

ELIZABETH A. PEARCE
STATE TREASURER

RETIREMENT DIVISION
TEL: (802) 828-2305
FAX: (802) 828-5182



UNCLAIMED PROPERTY DIVISION
TEL: (802) 828-2407

ACCOUNTING DIVISION
TEL: (802) 828-2301
FAX: (802) 828-2884

STATE OF VERMONT
OFFICE OF THE STATE TREASURER

TO: Jill Krowinski, Speaker of the House
Becca Balint, President Pro Tempore
Senator Jane Kitchel, Chair, Senate Committee on Appropriations
Senator Jeanette White, Chair, Senate Committee on Government Operations
Representative Mary Hooper, Chair, House Committee on Appropriations
Representative Sarah Copeland-Hanzas, Chair, House Committee on Government Operations
Susanne Young, Secretary of Administration

FROM: Beth Pearce, State Treasurer

DATE: January 15, 2021

RE: Law Enforcement Retirement Benefits Study Committee – Final Report

In 2019, the General Assembly created the Law Enforcement Retirement Benefits Study Committee (Committee) in Act 25. The Committee's purpose is "to evaluate the requirements for, and make recommendations on, membership in Group C of the Vermont State Employees' Retirement System." 2019 Acts & Resolves No. 25, Sec. 4, Subsec. (a).

Per Act 25, the Committee is made up of 10 members, and as State Treasurer, I serve as Chair. The General Assembly tasked the Committee with providing a final written report, including recommendations, by January 2021. In the interim, the General Assembly directed that the Committee provide a progress report by January 2020.

I provided the General Assembly and Administration with the progress report on January 15, 2020, and I now provide the final report and recommendations of the Committee, in compliance with Act 25.

Background

An Overview of Group C

The Vermont State Employees' Retirement System (VSERS) includes Group C, which is specifically reserved for state employees in law enforcement and firefighter positions. The specific positions in Group C are set forth in 3 V.S.A. § 455(a)(9)(B) and (a)(11)(C), and include the following positions:

- Employees of the Department of Public Safety, Department of Liquor Control, and Department of Fish and Wildlife assigned to law enforcement duties;
- Motor vehicle inspectors;

- Deputy sheriffs paid by the State of Vermont whose primary function is transports;
- The Capitol Police force;
- Certain investigators employed by the Criminal Division of the Office of the Attorney General, Department of State's Attorneys, Department of Health, or Office of the Secretary of State; and
- Full-time firefighters employed by the State of Vermont.

The eligibility criteria and retirement benefits for VSERS members are summarized in Appendix A to this Report. While not an exhaustive comparison, Appendix A illustrates how Group C compares to the other Groups in the State Plan. By way of reference, Group A is a closed Group with only a handful of active employees. Group D is reserved for judges only. And Group F is the open Group to which most of the State's active workforce belongs.

The main features of Group C can be summarized as follows:

- The normal retirement age for Group C members is 55.
- The early retirement age for Group C members is 50, provided the member has 20 years of service. Unlike other groups, there is no reduction in retirement allowance for early retirement for Group C members.
- Group C members vest after 5 years for retirement and disability benefits, and after 10 years for death-in-service benefits.
- Group C members' surviving spouses receive a higher death-in-service benefit (70 percent of member's accrued benefit) than other groups.
- The retirement benefit for Group C members is based on the member's highest two consecutive years of salary (average final compensation or AFC), and it is capped at 50 percent of the member's AFC.
- Perhaps the most unique aspect of Group C is that the normal retirement age of 55 is also a mandatory retirement age. This mandatory retirement age is a focus of the Committee's review.

Act 25 and the Creation of the Committee

As noted above, the Committee was established to review the Group C membership requirements. Specifically, the Committee was tasked with addressing the following questions:

1. Whether the requirements for membership in Group C are tailored to provide the appropriate retirement benefit to the appropriate group of employees. This analysis shall include identifying all law enforcement positions that are currently in Group C and all law enforcement positions that are in another Group.
2. Whether applicable federal requirements, including the provisions of Age Discrimination in Employment Act, merit changes to the requirements of Group C. This shall include an evaluation of any possible changes to mandatory retirement ages as well as whether the specified positions are appropriately subject to a mandatory retirement age.

After performing the necessary review and analysis required by Act 25, the Committee is directed to make recommendations as to the following:

- Whether any State positions currently in Group C should be reclassified to another Group within the Vermont State Employees' Retirement System, given the nature of the job duties performed by members in such positions;
- Whether any State positions not currently in Group C should be reclassified into Group C, given the nature of the job duties performed by members in such positions; and
- Whether the General Assembly should consider any revisions or enhancements to the retirement benefits for certain State positions that do not qualify for the current or recommended Group C requirements, or reclassification of State positions, where the nature of the position and job duties performed merit such revisions.

The Committee

In late summer 2019, following the passage of Act 25, appointments were made to the Committee, which is made up of the following individuals:

- State Treasurer Beth Pearce, Chair
- Sen. Jane Kitchel (Senate Appropriations)
- Rep. Maida Townsend (House Appropriations)
- Sen. Jeanette White (Senate Government Operations)
- Rep. John Gannon (House Government Operations)
- Roger Dumas (Vermont State Employees' Retirement System)
- Commissioner Beth Fastiggi (Department of Human Resources)
- Major Ingrid Jonas (Department of Public Safety)
- John Federico (Vermont State Employees' Association)
- Michael O'Neil (Vermont Troopers' Association)

The full Committee met three times in 2019, in August, September, and December. In between the September and December full Committee meetings, subcommittee meetings were held to review the job specifications for all Group C members.

The full Committee met early in 2020, and then met another three times in late 2020 to complete its work.

Staff from the State Treasurer's Office, Attorney General's Office, and Department of Human Resources provided valuable assistance to the Committee in carrying out its assigned tasks.

Final Report

I am pleased to report that the Committee has completed its work and makes the recommendations set forth below.

Definition of Law Enforcement Officer

Consistent with Act 25's mandate, the Committee has focused its efforts on the question of whether members currently in Group C are appropriately subject to mandatory retirement under the federal Age Discrimination in Employment Act, or ADEA. Under the ADEA, it is generally unlawful to require an employee to retire based on the employee's age unless the employee falls within certain

categories. One such category is for law enforcement officers and firefighters. 29 U.S.C. § 623(j). Accordingly, the Committee has conducted a review of all Group C law enforcement positions to determine whether those positions fall within the ADEA's law enforcement exception.¹ To perform this review, the Committee has identified all positions with employees currently in Group C and compiled the job specifications set forth by the Department of Human Resources.

The Committee has also reviewed the legal definition of the term "law enforcement officer," and based on this review, established a working definition to use in evaluating existing positions. The Committee's working definition of "law enforcement officer" is as follows:

An employee who is certified by the Criminal Justice Training Council and whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the State, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The working definition is generally derived from the federal definition of "law enforcement officer" set forth in the ADEA, which can be found at 29 U.S.C. § 630(k). In addition to adopting this working definition, the Committee also reviewed and adopted a series of factors to use in evaluation of existing positions. These factors were derived from a similar statutory definition of a "law enforcement officer" in the federal retirement systems (5 U.S.C. § 8331(20)), as well as associated regulations and caselaw.² Factors include, among other things, whether the position has frequent direct contact with criminal suspects, is authorized to carry a firearm, works for long periods without a break, is physically demanding, etc.

Review of Existing Group C Positions

After establishing a working definition of law enforcement officer, the Committee reviewed existing Group C positions to determine whether those positions are consistent with the working definition of law enforcement officer. The Committee took an initial pass through all of the Group C job specifications to determine whether it could reach a preliminary conclusion that the position is likely to meet the law enforcement officer definition based solely on a review of the position's job specifications. For example, there would be no question that employees such as State Troopers clearly meet the law enforcement definition, rendering any further review of those and other positions unnecessary. This "first cut" significantly reduced the number of positions in need of further review.

In order to better evaluate those positions in need of further review, a brief questionnaire was developed and circulated to appointing authorities for the positions listed below. The questionnaire was developed from the working definition of law enforcement officer and the factors noted above.

¹ Firefighters are not included in the instant review as they are outside the scope of Committee's charge to evaluate law enforcement personnel and they are subject to their own exception under the ADEA.

² See 5 C.F.R. § 831.902; *Bingaman v. Department of Treasury*, 127 F.3d 1431, 1436 (Fed.Cir. 1997); *Watson v. Dept of Navy*, 262 F.3d 1292, 1300-01 (Fed.Cir. 2001). For a more general discussion of the topic, please see Katelin P Isaacs, Congressional Research Service, *Retirement Benefits for Federal Law Enforcement Personnel* (Sept. 5, 2017), at p. 1-3, available at <https://fas.org/sgp/crs/misc/R42631.pdf>.

- Attorney General's Office
 - AGO Criminal Investigator
- Sergeant at Arm's Office
 - Capitol Police Officer
- Department of Liquor Control
 - Director Liquor Compliance & Enforcement
 - Liquor Control Investigator
 - Liquor Control Investigator Supervisor
- Secretary of State's Office
 - Licensing Board Investigator Law Enforcement
 - Licensing Board Chief Investigator
 - Licensing Board Investigator Coordinator
- Department of Health
 - Medical Board Investigator
- Department of Motor Vehicles
 - Mot Vehicle Criminal Investigator
 - Mot Vehicle Criminal Unit Supervisor
 - Mot Vehicle Enforcement & Safety Director
 - Motor Vehicle Chief Inspector

The Committee reviewed the questionnaire responses and determined that the following positions should no longer be placed within Group C:

- Secretary of State's Office
 - Licensing Board Investigator Law Enforcement
 - Licensing Board Chief Investigator
 - Licensing Board Investigator Coordinator
- Department of Health
 - Medical Board Investigator

The reason for this determination is that these positions' primary duties focus substantially on civil, rather than criminal matters. For the positions in the Secretary of State's office, employees spend only about 10 percent of their time on criminal matters. For the positions in the Department of Health, only about 2% of employees' time is spent on criminal matters. These positions are not uniformed officers, and they do not have frequent, direct contact with criminals and/or criminal suspects. They are not required to be on call, nor are they required to maintain a level of physical fitness. Accordingly, when the positions were viewed as a whole, it was determined that the positions did not meet the above-noted definition of "law enforcement officer," and the more appropriate retirement group for these employees is Group F, not Group C.

The Committee's recommendation to move these positions to Group F is prospective only, and it includes an additional recommendation that employees currently occupying these positions be given the option to be grandfathered into their current retirement Group. In the Committee's view, it would be inappropriate to suddenly mandate a change in retirement group for employees whose position is currently in Group C. Historically, such grandfathering has been employed when positions are moved from one retirement group to another as a matter of fairness to existing employees within those positions.

Review of Other Positions

The Committee also solicited input from employees and employee groups as to whether certain positions in Group F should be moved into Group C. The Committee held a public hearing to provide interested stakeholders with an opportunity to make the case for the change. The following groups expressed interest in reclassification into Group C:

- Vermont Criminal Justice Council employees
- Department of Corrections (DOC) correctional officers

The arguments for inclusion focused on recruitment and retention issues, as well as pay scale issues. Specifically, employee representatives argued that where law enforcement officers have a Group C retirement benefit (full retirement at age 55, or at age 50 with 20 years of service), it is difficult to retain skilled employees in similar positions with a less generous retirement benefit. Additionally, the argument for inclusion of correctional officers also focused on the mental and physical toll the work takes on correctional officers.

The Committee considered the arguments raised by these employee groups, but it ultimately determined that it did not have enough information to recommend a change in classification for these positions. The Committee's decision was based largely on the fact that nature of the positions do not appear to meet the working definition of law enforcement officer noted above. Moreover, the Committee noted that correctional officers already have a carve-out within Group F, which permits corrections officers to retire at age 55 with 20 years of service in a facility without the early retirement penalty faced by other Group F positions.

Finally, while the Committee was sensitive to the recruitment and retention issues raised by the employee representatives, the Committee believed that those issues would be better addressed on a more holistic basis in which work conditions, pay, and other matters could be addressed in addition to narrowly looking at retirement benefits.

In light of the above, the Committee recommends that no existing positions be added to Group C at this time.

Sheriff's Deputies Currently in VSERS Group F

Pursuant to Act 25, the Committee's review of positions is focused on whether certain positions should be included in VSERS Group C. It does not involve a review of whether certain positions should be included in the Vermont Municipal Employees' Retirement System, or VMERS. However, in advance of Act 25's passage, Lamoille County Sheriff Marcoux had raised a concern about sheriffs' deputies who work for sheriffs' departments that have elected to participate in Group F of VSERS, and who therefore do not have access to a 20-year retirement benefit.³

By way of background, the Appendix attached hereto contains a chart comparing the retirement benefits of the different groups in which law enforcement officers may be placed. As this chart

³ Certain sheriffs' deputies who perform transport duties and who are paid by the State of Vermont are addressed separately. Those transport deputies are in VSERS Group C, and they are not included in the concerns raised by Sheriff Marcoux.

demonstrates, VSERS Group C includes a 20-year retirement benefit, i.e., full retirement benefit eligibility after 20 years of service, and a mandatory retirement age of 55. In VMERS, both Groups C and D also provide for a 20-year retirement benefit, but without the mandatory retirement age. As was explained to the Committee, it is not uncommon for law enforcement officers in VSERS Group C to retire after 20 years of service with the State, and thereafter work in law enforcement for a county or municipality.

Over the years, different sheriff's offices have elected to participate in different plans. Those sheriff's offices that elected to participate in VMERS can provide for a 20-year retirement benefit in Groups C or D. Those sheriff's offices (like Sheriff Marcoux's) that elected to participate in VSERS cannot provide for a 20-year retirement.

Sheriff Marcoux's concern focuses on employee retention. He notes that it is difficult to retain qualified sheriff's deputies after they are trained because they may find it financially advantageous to seek employment with the State in a position with a 20-year retirement benefit. He therefore requests that sheriff's offices that elected to participate in VSERS Group F be given the opportunity to switch to a plan with a 20-year retirement benefit, either VSERS Group C or VMERS Group C or D.

The Committee discussed this issue at length, hearing from both Sheriff Marcoux and a representative of the State's Attorneys and Sheriffs Office. The Committee acknowledged both the employee retention issue faced by Sheriff Marcoux and others, and the need for equity consistency among different police departments. However, the Committee ultimately determined that issue raised by Sheriff Marcoux was both complex and outside the scope of Act 25, which focuses solely on state employees within VSERS. Fundamentally, additional study on the overall working conditions and compensation afforded sheriffs' deputies would be needed to address the retention issues raised. Moreover, any potential change in retirement systems, i.e., from VSERS to VMERS, would require an in-depth analysis of the inter-system costs associated with the change and how and to whom they would be allocated.

Because these issues are beyond the scope of the Committee's charge, the Committee makes no recommendation on this issue but recommends further study.

Mandatory Retirement Age of 55

The Committee also reviewed the mandatory retirement age of 55. By way of background, the ADEA permits a mandatory retirement age for law enforcement officers and firefighters, but in no event may that mandatory retirement age be below the age of 55. *See* 29 U.S.C. § 623(j). In Vermont, the mandatory retirement age for State-employed law enforcement officers is age 55. *See* 3 V.S.A. § 459(a)(2). That mandatory retirement age has faced a legal challenge in the past—and it was upheld by the Vermont Supreme Court in 2010. *Badgely v. Walton*, 188 Vt. 367 (2010).⁴

The Committee reviewed mandatory retirement ages of other public systems, which ranged from 55 to no mandatory retirement age at all. It was noted that the mandatory retirement age for law enforcement officers in the federal government is 57. It was also noted that the history of the ADEA

⁴ The primary challenge to the mandatory retirement age in *Badgely* was based on the Common Benefits Clause of the Vermont Constitution. It focused on whether state troopers' mandatory retirement requirement should be based on a physical ability test rather than a specific age.

demonstrates an ongoing national discussion about whether a mandatory retirement age or a physical skills test is the best and most fair way to address mandatory retirement of law enforcement officers. That discussion, as noted in the *Badgely* case, has not reached a definitive resolution at the national level.

Ultimately, the Committee determined that some form of a mandatory retirement age is likely appropriate, but that it did not have the expertise or data to make any recommendations regarding the existing mandatory age of 55. Accordingly, the Committee recommends no change in the existing mandatory retirement age.

Conclusion

While the Committee has completed the responsibilities assigned to it by Act 25, we note that the recruitment and retention issues faced by law enforcement agencies in Vermont are serious and worthy of further study. However, any such study would involve much more than retirement benefits. It would involve a holistic review of officer working conditions, pay, benefits, etc. It also involves a serious discussion regarding equity among the different law enforcement agencies. To the extent Committee members can be helpful in furtherance of that discussion, we welcome the opportunity.

For more information about the Committee and to access the agendas and minutes from the meetings, please visit the Treasurer's Office website by using the following link:

<https://www.vermonttreasurer.gov/content/law-enforcement-retirement-benefits-study-committee>

Please note: Secretary Condos appeared at the January 11 meeting and objected to the Committee's conclusions with respect to the positions within the Secretary of State's Office. The Committee recognizes the need for further testimony in front of the legislative policy committees on this topic. Secretary Condos' written comments are provided as Attachment A to this report.

Attachment A



State of Vermont
Office of the Secretary of State

Office of Professional Regulation
89 Main Street, 3rd Floor
Montpelier, VT 05620-3402
sos.vermont.gov

James C. Condos, Secretary of State
Christopher D. Winters, Deputy Secretary
S. Lauren Hibbert, Director

January 11, 2021

To: Law Enforcement Retirement Benefits Study Committee
From: Jim Condos, Secretary of State
Christopher Winters, Deputy Secretary of State
Lauren Hibbert, Director, Office of Professional Regulation

Re: Law Enforcement Retirement Benefits

Dear Committee,

Thank you for the opportunity to provide commentary. The Office of Professional Regulation, a division within the Secretary of State's Office employs five individuals who are currently classified as Law Enforcement and who collect retirement under Class C. In reviewing the draft recommendation from the Committee the Office has concerns about transferring the retirement classification to Class F. We are not outright opposed to the recommendation, but want to ensure that we understand the rationale being used here. Our concerns can be placed into 3 intertwined categories:

- Necessity for Criminal Designation,
- Equity, and
- Recruitment.

Necessity for Criminal Designation: OPR's primary function is to protect the public from unprofessional conduct committed by licensees. Unfortunately, some of the most egregious conduct is criminal in nature. Drug diversions are the most commonly seen type of criminal investigation at OPR. We also have a fair number of unlicensed practice cases, financial exploitation, sexual misconduct, and abuse or neglect.

Our law enforcement employees are required to seek and conduct search warrants and they are frequently in the field interviewing licensees suspected of criminal activity. Our criminal investigators wear a badge and carry a firearm any time they are out in the field. Ten percent of OPR investigations are criminal and OPR must employ criminal investigators to complete those duties.

When cases of diversion in a health care agency or by a health care professional are investigated by a local law enforcement agency the timeframe of the investigation and the

thoroughness of the investigation are diminished. This is understandable since most local law enforcement does not have training or expertise in electronic medical records and procedures within the health care environment. OPR's criminal investigators receive specialized training in this highly technical area.

Equity: It is important to OPR that its employees are treated fairly under the committee's analysis. Under the current analysis while they are not uniformed officers nor is the majority of their work with criminal or criminal suspects they are frequently in the homes and workplaces of criminals or suspects.

The decision to make them non-uniformed was intentional. It was decided that if they were uniformed it would create tension and concern when OPR's investigators enter hospitals, long-term care facilities, and nursing homes - an activity an OPR investigator does daily. OPR also asks that the committee directly reviews its determination in comparison to the Liquor Control Investigator position. That position only spends 5% more of its time investigating criminal complaints. That position is also not required to be on call and it also is not required to maintain a level of physical fitness. OPR would ask that its investigators not be treated differently than Liquor Control investigators.

Recruitment: OPR has serious concerns it will struggle in recruiting certified law enforcement officers whose retirement benefits are in Class F IF other similar positions remain classified in Group C. As the committee is well aware, Class C is a considerably higher benefit in relation to Class F. In talking about this issue with current staff, it was indicated that they would not have applied for their positions if when recruited the position was Class F.

OPR must employ experienced law enforcement individuals. Many of our criminal cases are very complex, including some homicides/untimely deaths. We may not be able to recruit experienced law enforcement officers if accepting an offer from OPR would affect an individual's long-term retirement planning.

In reviewing other agencies' responses to the number of years of experience, OPR requires a high level years of experience indicating the complexity of our cases and the high level of independence OPR investigators have.

OPR has been using the 55 retirement age along with the required Firearms and Law Enforcement certification as a proxy for a physical fitness test.

It is imperative that OPR has five employees who can execute search warrants and arrest individuals. We can foresee the decision to prospectively reclassify will create barriers to OPR's recruitment of appropriately physically qualified individuals or create a workforce that is entirely older than 55.

Again, thank you for this opportunity to raise our concerns before the report is finalized.

Position	2. Freq Direct Contact w/Criminals	3. Investigate Apprehend	4a. % Investigate/enforce Criminal	4b. % Investigate/Enforce activities Civil/regulatory	4c. % Patrol, maintaining order	4d. Other%	5. Interrogate	6. Equipment	9. On-Call	10. Physical Fitness	13. Standards, # yrs
AGO Criminal Investigator	Y	Y	100%	0%	0%	0%	0% Y	No Uni, No Duty Belt	Y	N	N, 0
AGO Criminal Invest, ICAC	Y	Y	100%	0%	0%	0%	0% Y	No Uni, No Duty Belt	Y	N	N, 0
Capitol Police Ofc	Y ?	Y ?	5%	20%	60%	15%	Y		Y	N	Y, ? Chief Only?
Medical Practice Board	N	Y	2%	97%	1%	0%	Y	No Uni, No Duty Belt, No Weapons, No Handcuffs, No Police Insignia	N	N	N, 0
Liq Control Investigator	Y	Y	15%	60%	25%	0%	Y		N	N	Y, 3
Liq Control Invest Supervisor	Y	Y	15%	60%	25%	0%	Y		N	N	Y, 5
Liq Compliance Director	N	Y	<5%	50%	<5%	40%	Y		N	N	Y, 5-7
							Supervisory Only				
OPR - Lic Bd Chief	N	Y	10%	90%	0%	0%	Y	No Uni, No Duty Belt	N	N	Y, 5
OPR - Lic Bd Coordinator	N	Y	10%	90%	0%	0%	Y	No Uni, No Duty Belt	N	N	Y, 5
DMV Criminal Invest	Y	Y	60%	20%	20%	0%	Y		N	Y	Y, 3
DMV MV Investigator	Y	Y	60%	20%	20%	0%	Y		N	Y	Y, 3
DMV Enforcement & Safety	Y	Y	60%	20%	20%	0%	Y		N	Y	Y, 3
DMV Criminal Unit Supervisor	Y	Y	10%	20%	20%	60%	Y		N	Y	Y, 7
DMV MV Chief Inspector	Y	Y	5%	10%	10%	75%	Y		N	Y	Y, 8
DMV Enforcement & Safety Dir	N	Y	5%	30%	5%	60%	Y		Y	N	N, 0
							Administrative				