NO. CV 07 4015397S	:	SUPERIOR COURT
CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL.	: :	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
V.		
STATE OF CONNECTICUT, BOARD OF LABOR RELATIONS, ET AL.	: :	MAY 22, 2008

MEMORANDUM OF DECISION

The State of Connecticut, and the Connecticut department of public safety (DPS) acting through the office of labor relations of the Connecticut office of policy and management[1] bring this administrative appeal from decisions of the Connecticut state board of labor relations (labor board) relating to the state's duty to bargain with state police captains and lieutenants. The state has also named the Connecticut State Employees' Association, SEIU Local 201 (CSEA) as a defendant in light of CSEA's participation in the proceedings in the labor board.

The labor board issued a final decision on February 16, 2007 (Return of Record, ROR, item 3) that sets forth the following factual introduction: On February 17, 2006, CSEA filed a petition with the labor board seeking certification as the exclusive

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1 The plaintiffs are hereinafter referred to in this opinion as "the state."

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bargaining representative of a bargaining unit of state police captains and lieutenants employed by the state. On June 13, 2006, an agent of the board ordered an election among the petitioned-for employees over the state's objection and a mail-ballot election was conducted between July 5 and July 19, 2006. The ballot count showed that CSEA had prevailed. A hearing was held on the state's objection on August 3, September 7, September 21, October 5 and October 19, 2006.

The labor board made the following relevant findings of fact in its final decision based on the record:

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> 4. Section 5-273-77 of the Regulations of Connecticut State Agencies includes a bargaining unit entitled "State Police–uniformed and investigatory." This unit has been referenced by the labor board's regulations as the State Police or NP-1 unit.

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> 10. The Department of Public Safety has a State Police Division of about 1500 employees in which almost all of the sworn police officers are assigned. . . . On or about the time that the petition was filed, there were approximately 15 captains and 27 lieutenants.
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> 11. The State Police Division also has higher sworn police officials: 7 majors and 2 lieutenant colonels and 1 deputy commissioner. The majors and colonels are unclassified appointments and may also return to their former rank at the end of their appointments.

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22. Captains and lieutenants do not have authority to hire or fire personnel or to transfer personnel either within a unit or inter-unit. Captains may discipline subordinates up to thirty-day suspension but only with approval of superiors and the State Police Office of Labor Relations. A captain may not impose such discipline unilaterally and cannot override a discipline decision with which he disagrees. A lieutenant may impose discipline up to a five-day suspension but with the same restrictions.

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23. Captains and lieutenants do not play a role in collective bargaining unless they are assigned to the Office of Labor Relations. They do not serve as a step in the grievance process.

24. Captains and lieutenants may not order or purchase equipment without approval.

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26. Captains and lieutenants are expected to respond quickly and with authority to emergency and critical situations, including catastrophes, accidents and criminal activity that occur within their area. In those instances, a captain or lieutenant would be called upon to quickly assess the situation, provide immediate instructions for deployment of personnel and maintain control of the situation until a superior became involved.

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28. Captains and lieutenants do not participate in formulating agency policy. Like troopers and sergeants, they are sometimes asked for suggestions on operations and can make recommendations to their superiors for improvements and changes. Captains and lieutenants cannot promulgate orders concerning the operation of their divisions except

> for directives involving such minor things as temporary parking at a facility. The captains who serve as executive officers in the Divisions do not participate in formulating policy; they carry out the directives of the majors to whom they report and act in accordance with instructions in the majors' absence.

The labor board next discussed the following issue[2], based on these findings of fact: Were the captains and lieutenants managerial employees under General Statutes § 5-270 (g)? That section provides: "Managerial employee means any individual in a position in which the principal functions are characterized by not fewer than two of the following . . . (1) Responsibility for direction of a subunit or facility of a major division of any agency head's staff; (2) development, implementation and evaluation of goals and objectives consistent with agency mission and policy; (3) participation in the formulation of agency policy; or (4) a major role in the administration of collective bargaining, agreements or major personnel decisions, or both, including staffing, hiring, firing, evaluation, promotion and training of employees."

The labor board found that the state had established that the captains and lieutenants met the requirements of the first criterion – "responsibility for direction of a subunit or facility of a major division of an agency or assignment to an agency head's staff." The labor board found, however, that the captains and lieutenants do not

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[2] The state raised other issues that the labor board considered in its final decision, but these issues are not pursued in the administrative appeal.

participate in the formulation of agency policy, the third criterion. Finally the labor board also found that the captains and lieutenants do not play a major role in collective bargaining or personnel decisions, the fourth criterion.

Had the labor board found that the captains and lieutenants met the second statutory criterion--development, implementation and evaluation of agency goals and objectives–the plaintiffs would still have qualified the captains and lieutenants for exempt status. It concluded otherwise.

While the captains and lieutenants must act with dispatch on critical matters, make day-to-day decisions, and are highly trained, they have very little autonomy or authority over major decisions that effect their operations. They are involved in implementation of plans and then act as part of ground troops during the operation, reporting to higher authority. "While these employees may be asked for their opinions and in select cases, individual majors and other superiors may rely heavily on them, they simply do not have and cannot exercise the level of independent judgment and involvement necessary to meet this criterion." (Final Decision, p. 8.)

Based on the findings and discussion, the labor board overruled the state's objection, and certified that CSEA was the exclusive bargaining representative of "all said lieutenants and captains" employed by the state for the purposes of collective bargaining. On a failure of the state to bargain, the matter returned to the labor board, and it issued another final decision dated July 24, 2007. (ROR, item 13). The labor

board affirmed its support for its February 16, 2007 decision in the subsequent case. The labor board found that the state had informed CSEA that it would not negotiate "in order to be able to exercise its right to appeal the Board's certification decision [of February 16, 2007]."[3] The labor board duly concluded that the state had committed a prohibited practice by refusing to bargain with the CSEA, the certified exclusive bargaining representative, and this appeal followed.[4] While the final decision is technically the July 24 decision, the validity of the original decision of February 16 is the matter which the court will consider in ruling on this appeal.

The state claims that the labor board incorrectly determined that the captains and lieutenants were not managerial employees, as defined in § 5-270 (g). The court utilizes the "substantial evidence" standard of review of the labor board's decision. "Judicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court . . . to retry the case or to

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Under *Town of Windsor* v. *Windsor Police Department Employees Association, Inc.*, 154 Conn. 530, 227 A.2d 65 (1967), the labor board's decision of February 16 to certify CSEA is not a final decision under § 4-183; the labor board needed to make a second finding of a "prohibited practice" violation under § 5-272 (a) (4) for the state to have the right to take an administrative appeal on the issue of captains and lieutenants.

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Because the labor board found that the state committed a prohibited practice, it is aggrieved by the final decision of the labor board. *Local 1183 of Council #4* v. *Board of Labor Relations*, 33 Conn. App. 541, 545, 636 A.2d 1366 (1994).

substitute its judgment for that of the administrative agency . . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential. . . . The burden is on [the state] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citations and internal quotation marks omitted.) *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). See also *New Haven* v. *State Board of Labor Relations*, 36 Conn. Sup. 18, 23, 410 A.2d 140 (1979) ("If the labor board's findings are supported by substantial evidence, they cannot be disturbed.")

MacDermid also emphasizes that courts should accord great deference to the construction given a statute by the agency charged with its enforcement. *MacDermid, Inc.* v. *Dept. of Environmental Protection,* supra, 257 Conn. 138. This rule applies where the agency decision is time-tested and reasonable, even if the agency interpretation has not been judicially reviewed. *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007); *Jim's Auto Body* v. *Commissioner of Motor*

Vehicles, 285 Conn. 794, 813, n. 27, 942 A.2d 305 (2008).

In this case, the state attempts to prove that the labor board lacked substantial evidence to conclude that it did not meet at least two of the four criteria of § 5-270 (g).[5] Under criterion two, the plaintiffs argue that the captains and lieutenants are directly involved in implementing the goals and objectives of the department of public safety. Pages 12 and 13 of the state's brief summarizes the evidence at the hearing regarding lieutenants, pointing out, among other things, that they react to special and unscheduled events in the community, develop community policing initiatives, and create additional on-line programs at the Training Academy. Captains (p. 19, state's brief) as drawn from the record assume the duties of a major in his/her absence, handle grant funding for traffic enforcement, and are involved in strategic planning.

On the other hand, the labor board has pointed to other evidence in the record. The captains and lieutenants do not spend their principal time on suggestions; all operational plans must be reviewed by majors and a lieutenant colonel. Orders, except for minor decisions, are made at the level above that of a captain. (Brief of labor board, pp. 8-10).

Under criterion three, the state sets forth evidence in the record to show that the

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As indicated above, the parties do not dispute the labor board's conclusion that the state met criterion one. Thus the state is actually disputing the labor board's conclusion that none of the other criterion apply.

lieutenants and captains participate in the formulation of agency policy. (State's brief, pp. 13-15, 19-21). The evidence included that the lieutenant in charge at Bradley Field has made changes in rules, lieutenants add to the DPS manual, and serve on important committees such as jail overcrowding and legislative agenda. Captains in addition formulate district policy and make recommendations for change.

The labor board in contrast points out (at p. 11 of its brief) that the record shows that policy is communicated by higher levels to the captains and lieutenants after it is implemented. CSEA points to the September 21, 2006, testimony of Major Robert Duffy to support its argument that a lieutenant was not principally involved in policy-making. The plaintiffs had made a point that Duffy (when he had been a lieutenant serving at Bradley Field) had initiated a winter gear program for the airport police officers. His testimony on cross-examination was that he accomplished this objective by filling out an "equipment requisition form" after contacting the quarter master. (ROR, Transcript of September 21, 2006, p. 57). This helpful innovation by then Lieutenant Duffy can hardly be classified as one of his "principal functions." The record shows that CSEA's witnesses, lieutenants asking not to be treated as managers, denied a policy-making role. (See, e.g., ROR, Transcript of October 5, 2006, pp. 45, 53, 93; October 19, 2006, p. 23).

Two prior decisions of the labor board have commented on criterion two and

three and have ruled that the exclusion does not apply.[6] In Protective Services Employees Coalition, Decision No. 3143 (1993), the labor board considered whether police lieutenants of the state department then known as CADAC should be excluded as managerial employees. Using the same factors as are now listed in § 5-270 (g), the labor board concluded that the lieutenants were not managers. Under criterion two, the labor board, as in the present case, set forth the activities of the lieutenants as identified by the state and the union. In its discussion, the labor board stated at page 8: "These Lieutenants participate in a goal-setting process, it is true, but they do not exercise **independent** judgment to '**develop[ ], implement[ ]** and **evaluat[e]** goals and objectives consistent with agency mission and policy.' . . . Most significantly, development of goals and objectives . . . is **not** one of the 'principal functions' of the position of an DMH Police Lieutenant. It does not require a substantial portion of his time and appears tangentially related to the provision of police and safety issues." (Emphasis in original).

A second decision, CSEA, SEIU Local 2001, Decision No. 4070 (2005) reached a similar conclusion. There the issue was whether captains at the department of correction were managerial. In concluding that the captains were not excluded, the labor board

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The state argues that these cases are not applicable as factually distinguishable (these involved police assigned to the department of mental health and drug abuse and correction officers respectively). The court defers, however, to the legal discussion by the labor board of criteria two and three, not the factual nature of the law enforcement officers.

stated at page 4 with regard to criteria two and three: "The State presented testimony regarding the DOC mission and structure. This structure allows some of these employees to act quickly and decisively while performing their day to day responsibilities. However, this same structure removes the development of goals consistent with agency mission and policy and development of agency policy from the responsibilities of the employees at issue and places it at the highest levels of the agency. Thus, while employees may be asked for their recommendations, none exercise the level of independent judgment or authority necessary to fulfill statutory criterion two or three."

These decisions hold that while the captains and lieutenants have a role in developing goals for the agency (as would any upper level employee), it is not their principal function as required by § 5-270 (g). Further the labor board in these decisions looked to whether the employees at issue exercise a level of independent judgment in fulfilling criterion two and three. The state claims error in the labor board's introducing the concept of independent judgment into the tests of the statute. On the other hand, this interpretation has been effect since at least 1993 and the court finds that it is a reasonable interpretation of § 5-270 (g). The court therefore defers under the *Longley* and *Jim's Auto Body* cases to the "independent judgment" interpretation[7] placed on criterion two

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The concept of "independent judgment" does not require the manager to have "absolute autonomy," but as the labor board states in its brief at page 21: "[T]he State [must] show that the employees were vested with some indication of trust in their judgment and authority and that they were included in a meaningful way in decision-making and policy

and three by the labor board. The court concludes, based on the record, that the state has not established a lack of substantial evidence to support the decision of the labor board on criteria two or three.

The state also sets forth record evidence at pages 15-17 and 21-22 of its brief to argue that it met the fourth criterion. It claims, among other things, that a lieutenant may reassign staff, select troopers to fill vacancies, train assistants, assist in evaluating new recruits and in conducting disciplinary hearings, and serving on the management bargaining team in contract negotiations. Captains in addition supervise mentoring of new troopers and establish "benchmarks" for their personnel.

The labor board replies at page 8 of its brief, relying on the record, that the captains and lieutenants do not have major roles in personnel decisions. They are not a "step" in the grievance process, do not set collective bargaining priorities and do not interpret the collective bargaining agreement. Neither captains nor lieutenants were proved by the plaintiffs to be members of the (Labor Relations Unit) of the department of public safety.[8] Again in light of the record, the court concludes that the state has failed to

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formulation . . . . To some extent all State employees 'implement' goals and objectives and make suggestions about policy. However, the statute means nothing if it does not mean that managers have some indicia that they participate effectively in the processes by which decisions regarding the agency are made."

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Finding 22 (ROR, Item 3) by the labor board specifies the narrow authority of captains and lieutenants over personnel decisions.

show that the labor board's conclusion about criterion four lacks substantial evidence.

The state further argues that the labor board erred in not considering the legislative history of § 5-270 (g). It argues that the court should analyze the four criteria of the statute in light of prior legislation intending to create a managerial class of employees. In response, the court relies on *Vincent* v. *New Haven*, 285 Conn. 778, 792, 941 A.2d 932 (2008): "We cannot accomplish a result that is contrary to the intent of the legislature as expressed in the act's plain language." (Internal quotation marks omitted.) The Supreme Court continues by citing General Statute § 1-2z: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

There is a question, therefore, of whether the court may look to the legislative history of § 5-270 (g). The Appellate Court has stated: "In light of the dictates of § 1-2z, we must first determine whether the language of [the statute at issue] is plain and unambiguous . . . . A statute is plain and unambiguous when the meaning . . . is so strongly indicated or suggested by the [statutory] language as applied to the facts of the case . . . that, when the language is read as so applied, it appears to be the meaning and appears to preclude any other likely meaning." (Internal quotation marks omitted.)

Sander v. *Sander*, 96 Conn. App. 102, 117, 899 A.2d 670 (2006).

Under this analysis, the court finds § 5-270 (g) to set forth plainly and unambiguously the means under which an exempt position arises under the state collective bargaining act. It is found in Chapter 68 of the General Statutes, providing collective bargaining rights for state employees. Indeed, the state does not suggest that any of the terms of the statute are not plain, but only that having an understanding of the history behind the exemption will influence the outcome of the case. Under these circumstances, the court does not have sufficient reason to consult the legislative history. *Rivers* v. *New Britain*, 99 Conn. App. 492, 499, 913 A.2d 1146 (2007).[9]

Finally, the state argues that allowing captains and lieutenants to be bargaining unit members is unworkable. A captain or a lieutenant might temporarily fill in at a higher level in the chain of command and be excluded from the bargaining unit. The employee would be making decisions that would impact the bargaining unit to which the employee would later return. This is a hypothetical concern, however. There are many instances in state service where union members are temporarily in a different level of service and have to make decisions (obviously acting responsibly) with the understanding that they will return to their former position. The further concern of the state that too few

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Even if the court were to consider the legislative history, it agrees with the labor board that the General Assembly (as contrasted with Congress under the NLRB) in its various enactments on state managers has intended to narrow the exceptions and to widen the availability of collective bargaining for supervisors and managers.

employees will be excluded supervisors, and that there will hardly be any excluded class at all, is one that arises from the very terms of § 5-270 (g), as it has been properly interpreted by the labor board. The court cannot re-write the law.

Based on the foregoing, the appeal is dismissed.

Henry S. Cohn, Judge