

Supreme Court of Vermont
Office of State Court Administrator



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TO: Sen. Jeanette K. White, Chair, and Members
Senate Government Operations Committee

FROM: Patricia Gabel, Esq., State Court Administrator

DATE: March 10, 2020

RE: S. 127 - An act relating to the definition and rights of temporary State employees

Dear Senator White:

Thank you for the opportunity to testify on proposed S.127. In addition to my testimony, I am submitting this written summary, which

1. expresses deep concerns regarding the legislature's proposed micromanagement of the Judiciary's personnel practices; and
2. requests an additional FY21 appropriation, over and above the Judiciary's current FY21 budget request, of \$600,000 to be added to the Judiciary's base budget in the event this bill becomes law. (Please note that this sum is in addition to the amount of \$1,075,000 identified in the fiscal impact statement dated February 26, 2020, provided to several legislative committees regarding expungement legislation H. 251, S. 114, H. 653, and S. 294.)

Background

As I have previously testified in connection with proposed H.334 from last term, temporary employees represent a fraction of the Judiciary's salary budget for FY2019—just 4.9%. Although we spend little, the Judiciary maintains a large 'pool' of approximately 75 temporary employees, consisting of 39 judicial officers, 29 non-exempts and 7 management temporary employees. Approximately 1/3 are retired former state employees who work sporadically or only a few hours per week. These retired employees, who are interested only in temporary work, bring a wealth of experience and provide an invaluable service to the Judiciary.

The Judiciary's use of temporary employees has remained consistent for many years and represents only a small fraction of Judiciary payroll. Our model for utilizing temporary

employees predates the creation of the Judiciary bargaining unit in 2000. Furthermore, the Judiciary has followed the same policy governing its use of temporaries since the early 1990's. This policy, established by the Supreme Court, lays out the parameters for the requesting, approving, and management of temporary employees.

Because a number of the provisions within proposed S.127 are aimed specifically at drastically restricting the Judiciary's flexibility in its use of temporary employees, apply only to the Judiciary, and will have a significant impact on the functioning of the Judiciary, we thought it critical that we share our perspective. The Judiciary does not support the legislation as written, as it will severely impact our ability to perform our core administrative functions, as well as infringe upon management's contractual right to oversee the operations of the Judiciary.

For example, the current Judiciary policy allows us to hire temporaries for a 'Special assignment' or 'Special project'. Accordingly, we currently have temporary employees supporting a 5-year IT project to replace our antiquated enterprise court management software. At the end of the project, we will have no need for these temporary employees. Under the proposed legislation, we would be obligated to hire them as permanent members of the bargaining unit. We have similarly hired temporary workers to address tasks necessitated by legislative changes to the expungement statutes. Under the proposed legislation, we will be forced to either terminate many of our current temporary workers or be compelled to make them permanent, at a cost that we cannot accommodate under our current budget. In addition to these practical concerns, the potential impacts on the Judiciary's ability to manage its workforce and address critical administrative needs within the Judicial branch raise serious constitutional concerns, as well.

Separation of Powers Issues

As in most states and the federal government, Vermont's fundamental law requires a division of power among the separate branches of government. The Vermont Constitution expressly provides that "[t]he Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Vt. Const., ch. II, sec. 5. High on the list of critical constitutional powers entrusted to the Judicial branch operating through the Supreme Court is the authority not only to adjudicate disputes between parties but to provide for the proper and efficient administration of justice throughout the State. See Vt. Const., ch. II, sec. 30 ("The Supreme Court shall have administrative control of all the courts of the state . . .").

Although easy to state, the separation-of-powers doctrine is not always easy to apply. The reality that courts have long recognized is that the doctrine does not require an absolute division of power; and, in fact, recognizes that modern government often involves a certain amount of overlap or sharing of power. Thus, as the Vermont Supreme Court has stated, the "focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so

encroaches upon another branch's power as *to usurp from that branch its constitutionally defined function.*" In re D.L., 164 Vt. 223, 229 (1995 (emphasis added)).

Viewed in the light of these principle, provisions of S.127 intrude so deeply and impactfully into the administrative authority of the Judiciary as to raise serious concerns about their constitutionality. As discussed, the provisions—if enacted—would effectively bar the Judiciary from retaining many of its temporary employees for any meaningful purpose in the future, compel many of those temporary employees currently employed to be either terminated before the bill become law or be retained as permanent employees, and cut deeply and irreparably into the ability of the Judicial branch to address a number of critical (but temporary) administrative needs. The effect, if not the purpose, of the proposed law is a virtual takeover of the personnel policies of the Judicial branch. That the most burdensome restrictions on temporary employees within the bill apply to the Judiciary and not to the other branches serves only to underscore the significant constitutional questions raised about the purpose and scope of the proposed law.

As noted, the Constitution does not bar the reasonable sharing of power among the branches of government, indeed the Judicial Employees Labor Relations Act, 3 V.S.A. secs. 1010 – 1044, represents one clear example. However, the Act expressly exempts from the definition of “employee” within the scope of the Act “an individual employed on a *temporary*, contractual, seasonal or on-call basis, including an intern.” 3 V.S.A. sec. 1011(8)(e), and that exemption is reinforced in the collective bargaining agreement between the Judicial branch and the VSEA, which vests the Judiciary with the “sole right and authority” to “hire and terminate employees, including the right to hire *temporary* employees.” Article 2. JELRA thus strikes the proper balance between the application of general labor-relation principles and protections to judiciary employees and the preservation of the Judiciary’s constitutional independence and authority over critical administrative functions. If enacted, the provisions of S.127 would threaten to overthrow that balance.

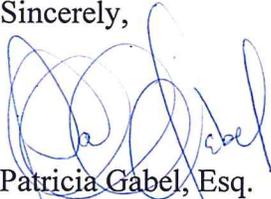
Fiscal Impact: \$600,000 in base general funds budget for 8 positions at the cost of \$75,000 per position

As required under 4 V.S.A. §40, the Judiciary submitted a report to this Committee on January 15, 2020 detailing our temporary employee utilization (a copy of which is attached to this letter.) That report showed that eight temporary employees worked in excess of 1,280 hours in calendar year 2018 and nine in calendar year 2019. We estimate that to be proactively compliant with S.127, we will need to secure eight permanent positions to do the temporary work currently being performed by temporary employees.

Consequently, we oppose this legislation. If it is passed, we will need \$600,000 added to our FY21 general funds budget to complete the implementation of the Next Generation Case Management System by the end of the next calendar year, in accord with the project budget approved by the legislature, and continue the expungement and sealing of case records required by current law and contemplated legislation.

Thank you for your consideration of our requests with respect to this proposed legislation.

Sincerely,



Patricia Gabel, Esq.
State Court Administrator

cc.

Sen. Anthony Pollina, Vice Chair
Sen. Christopher Bray
Sen. Alison Clarkson, Clerk
Sen. Brian Collamore
Gail Carrigan, Committee Assistant
Sen. Jane Kitchel, Chair, S. Appropriations