DEPARTMENT OF PUBLIC SAFETY ET AL. *v.* STATE BOARD OF LABOR RELATIONS ET AL.
(SC 18259)

Rogers, C. J., and Norcott, Katz, Palmer, Zarella and McLachlan, Js.*

Argued February 11—officially released June 8, 2010

Diana Garfield, with whom were *Lisa S. Lazarek*, and, on the brief, *Patrick J. McHale*, for the appellants (plaintiffs).

Karen K. Buffkin, general counsel, with whom were *Alexandra M. Gross*, assistant general counsel, and, on the brief, *Jaye Bailey*, former general counsel, for the appellee (named defendant).

Robert J. Krzys, for the appellee (defendant Connecticut State Employees Association, SEIU Local 2001).

Opinion

ROGERS, C. J. The issue presented by this appeal is whether the trial court properly concluded that the employees of the named plaintiff, the department of public safety (department),[1] in the job classifications of state police lieutenant and state police captain (employees), are not managerial employees under General Statutes § 5-270 (g)[2] and, therefore, have the right to bargain under the state employee collective bargaining law. General Statutes §§ 5-270 through 5-280. The named defendant, the state board of labor relations (board), concluded that the employees were not managerial employees and, accordingly, granted the petition of the defendant Connecticut State Employees Association, SEIU Local 2001 (union), seeking certification as their exclusive bargaining representative. The department appealed from that decision to the trial court pursuant to General Statutes § 4-183 and the trial court dismissed the appeal. The department then filed this appeal.[3] We reverse the judgment of the trial court on the ground that the trial court applied an improper legal standard in determining that the board properly had determined that the employees were not managerial employees.

The record reveals the following procedural history. The union filed a petition with the board seeking certification as the exclusive bargaining representative of a new bargaining unit consisting of state police lieutenants and state police captains. The board ordered an election among those employees, to which the department objected on the ground that the employees did not have the right to bargain under the state employee collective bargaining law because, among other reasons, they met at least two of the criteria set forth in § 5-270 (g) and, therefore, were managerial employees. After the employees voted in favor of union representation, the board conducted a hearing on the department's objections. The board concluded that the employees met the criterion set forth in § 5-270 (g) (1), but did not meet any of the other three statutory criteria. Specifically, with respect to subdivision (2) of § 5-270 (g), the board concluded that "[t]he evidence clearly supports a conclusion that the responsibility for the development, implementation and evaluation of goals and objectives consistent with the [department's] mission is placed at a level above that of captain. 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." With respect to subdivision (3) of § 5-270 (g), the board concluded that "no evidence or testimony established that these employees are involved in any way, other than the occasional suggestion, in the formulation of [department] policy." With

respect to subdivision (4) of § 5-270 (g), the board concluded that "[t]here is no question that none of the . . . employees has any role in the administration of collective bargaining agreements." Accordingly, the board concluded that the employees were not managerial employees, dismissed the department's objections and certified the union as the employees' representative.

Thereafter, the department refused to bargain with the union[4] and the union filed an unfair labor practice complaint with the board. The board ruled in favor of the union and ordered the department to negotiate with it. The department then appealed to the trial court. The trial court concluded that the language of § 5-270 (g) was plain and unambiguous and that the board properly had determined that subdivisions (2) and (3) of § 5-270 (g) require that "the employees at issue exercise a level of independent judgment . . . ."[5] Accordingly, the trial court dismissed the appeal. This appeal followed.

On appeal, the department claims that the trial court improperly deferred to the board's interpretation of § 5-270 (g) (2) and (3) and concluded that the employees were not managerial employees because the statute provides that managerial employees must exercise independent judgment in carrying out the enumerated functions. The board and the union contend that the trial court properly interpreted the statute and properly applied it to the facts of this case. We conclude that the trial court improperly construed § 5-270 (g) to include a requirement that the managerial employees exercise independent judgment in carrying out the principal functions listed in subdivisions (2) and (3).

At the outset, we set forth the standard of review. "According to our well established standards, [r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . It is well settled [however] that we do not defer to the board's construction of a statute—a question of law—when . . . the [provisions] at issue previously ha[v]e not been subjected to judicial scrutiny or when the board's interpretation has not been time tested." (Internal quotation marks omitted.) *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 603, 893 A.2d 431 (2006). A conclusion that an agency's interpretation of a statute is entitled to

deference, however, "does not end [our] inquiry. We also must determine whether the [board's] interpretation is reasonable. . . . In so doing, we apply our established rules of statutory construction." (Citation omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008); see also *Vincent* v. *New Haven*, 285 Conn. 778, 784 n.8, 941 A.2d 932 (2008) ("rule of deference applies only when agency 'has consistently followed its construction over a long period of time, *the statutory language is ambiguous*, and the agency's interpretation is reasonable' " [emphasis in original]).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z[6] directs us first to consider 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Vincent* v. *New Haven*, supra, 285 Conn. 784–85.

In the present case, the department contends that, because the board's interpretation of § 5-270 (g) has not been time-tested and previously has not been subject to judicial scrutiny, the board was not entitled to deference and our review is plenary. Specifically, the department points out that the board has interpreted § 5-270 only twice; see *In re Connecticut State Employees Assn., SEIU Local 2001*, Conn. Board of Labor Relations Decision No. 4070 (August 17, 2005); *In re Protective Services Employees Coalition, AFL-CIO*, Conn. Board of Labor Relations Decision No. 3145 (October 27, 1993); and that neither decision was subject to judicial review. The board and the union contend that, because the board concluded in these two decisions that certain police lieutenants who worked for various agencies and captains in the department of correction were not managerial employees under § 5-270 (g), and because the department was the employer in both decisions and did not challenge the board's decisions, the board's interpretation of the statute is time-tested and is entitled to deference.[7] We agree with the department.

In *Vincent* v. *New Haven*, supra, 285 Conn. 783–84

and n.8, this court concluded that the compensation review board's interpretation of General Statutes (Rev. to 1989) § 31-306 was not entitled to deference because it had applied the interpretation in only two cases, the oldest of which had been decided in 1999, and neither decision had been subject to judicial review. See also *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 603 n.9 ("[t]wo isolated cases do not indicate a time tested interpretation"); cf. *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 405–407 (when commission on human rights and opportunities had consistently interpreted General Statutes § 46a-60 in thirteen decisions over twelve years, several of which had been adopted by various trial courts, interpretation was entitled to deference); *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 268, 788 A.2d 60 (2002) (deferring to interpretation of board to resolve possible ambiguity when board had presented evidence of consistent interpretation of statute for more than twenty-five years). In the present case, the board has interpreted § 5-270 (g) only twice and neither decision was subject to judicial scrutiny. We conclude, therefore, that, as in *Vincent* and *Christopher R.*, the board's interpretation is not entitled to deference.[8] Accordingly, our review is plenary.

We begin our analysis with the language of § 5-270 (g), which provides: " 'Managerial employee' means any individual in a position in which the principal functions are characterized by not fewer than two of the following, provided for any position in any unit of the system of higher education, one of such two functions shall be as specified in subdivision (4) of this subsection: (1) Responsibility for direction of a subunit or facility of a major division of an agency or assignment to an 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."

Thus, under § 5-270 (g) (2) and (3), employees in a particular position are managerial employees if the enumerated functions constitute the position's "principal functions . . . ." Although the phrase "principal functions" is not statutorily defined, we conclude that no reasonable interpretation of the phrase carries the connotation that employees in a managerial position must exercise independent judgment in carrying out the enumerated functions. Rather, the phrase connotes that the enumerated functions must be the position's most important, consequential or influential functions. See Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) (defining "principal" as "most important, consequential, or influential: CHIEF"); see also Black's Law

Dictionary (9th Ed. 2009) (defining "principal" as "[c]hief; primary; most important").[9] Thus, contrary to the board's suggestion that, if the phrase principal function is to have any meaning, it must mean that managerial employees exercise independent judgment,[10] it is reasonable to conclude that the legislature intended that the board could consider the amount of time that the employees in the position devote to each function, whether an employee's ability to carry out an enumerated function is a prerequisite for being hired to the position and whether the failure of an employee in the position to carry out an enumerated function would have important consequences to the employer.[11] We conclude, therefore, that although the application of the phrase principal functions to any particular position will require an exercise of judgment as to which functions of a particular position are the most important, consequential and influential, the phrase clearly and unambiguously does not mean that the employee must exercise independent judgment in carrying out the enumerated functions.[12]

Similarly, nothing within the language specifically describing the principal functions of managerial employees connotes that such employees must exercise independent judgment in carrying out those functions. Subdivision (2) provides that the position's most important, consequential or influential functions may include the "development, implementation and evaluation of goals and objectives consistent with agency mission and policy . . . ." General Statutes § 5-270 (g) (2). The development, implementation and evaluation of the goals and objectives may be an important responsibility of an employee in a particular position even if the employee does not exercise independent judgment in carrying out that responsibility. For example, one of the principal functions of an employee may be to present a range of options for implementing the employer's goals and objectives, with the final choice to be made by a higher ranking employee. Subdivision (3) of § 5-270 (g) merely provides that a principal function of a managerial employee may be "participation in the formulation of agency policy . . . ."[13] Participation, by its very nature, does not require independence.[14]

Moreover, if the legislature had intended to impose a requirement that managerial employees exercise independent judgment in carrying out the activities described in § 5-270 (g) (2) and (3), it could have done so expressly, as it did in § 5-270 (f).[15] "We are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 119, 830 A.2d 1121 (2003).

The board and the union raise numerous policy arguments in support of their claim that managerial employ-

ees must exercise independent judgment in carrying out the principal functions described in § 5-270 (g) (2) and (3), and also point to the legislative history of the statute. We have concluded, however, that the language of § 5-270 (g) plainly and unambiguously does not require that managerial employees exercise independent judgment in carrying out their principal functions.

We conclude, therefore, that the trial court improperly dismissed the department's appeal after concluding that the board properly had determined that the employees did not meet the criteria for managerial employees set forth in § 5-270 (g) (2) and (3) because the department had not proved that the employees exercised independent judgment in carrying out the functions described in those subdivisions. Accordingly, we reverse the judgment of the trial court and remand the case to that court with direction to remand the case to the board so that it may apply the proper standard.[16]

The judgment of the trial court is reversed and the case is remanded to that court with direction to sustain the department's appeal and to remand the case to the board for further proceedings according to law.

In this opinion NORCOTT, ZARELLA and McLACHLAN, Js., concurred.

* This case was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Katz, Palmer, Zarella and McLachlan. Although Justice McLachlan was not present when the case was argued before the court, he read the record, briefs and transcript of oral argument prior to participating in this decision.

[1] Because the department, in its appeal, was acting through the office of labor relations of the office of policy and management, that office also is a plaintiff in this action.

[2] General Statutes § 5-270 (g) provides: " 'Managerial employee' means any individual in a position in which the principal functions are characterized by not fewer than two of the following, provided for any position in any unit of the system of higher education, one of such two functions shall be as specified in subdivision (4) of this subsection: (1) Responsibility for direction of a subunit or facility of a major division of an agency or assignment to an 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."

[3] The department appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] The department was required to refuse to negotiate with the union in order to obtain judicial review of the board's decision certifying the union as the employees' bargaining representative. See *Windsor* v. *Windsor Police Dept. Employees Assn., Inc.*, 154 Conn. 530, 535, 227 A.2d 65 (1967) ("there is statutory provision for an appeal from an order of the board only when that order is a final order of the board and when an unfair labor practice is alleged to have occurred").

[5] The court also concluded that the department had "failed to show that the . . . board's conclusion [that the employees did not satisfy subdivision (4) of § 5-270 (g)] lacks substantial evidence." On appeal, the department has abandoned its claim that the employees meet this criterion.

[6] General Statutes § 1-2z provides: "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."

[7] Neither the board nor the union contends that the department's claim was barred by the doctrine of collateral estoppel.

[8] The dissent agrees with this conclusion, but concludes that, because the legislature has amended § 5-270 (g) several times since the department's decision in *In re Protective Services Employees Coalition, AFL-CIO*, supra, Conn. Board of Labor Relations Decision No. 3145, we should presume that the legislature acquiesced in the decision. We recognize that "in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute." (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 164, 931 A.2d 890 (2007). We have concluded, however, that the board's interpretation of § 5-270 (g) (2) is not time-tested. In addition, we conclude that that interpretation is inconsistent with the plain language of the statute. We believe that these considerations rebut any presumption of legislative acquiescence.

[9] "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. General Statutes § 1-1 (a). If a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 235, 983 A.2d 1 (2009).

[10] The board contends in its brief that, "for the phrase 'principal function' to have any meaning, it must include . . . elements of expertise and judgment and reliance by the [department] on both." In its decision, however, it concluded that, under § 5-270 (g) (2), managerial employees must "exercise . . . *independent* judgment . . . ." (Emphasis added.) Although we agree with the board that the functions described in § 5-270 (g) (2) and (3) may require some level of expertise and judgment and that employers will rely on managerial employees to carry out their functions, we do not agree with its conclusion that the phrase principal function connotes the exercise of independent judgment, which was the basis for its decision.

[11] We do not suggest that these are the only factors that may be considered.

[12] We emphasize that we do not, as the dissent suggests, conclude that the functions of managers as set forth in § 5-270 (g) (2) are "ministerial." We conclude only that managerial employees need not exercise *independent judgment* in carrying out those functions. The board found that the employees "may be asked for their opinions . . . in select cases, [and] individual majors and other superiors may rely heavily on them," but, nevertheless, concluded that they were not managerial employees because "they simply do not have and cannot exercise the level of independent judgment and involvement necessary to meet this criterion." Thus, the board concluded that, although the employees gave opinions, which requires the exercise of judgment, they were not managerial employees because they did not exercise *independent* judgment. We conclude only that the latter determination by the board was improper. Contrary to the dissent's suggestion, our conclusion that § 5-270 (g) (2) does not require that managerial employees exercise *independent* judgment in carrying out the enumerated functions does not necessarily mean that those functions are purely ministerial.

[13] The department points out that the state police, as a paramilitary organization, has a strict chain of command requiring more pronounced accountability than other areas of state service. In recognition of this fact, we conclude that the board, on remand, may consider the nature of the organization in determining the degree of autonomy that the employees must enjoy in order to satisfy the criteria set forth in § 5-270 (g) (2).

[14] In its memorandum of decision, the trial court suggested that the board properly held that both subdivisions (2) and (3) of § 5-270 (g) require that managerial employees exercise independent judgment in carrying out the described activities. In the board's decision, however, the board stated that the department had not established that the employees met the criterion in subdivision (3) of § 5-270 (g) because "no evidence or testimony established that these employees are involved in any way, other than the occasional suggestion, in the formulation of agency policy." Thus, the board did not interpret subdivision (3) of § 5-270 (g) to require the exercise of independent judgment.

Because we must remand the case to the board for reconsideration of its determination that the employees do not meet the criterion contained

in § 5-270 (g) (2) in light of our determination that that criterion does not require the exercise of independent judgment, we need not decide whether the board's determination that the employees did not meet the criterion set forth in subdivision (3) was proper under the definition of principal functions that we have adopted in this opinion. Rather, we leave that determination to the board on remand.

[15] General Statutes § 5-270 (f) provides in relevant part: " 'Supervisory employee' means any individual in a position in which the principal functions are characterized by not fewer than two of the following: (1) Performing such management control duties as scheduling, assigning, overseeing and reviewing the work of subordinate employees; (2) performing such duties as are distinct and dissimilar from those performed by the employees supervised; (3) exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing the provisions of a collective bargaining agreement; and (4) establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards, provided in connection with any of the foregoing the exercise of such authority is not merely of a routine or clerical nature, *but requires the use of independent judgment* . . . ." (Emphasis added.) The board argues that it would be absurd to conclude that supervisory employees, who are of lower rank than managerial employees and who are not excluded from collective bargaining, are required to exercise independent judgment in carrying out their principal functions, but managerial employees are not. The principal functions of supervisory employees are different, however, from those of managerial employees. Accordingly, we do not agree that our interpretation results in an absurdity. The legislature reasonably could distinguish supervisory employees from lower ranking employees by requiring a finding that the former exercise independent judgment in carrying out certain functions while distinguishing managerial employees from lower ranking employees by requiring a finding that the former had different principal functions than the latter.

[16] General Statutes § 4-183 (j) provides in relevant part that, if the trial court sustains an administrative appeal, it may, "if appropriate . . . remand the case for further proceedings. . . ."