFT DIFFERENTIAL (ARTICLE 25 NON-MANAGEMENT AGREEMENT)

Article 25 of the Non-Management Agreement now reads:

> 6. Employees who actually work on a weekend shift, pursuant to regular assignment, including employees who do not self-activate or self-schedule, shall effective the first pay period in July 2001, receive a weekend differential of thirty-five cents ($.35) per hour on any weekend shift. Effective the first pay period in July 2002, the weekend differential rate will increase to forty cents ($.40) per hour. Employees not regularly assigned to a weekend shift but work overtime then, shall not receive weekend differential. Weekend differential will be added to any other shift differential and to the basic hourly rate before cash overtime is computed.

ASSOCIATION POSITION

The Association proposes to increase the weekend shift differential an additional 10¢ per hour, and add new language that would provide that weekend shift

differential would be paid to anyone working any portion of any weekend shift. The Association would re-write Section 6 to read as follows:

> **All employees who actually work any portion of a weekend shift, shall receive a weekend differential of fifty cents ($.50) per hour.** Weekend differential will be added to any other shift differential and to the basic hourly rate before cash overtime is computed.

The Association maintains that there has not been an increase in the differential since 2002, and that the Corrections Unit agreed to the 50¢ an hour differential in 2007, and that it is reasonable to increase the differential by 10¢ an hour at this time. The Association maintains that this change would cost an estimated $18,180 per year.

STATE POSITION

The State opposes the Union's proposal. The State maintains that this is not the time to increase the differential, and that the Association's proposal would expand the situations, in which the weekend differential is paid, further increasing the costs of this benefit.

Discussion

The Association's proposal is not recommended at this time. As stated above there should be no increase in benefits, and instead available funds should be used towards the across the board increases for all employees.

RECOMMENDATION - WEEKEND SHIFT DIFFERENTIAL Article 25 NMU

The Association's proposal is not recommended. There should be no change to the status quo.

7. ARTICLE 6. EXCHANGE OF INFORMATION (All Agreements)

Article 6 of the current Agreement is entitled "Exchange of Information", and sets forth the process for the State to provide information to the Association in various circumstances. Paragraph 4 of the current provision reads:

> The State will also provide such additional information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such additional information shall not be unreasonably denied. Failure to provide information as required under this Article may be grieved through the grievance procedure to the Vermont Labor Relations Board (VLRB); provided, however, the VSEA agrees that it will not pursue under this Agreement or under 1 V.S.A., Sections 315 to 320, disclosure of a document which the State asserts in good faith is a privileged matter of labor relations policy as, for example, a strike contingency plan.

STATE POSITION

The State proposes to add a new paragraph (b) to Section 4 that reads as follows:

> **4: (b) Notwithstanding the above, in matters involving disciplinary action, performance corrective action, and Steps I – III of the grievance procedure, such additional information shall be limited to evidence upon which the State relied when taking the disputed action and that has a direct bearing on material issues of genuine dispute. This subsection is not intended to, in any way, limit the Parties' use of the discovery process at Step IV of the grievance procedure.**

The State claims that at the present time information requests by the Association are overly broad, and often times the Association seeks information way beyond the

issue of the specific grievance that has been filed, and can be characterized as a "fishing expedition". The State contends that the responsibility of one employee is now devoted almost exclusively to responding to information requests made by the Association. The State contends that its proposal would add reasonable limitations to the information requests without interfering with the Association's responsibility to represent its members.

ASSOCIATION POSITION

The Association opposes the State's proposal. The Association maintains that the requests that it makes for information are reasonably related to the grievance. The Association states that it only seeks information so that it can represent its members and it has recently been working with the State to narrow its information requests. The Association states that the State's proposal would interfere with its statutory responsibility to represent its members.

Discussion

Under the Collective Bargaining Law the Association has the right to request information that is relevant and necessary to its duties to represent bargaining unit members. The State's proposal could theoretically limit the Association's statutory right to obtain relevant and necessary information. At the time of a request, if the State believes that the Association's requests are overly burdensome and seeking information that is not necessary or amounts to fishing expedition, the State can refuse to provide the information, and have the matter resolved by the State Labor Relations Board. It would be unreasonable to place a contractual limit on the Association's right to obtain relevant and necessary information. At this time I

cannot recommend that the language proposed by the State be adopted.

RECOMMENDATION ARTICLE 6 - EXCHANGE OF INFORMATION

The State's proposal to amend Article 6 paragraph 4 is not recommended.

8. ARTICLE 12 Section 4 PERFORMANCE EVALUATIONS (All Agreements)

Article 12 of the current Agreement sets forth the various terms relating to performance reviews for employees. Article 6, Section 4 reads:

> Performance evaluations shall continue to be based exclusively on job duties, responsibilities, and other performance related factors. Individual factors on the rating sheet shall not be graded. Comments reflective of the individual factors or of the overall evaluation shall be placed on a separate sheet attached to the evaluation but shall not be considered to be a permanent part of the evaluation itself.

STATE POSITION

The State proposes to modify Article 6 Section 4 to read as follows:

> Performance evaluations shall continue to be based exclusively on job duties, responsibilities, and other performance related factors. **Individual factors in the rating sheet may be graded, so long as such grade is incorporated in a narrative evaluating said factor.** Comments reflective of the individual factors or of the overall evaluation shall be placed on a separate sheet attached to the evaluation but shall not be considered to be a permanent part of the evaluation itself.

ASSOCIATION POSITION

The Association opposes the State's proposal to modify Article 6, and maintains that the modification is not necessary.

Discussion

The goal of performance evaluations is to provide accurate feedback to an employee of his or her performance. The Employer's proposal would further the overall purpose of performance evaluations, and would be beneficial for bargaining unit employeesto have more detailed reports of their performance. The Employer's proposal is reasonable and should be adopted by the parties.

RECOMMENDATION - PERFORMANCE EVALUATIONS

The Employer's proposal should be adopted by the parties, and the parties should add the proposed language to the current contract provision.

9. ARTICLE 15 GRIEVANCE PROCEDURE (All Agreements)

Article 15 sets forth the grievance procedure for all Agreements. Article 15 (3)(a) describes the procedure for filing a grievance at Step 1, which is filed with the employee's immediate supervisor. Step 1 is optional and the employee may elect to file his or her grievance at Step 2.

STATE POSITION

The State proposes to add a new paragraph to Step 1, which reads:

> (**5) Resolutions to Step I complaints shall be non-precedent setting and inadmissible in any legal or administrative proceeding, except to enforce said resolutions.**

The State claims that by ensuring that settlements at Step 1 would be non-precedent setting this would encourage grievance resolutions between employees and their immediate

supervisors, as supervisors would not have to be concerned that any resolution would be binding or serve as precedent for any future cases.

ASSOCIATION POSITION

The Association opposes the State's proposal, and maintains that if there is a resolution it should be binding for similar occurences in the future. The Association states that this language could allow settlements that would be contrary to the terms of the parties' Agreement.

Discussion

Step 1 of the grievance procedure is the lowest level of the grievance procedure; this step can actually be skipped and a grievance can be initiated at Step 2. It is reasonable that the parties attempt to resolve grievances at the lowest possible step of the grievance procedure. To have employees and their direct supervisors attempt to resolve a grievance without fear that such a resolution would be binding on other cases would perhaps encourage parties to seek resolution without having to pursue the case through the steps of the grievance procedure. The State's proposal is recommended.

RECOMMENDATION - ARTICLE 15 GRIEVANCE PROCEDURE

The State's proposal is recommended, and the State's proposal language should be added to the parties' Agreement.

10. OVERTIME (All Agreements)

All three agreements have comprehensive provisions describing overtime eligibility and the method of computing overtime.

STATE POSITION

The State proposes to make a number of changes in the overtime provisions for all the bargaining units. Specifically, the State proposes to:

1. Restrict good time for overtime compensation to time actually worked. Make appropriate adjustments to this effect throughout contract, including Appendix A.

2. Raise eligibility threshold for premium overtime compensation to paygrade 24.

The State asserts that the Legislature has requested that the Executive Branch negotiate a labor agreement that is currently affordable and sustainable in the long run, and one of the changes the Administration now proposes to change is the overtime practice throughout the State. The State asserts that the current policy on overtime is more generous than required under the Fair Labor Standards Act, in that its present practice now considers time that is paid to determine whether an employee is eligible for overtime. Under the Fair Labor Standards Act only time worked must considered in determining whether an employee meets the threshold for earning overtime. The State claims that by not counting paid holidays, vacation and other paid but not worked time ("good time") to determine overtime eligibility, that this would save approximately $1.9 million =, and that these savings could then be used to improve the wages for all bargaining unit employees.

ASSOCIATION POSITION

The Association is willing to agree to raise the threshold for premium overtime eligibility to job grade 24. The Association, however, opposes the State's proposal to alter the existing provisions with respect to eligibility

for overtime so that "good time" is not counted and to change it so that only time actually worked would be the criterion. The Association argues that the contract language with respect to determining eligibility for overtime has been in the parties' Agreements since the 1980's. The Association further asserts that the State's proposal would most likely result in difficulty in getting employees to volunteer for overtime, and will substantially impact employees who work in Departments that rely on overtime for coverage, such as the Corrections Department.

Discussion

One can understand the State's motivation, as it seeks to contain and lower overtime costs. On the other hand, the current practice has been in the parties' Agreement for more than two decades, and was included as a result of the parties' prior contract negotiations. The primary question is whether the current practices are out of line with the practices that occur in similar public entities. There is no evidence that counting paid time off when determining an employee's overtime payments is out of line with other public employers or even private employers. Therefore it cannot be concluded that the current practice of considering paid time in determining overtime payments is an unusual or outdated practice. Moreover, changing the standards could make employees less inclined to accept voluntary overtime, which could have a significant impact on those agencies that rely on overtime for their overall staffing.

When considering the totality of proposals and changes for this successor Agreement, the concessions proposed by the State in changing the methodology of determining overtime is not warranted. Accordingly, I cannot recommend

the State's proposed change to eliminate paid time off ("good time") from calculating overtime for any of the bargaining units.

RECOMMENDATION – OVERTIME

The Employer's proposal to raise the eligibility threshold for premium overtime compensation to pay-grade 24 is recommended. The State's proposal to restrict good time for overtime compensation to time actually worked is not recommended.

11. OVERTIME ARTICLE 28 (Supervisory Agreement)

Article 28 Section 3 now reads:

> (3) Overtime Category 13. Employees in the classes listed below shall receive twenty percent (20) of their base weekly salary per week irrespective of the maximum of their pay grades as full compensation for all overtime hours.
>
> This category shall include only the following classes:
>
> Airport Firefighter Shift Supervisor
> Chief Environmental Enforcement Officer
> Criminal Justice Training Administrator
> Fish Culture Station Supervisor I, II, III

STATE POSITION

The State proposes to eliminate the Airport Firefighter Supervisor from Category 13. The State maintains that its proposal would maximize reimbursements received from the federal government, and would pay employees for time actually worked.

ASSOCIATION POSITION

The Association opposes the State's position. The Association contends that there is no good reason to change the current practice.

Discussion

This contract language has been in the parties' Agreement for a considerable number of years. There is no evidence that duties have changed or that there has been some change in the overall responsibilities of the Airport Firefighter Supervisor that would now warrant deleting this provision from this overtime category.

RECOMMENDATION - OVERTIME ARTICLE 28

The State's proposal is not recommended. There should be no change in the current contract language.

12. MILITARY LEAVE (Article 38 Non-Management, Article 42 Supervisory and Article 43 Corrections)

The Agreements set forth provisions describing military leave, and leave for military training. The current language reads as follows:

> A permanent-status or limited-status classified employee who is a member of the Organized Reserve or National Guard shall be allowed military leave with pay, at the rate of his or her normal base salary prorated as appropriate, for any authorized training, UTA, AT Period, or other State or Federal service up to a maximum of fifteen (15) workdays scheduled by military authority in any Federal Training Year - October 1 to September 30. A permanent-status or limited-status classified employee who has more than fifteen (15) days of authorized military duty scheduled in one Federal Training Year shall not be entitled to leave with pay for those days in excess of fifteen (15), and shall be placed in an off payroll status or leave of absence, unless he or she elects to use accumulated annual, personal leave, or

compensatory time leave credits for the period of absence.

STATE POSITION

The State proposes to add the following provision at the end of Paragraph 1(g).

> **Notwithstanding the foregoing, Airport Firefighters shall be allowed to use Military Leave with pay at the rate of his or her normal base salary prorated as appropriate, on an hour for hour basis, up to a maximum of one hundred sixty eight (168) hours for authorized training as described.**

The State maintains that under current Federal Law, the State is reimbursed for up to 168 hours. The State maintains that this contract change would allow Firefighters to take leave for up to 168 hours, and they could do so on an hour per hour basis. The States asserts that this would limit its obligation to the amount of time for which it obtains Federal reimbursement.

ASSOCIATION POSITION

The Association opposes the State's proposal, and would retain the status quo. The Association maintains that at the present time twenty-one out of the twenty-eight airport firefighters and firefighter supervisors serve in the National Guard and are required to attend National Guard training and drills on a regular basis. The Association maintains that the State's proposal would reduce the time of military leave from the current practice of 311 hours to 168 hours. The Association states that this would result in firefighters having to attend weekend drills for eight hours and then be required to come back to work on the weekends, and that including the time of the drills and their actual work at the airport would result in

firefighters working then thirty straight hours. The Association argues that there is no justification to target this group of employees for this concession.

Discussion

The testimony demonstrates that the majority of firefighters working at the airport have training responsibilities with the National Guard, and that the amount of time for training has not been lowered. This proposal would impact only this group of employees. It appears that current provision has been in the parties' Agreements for a considerable period of time. There is insufficient justification to restrict the leave time for this group of employees.

RECOMMENDATION - MILITARY LEAVE

The State's proposal is not recommended. There should be no change in the current contract provision.

13. HEALTH INSURANCE (Article 49 All Agreements)

Article 49 of all Agreements set forth the provisions for Health Insurance plans provides to State employees.

STATE POSITION

The State proposes to add a new Paragraph 9(g) to the current contract article, which reads as follows:

> **(g) Notwithstanding any language contained in this Article to the contrary, if the total cost of a group health plan or plans offered under this agreement is anticipated to trigger an excise tax under Internal Revenue Code Section 4980I, or any other federal, state, or local statute or regulation, in excess of three hundred thousand dollars ($300,000.00) the parties agree to immediately reopen this agreement to engage in discussions designed to ensure that the payment of such excise tax is avoided.**

The State maintains that its proposal is made to address the financial penalty scheduled to be imposed by the Affordable Care Act. The penalty known as the "excise tax" is a fee that is levied against Employers who offer high-end health insurance coverage to their employees. The State contends that its proposal would ensure that the parties would reopen negotiations to address this issue to avoid what could be a significant financial penalty.

ASSOCIATION POSITION

The Association opposes the State's proposal. The Association states that Congress and the President agreed to legislation that delayed implementation of the excise tax until 2020, and thus there is no need to address this subject in this two-year Agreement.

Discussion

The issue of the excise tax on so called "Cadillac" health insurance plans was a real and pressing issue before Congress and the President agreed to delay implementation of the tax until 2020. The Collective Bargaining Agreement at issue in this proceeding will expire June 30, 2018. Much can happen on the issue of the excise tax as well as amendments to the Affordable Care Act in the intervening period. There is ample time to address this issue during the next round of contract negotiations. Accordingly, there is insufficient justification to recommend the State's proposal at this time.

RECOMMENDATION – HEALTH INSURANCE (Article 49)

The State should withdraw its proposal to add the language for a re-opener on health insurance.

14. MILEAGE REIMBURSEMENT (Article 54 Non-Management, Article 59 Supervisory, and Article 60 Corrections)

The current provision for mileage reimbursement reads as follows:

> 1. For authorized automobile mileage actually and necessarily traveled in the performance of official duties, a State employee shall be reimbursed at the applicable rate established by the Federal General Services Administration ("GSA"), unless the employee is traveling in a State-owned or leased vehicle.
>
> 2. For travel identified in Section 1, above, an employee who elects to utilize their personal vehicle when a State-owned or leased vehicle is not reasonably available for use shall be reimbursed at the applicable "if no Government-owned automobile is available" rate established by GSA.
>
> 3. For travel identified in Section 1, above, an employee who elects to utilize their personal vehicle, when a State-owned or leased vehicle is reasonably available for use, shall be reimbursed at the applicable "if Government-owned automobile is available" rate established by the GSA.
>
> 4. The Labor-Management Committee shall be utilized as a discussion vehicle for exploring the suggestions of both parties concerning energy conservation, reduction of energy costs and appropriate incentives therefore.
>
> 5. Beginning July 1, 1987, the "constructive travel doctrine" (i.e., where the normal commutation distance between an employee's home and his/her official duty station is deducted from mileage incurred in the course of business under certain circumstances) shall be abolished. Administrative rules and policies regarding mileage reimbursement shall be modified in accordance with this Article.

STATE POSITION

The State proposes to modify Paragraphs 2 and 3 as follows:

2. For travel identified in Section 1, above, an employee who elects to utilize their personal vehicle when a State-owned or leased vehicle is not reasonably available for use shall be reimbursed at the applicable "if no Government-owned automobile is available" rate established by GSA, **but shall not exceed a maximum reimbursement rate of fifty-four cents ($0.54) a mile.**

3. For travel identified in Section 1, above, an employee who elects to utilize their personal vehicle, when a State-owned or leased vehicle is reasonably available for use, shall be reimbursed at the applicable "if Government-owned automobile is available" rate established by the GSA, **but shall not exceed a maximum reimbursement rate of nineteen cents ($0.19) a mile.**

The State contends that its proposal would fairly reimburse employees when they use their own cars for travel, but also sets reasonable limits when employees use their own vehicles for such travel. The State further states that if its proposal was accepted it would encourage use of the State's vehicles.

ASSOCIATION POSITION

The Association opposes the State's proposal. The Association maintains that in the last round of contract negotiations it agreed to changes to lower expenses, and there is no need for further concessions at this time.

Discussion

The testimony was that the parties, in their last contract negotiations, agreed to modify the travel reimbursement provisions. There is insufficient justification to amend the current contract provision for this contract period.

15. Background Checks, Article 76 (NMU) Article 77 (Supv.) and Article 21 (Corr.) Background Checks

STATE POSITION

The State proposes to add the following new contract language to all Agreements, which reads as follows:

> **The State may, at its sole discretion, conduct any background checks it deems appropriate including but not limited to, fingerprint supported background checks, credit checks and registry checks, to comply with any Federal and/or State statute or regulation.**
>
> **Should the State determine that a classification is subject to a background check, as described above, the State shall notify the VSEA, and will meet, if requested, within ten (10) calendar days, on a regular basis, to negotiate the impact of such decision for up to forty-five (45) calendar days. If unresolved at the end of the forty-five (45) calendar day period commencing from the date VSEA requests negotiations, the State may implement the background check without further negotiations or recourse to the statutory impasse procedure.**

The State maintains that its proposal would ensure the safety of State employees and the public by having the ability to conduct background checks when necessary to comply with either Federal or State Regulation. The State is willing to negotiate over the impacts of any background checks but argues that there should be a limited time for such negotiations.

ASSOCIATION POSITION

The Association opposes the State's proposal. The Association maintains that there is no need for the State's proposed language, and that the Association should not be limited to bargaining only over the impacts.

Discussion

The State should not be prevented from conducting background checks if required to do so by State or Federal Law. The State's proposal to negotiate over the impacts of any such checks and to have a time period for such negotiations is also reasonable and appropriate. I would recommend the State's proposal, but the parties should also add language that would ensure that background checks would only occur if Federal or State law mandates such checks, and to add language that the results of any such background checks must be kept confidential.

RECOMMENDATION – BACKGROUND CHECKS

The State's proposal to add language for conducting background checks is reasonable and should be adopted by the parties. I would recommend the following language:

> In order to comply with any Federal and/or State statute or regulation the State may conduct background checks limited to, fingerprint supported background checks, credit checks and registry checks. The results of any such background checks must remain confidential.
>
> Should the State determine that a classification is subject to a background check, as described above, the State shall notify the VSEA, and will meet, if requested, within ten (10) calendar days, on a regular basis, to negotiate the impact of such decision for up to forty-five (45) calendar days. If unresolved at the end of the forty-five (45) calendar day period commencing from the date VSEA requests negotiations, the State may implement the background check without further negotiations or recourse to the statutory impasse procedure.

16. TERMINATION OF AGREEMENT (All Agreements)

STATE POSITION

The State seeks language that there would be no retroactive pay increases if no agreement is reached by July 1, 2016. The State maintains that its proposal would encourage the parties to reach agreement in a timely manner.

ASSOCIATION POSITION

The Association opposes the State's proposal.

Discussion

I cannot recommend the State's proposal. The date when the parties actually reach agreement should not dictate whether pay increases should be retroactive. The date for when wage increases should be implemented should not be based solely on the date that the parties ultimately reach a final Agreement. Moreover, adding such language to the Agreement would set a precedent for future negotiations that pay increases would not be retroactive if an Agreement is not reached by a certain date.

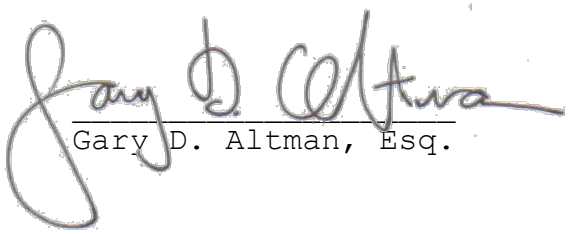
RECOMMENDATION - TERMINATION OF AGREEMENT

The State's proposal is not recommended.

CONCLUSION

I have no illusions that the preceding recommendations are perfect. I have attempted to consider the statutory criteria in an effort to balance the interests of the State employees, the State of Vermont and the citizens of Vermont. It is hoped that these recommendations will prove helpful to the parties in reaching a successor Agreement.

Respectfully submitted, this 29th day of February 2016.



Gary D. Altman, Esq.