VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 02-31
VERMONT STATE EMPLOYEES' ASSOCIATION	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 11, 2002, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board alleging that the State of Vermont violated Articles 1, 3 and 14 of the collective bargaining agreement between the State of Vermont and VSEA, effective July 1, 2001 – June 30, 2003, for the Corrections Bargaining Unit ("Contract"), and the parties' past practice, by failing to notify a Department of Corrections employee and VSEA of specific reasons as to the nature of a disciplinary investigation against the employee prior to an investigative meeting and failing to allow the employee meaningful VSEA representation during the disciplinary investigation.

Hearings were held on September 18 and 25 , 2003, in the Labor Relations Board hearing room in Montpelier before Board Members Richard W. Park, Chairperson; John Zampieri and Edward Zuccaro. Assistant Attorney General William Reynolds represented the Employer. VSEA Deputy General Counsel Michael Casey represented VSEA. The parties filed post-hearing briefs on December 22, 2003.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 1
VSEA RECOGNITION

The State of Vermont recognizes the Vermont State Employees' Association, Inc., as the exclusive representative of the Vermont State employees in the Corrections Bargaining Unit. . .

ARTICLE 3
VSEA RIGHTS

1. The Employer . . . must not engage in any type of conduct which would imply recognition of any organization, group, or individual other than the VSEA as the representative of the employees in any bargaining unit. . .

ARTICLE 14
DISCIPLINARY ACTION

. . .

4. Whenever an appointing authority contemplates dismissing an employee the employee will be notified in writing of the reason(s) for such action, and will be given an opportunity to respond either orally or in writing. The employee will normally be given 24 hrs. to notify the employer whether he or she wishes to respond in writing or to meet in person to discuss the contemplated dismissal . . . At such meeting the employee will be given an opportunity to present points of disagreement with the facts, to identify supporting witnesses or mitigating circumstances, or to offer any other appropriate arguments in his or her defense.

. . .

7. Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting. The notification requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility. Subject in all cases to the consent of the employee involved, in those cases where VSEA is not representing the employee, the VSEA reserves the right to attend such meetings as a non-participating observer if in its judgment the ramifications of such meetings are likely to impact on the interest(sic) of VSEA members.

. . .

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. . . 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. Notice 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.
>
> . . .

2. The collective bargaining agreements between VSEA and the State effective July 5, 1976 – June 30, 1979, contained no provision addressing the subject matter of Article 14, Section 7. The agreements effective July 1, 1979 – June 30, 1981, for the first time contained the provision: "A VSEA representative has the right to accompany an employee to any meeting in which discipline is being imposed or to any meeting the purpose of which is to determine whether discipline shall be imposed." The agreements effective July 1, 1981 – June 30, 1982, and July 1, 1982 – June 30, 1984, contained the additional provision: "A VSEA representative, so requested by an employee, has the right to accompany the employee to any meeting between the employee and management where discipline is being imposed or to any such meeting the purpose of which is to determine whether discipline shall be imposed. The VSEA reserves the right to attend such meetings as non-participating observer if in its judgment the ramification of such meetings are likely to impact on the interests of VSEA members." The agreements effective July 1, 1984 – June 30, 1986, further provided for the first time that management had to notify employees of their right to VSEA representation at investigative meetings. The agreements effective July 1, 1986 – June 30, 1988 contained the same language that is in Article 14, Section 7, of the Contract pertinent to this grievance except that they did not contain the sentence: "The notification

requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility." This sentence was added to the agreements effective July 1, 1988 – June 30, 1990, and those agreements and every successive agreement have contained the same language that is in Article 14, Section 7 of the Contract in this grievance (Grievant's Exhibit 6, State's Exhibits 19-21).

3. The 1976-1979 collective bargaining agreements between VSEA and the State contained no provision addressing the subject matter of Article 14, Section 9. The 1979 – 1981 agreements for the first time contained the same language that is in Article 14, Section 9, of the Contract in this grievance with the exception that they did not contain the words "made by or" in the first part of the first sentence of Section 9, and the last sentence of the section did not contain the words "representation by VSEA, or private counsel" but instead simply provided for "representation". The wording "representation by VSEA, or private counsel" first appeared in the 1981-1982 agreement, and has been in every successive agreement. The words "made by or" in the first sentence of Section 9 initially appeared in the 1984-1986 agreement, and has been in every successive agreement (Grievant's Exhibit 6, State's Exhibits 19-21).

4. Superintendent Michael O'Malley sent employee Jules Peteani a memorandum dated June 26, 2001, that provided in pertinent part:

> You are hereby directed to report to 9 Merchants Row, Rutland, Vermont on June 29th at 10 a.m. The purpose of this meeting is to meet with Jim Cronin(sic), who is conducting an investigation into the following allegations:
>
> 1) Violation of Work Rule #13 (with offender N.F.)
>
> You are hereby advised that it is possible that you may be subject to disciplinary action, up to and including dismissal, as a result of this investigation. For that

reason you are hereby advised that you have the right to request representation by the VSEA, or private counsel for this or any other subsequent meetings needed to complete this investigation.
. . .
(Grievant's Exhibit 2, State's Exhibit 1)

5. Department of Corrections Work Rule #13 provides:

Romantic and or sexual relationships between employees and offenders under any type of department control or supervision are strictly prohibited. Actions are also prohibited which in the opinion of the appointing authority give the appearance of an improper relationship between the employee and the offender. These include but are not limited to: hugging, kissing, hand holding and unofficial correspondence. (Grievant's Exhibit 4, State's Exhibit 4).

6. O'Malley sent Peteani a letter dated June 27, 2001, that provided in pertinent part:

I have received allegations that you may have been in violation of Work Rule #13. The Department is presently investigating these allegations. You will be informed at a later date if there is a need to interview you with regard to these allegations. Should that need arise you have the right to be represented by the VSEA or private counsel, at no expense to the State, in any department-conducted interviews connected with this investigation.
. . .
In connection with the allegations, you are advised that retaliation against anyone connected with this investigation is strictly prohibited, and that discipline, up to and including dismissal, may result if you engage in any form of retaliation. Specifically you are directed to have no contact with the complainants or anyone else connected with this matter. You are also prohibited from discussing this matter with any employees of the Department of Corrections, the only exception being that you are not prohibited from discussing it with staff assigned to investigate this allegation or with your union steward, if applicable.
. . .
(Grievant's Exhibit 3, State's Exhibit 2)

7. On June 29, 2001, investigator James Cronan met with Peteani to question him about alleged misconduct. VSEA Senior Field Representative Lucinda Kirk represented Peteani at the June 29 investigative interview.

8. O'Malley sent Peteani a letter dated September 18, 2001, that provided in pertinent part:

> As a result of your actions described below, I am contemplating serious discipline up to and including your dismissal from your position as Community Correctional Officer. You have the right to respond to the specific allegations listed below, either orally or in writing, before my decision is finalized. You have the right to representation during proceedings connected with this action by VSEA or by private counsel, at your own expense.
>
> This disciplinary action is contemplated for the following reasons:
> . . .
> During May and June, 2001, you took part in an inappropriate romantic relationship with offender NF while she was on furlough and subject to the supervision of this office. . .
>
> This is also to notify you that, effective immediately, you are temporarily relieved from duty for a period of up to 30 workdays. . .
> (Grievant's Exhibit 4, State's Exhibit 4)

9. Peteani attended a Loudermill meeting on October 8, 2001. Kirk represented Peteani at the meeting.

10. O'Malley sent a letter to Peteani dated November 29, 2001, providing in pertinent part:

> This letter is to notify you that the Department of Corrections is continuing the investigation into your apparent violations of DOC Work Rules. Christine Boraker, with the Department of Personnel, has been assigned to conduct the investigative interview with you. . .
> You have the right to request representation by the VSEA, or private counsel at your own expense, in any interview connected with this investigation or resulting hearing. . .
> (Grievant's Exhibit 5, State's Exhibit 9)

11. In late November 2001, Peteani informed Kirk that a meeting had been scheduled for December 5, 2001, concerning the allegations of misconduct against him. In late November or early December, Agency of Human Services Personnel Administrator Peter Garon informed Kirk that Christine Boraker, a paralegal with the Department of Personnel, would be conducting a follow-up inquiry to the investigation

that Cronan conducted. This was the first investigation Boraker conducted involving allegations of misconduct against an employee.

12. On December 3, 2001, Kirk had a telephone conversation with Boraker. Boraker confirmed that an investigative meeting with Peteani had been scheduled for December 5, 2001. Kirk told Boraker that she had a scheduling conflict for December 5, and they agreed to reschedule the meeting to December 6, 2001. During the conversation, Kirk asked Boraker for information concerning new allegations under investigation. Boraker understood that Kirk was seeking whatever investigative information she had at that time on Peteani. Kirk understood her request to be limited to notice identifying the nature of any new allegations under investigation. Boraker responded to Kirk's request by indicating that she would check with Department of Personnel General Counsel David Herlihy to see what information she was obligated to provide Peteani and VSEA. Later that day, Boraker left Kirk a voicemail message informing her that no information would be provided. Kirk responded to the message by leaving a voicemail message with Boraker objecting to the denial of information as a violation of Peteani's rights under the Contract (State's Exhibit 10).

13. Boraker conducted an investigative interview with Peteani at Department of Personnel offices in Montpelier on December 6, 2001. Kirk represented Peteani at the meeting. Boraker tape-recorded the meeting, and subsequently prepared a transcript of the meeting from the tape. Prior to the meeting, Kirk objected to the State not providing information to Peteani or her as a violation of the Contract. She indicated that, if Boraker asked questions concerning new allegations, she would seek a break in the meeting to talk to Peteani.

14. During the meeting, Boraker provided Peteani with a list of 16 women and then began to ask him questions about one woman on the list. The following exchange then occurred:

> KIRK: I want to stop the meeting because (unclear) people. We're going to be talking about all these people?
>
> BORAKER: These are all female offenders who are under the either furlough or pre-approved for furlough in April, May, and June of last spring. Jules may or may not have supervised all of them. It would have depended on what your direct orders were at the time.
>
> KIRK: Okay. I'd like to take a break.
>
> BORAKER: No, we're going to continue right now, Lucinda.
>
> KIRK: No, I have a right to caucus.
>
> BORAKER: Well, can you show me where in the contract you can?
>
> KIRK: It's not in there but I have a, it's a practice. I have a right to caucus whenever I want with my client.
>
> BORAKER: No, I have consulted with counsel and I was directed . . .
>
> KIRK: Well, then we need to stop the whole meeting then if that's the case because I'm not going to go through a meeting where I can't caucus with my client and I told you that in the beginning of the meeting and perhaps we should go down and talk to David Herlihy right now and settle it because I'm not going through a meeting where I have to sit here and you can ask all new questions and I don't know what any of this is about and not be able to talk to my client.
>
> BORAKER: Well, I'll see if David is available.
>
> KIRK: Okay.
>
> BORAKER: We're stopping the tape now.
> (Grievant's Exhibit 1, State's Exhibit 11, pages 65-66)

15. Kirk then met with Herlihy. She told him that she and Peteani had not known prior to the meeting the nature of new allegations against Peteani although they had requested such information, and that she needed to meet with Peteani. Herlihy

responded with words to the effect of “Jules knows why he’s here”. Kirk reiterated that she needed to speak privately with Peteani. Herlihy told her that she had five minutes to speak with Peteani.

16. Kirk then met with Peteani for five minutes. The investigative interview then resumed. Boraker asked Peteani questions about the 16 woman on the list she had provided him. After Boraker finished her questioning, she allowed a break for Kirk and Peteani to meet privately and to then make further statements. Several minutes after the conclusion of the interview, Kirk informed Boraker that Peteani had additional statements to make about the credibility of some of the female offenders. Boraker resumed the interview and recorded the additional information (State’s Exhibit 11, Grievant’s Exhibit 1).

17. Prior to the December 6, 2001, investigative interview, Kirk had represented many state employees in investigative interviews. Prior to those interviews, she had received sufficient information from the State, either orally or in writing, on the charges against the employee to adequately represent them in the interview. Prior to the December 6 interview, Kirk knew that the State was not obligated to provide her with investigative materials on employees being investigated for misconduct. Kirk has never advised employees to lie during investigative interviews. She has told employees that they need to tell the truth.

18. Prior to the December 6 interview, State investigators permitted Kirk to consult privately with employees being investigated during investigative interviews. She had never been told that she had to wait until a question was answered before meeting with a client.

19. Gary Hoadley was a Field Representative with VSEA from March 1994 to 1996. Since then, he has been a Senior Field Representative. Approximately one-half his time is spent on disciplinary and grievance matters. He usually learns that an investigation is being opened on an employee from the involved employee, who is seeking VSEA representation. Hoadley generally then contacts the person conducting the investigation to let the investigator know that he is representing the employee, schedule the investigative meeting, and find out about the nature of the investigation. Hoadley has received sufficient information on the nature of the investigation in all disciplinary investigations to allow him to adequately represent the employee. That information has come in the form of the letter informing the employee of the investigation and informal discussions Hoadley has had with personnel officers and investigators. It has not been his practice to ask for investigative materials from the investigator prior to the investigative interview. During investigative interviews prior to a February 24, 2003, interview involving Agency of Transportation employee Diane Dargie at issue in Board Docket No. 03-11, the State had not prohibited Hoadley from taking breaks before the employee being investigated answered a question.

20. Anne Noonan was hired as a Field Representative by VSEA in 1980, and subsequently became a Senior Field Representative. She served as a representative for approximately 12 years. She has been VSEA Director for several years. She has been involved in the negotiation of collective bargaining contracts between VSEA and the State since 1981, and has been Chief Negotiator for VSEA for many years. She has represented many employees in investigative interviews which took place prior to decisions being made whether or not to discipline them. Prior to investigative interviews,

she contacted management representatives to ask the specific allegations being made against an employee. Noonan has never advised employees to lie during an investigative interview. She has informed employees that they are obligated to tell the truth and could be dismissed if they did not tell the truth. In her experience, the State has always provided sufficient information prior to the investigative interview to allow her to adequately represent the employee. In cases where sexual harassment has been alleged, information has been provided to her as to which employees are involved.

21. In most cases, Noonan has not found it necessary to caucus with employees during investigative interviews. There have been cases where she has frequently caucused with employees. Investigators have been accommodating in allowing her to caucus with employees.

22. Peter Garon is a Human Resources Administrator with the Agency of Human Services. He has served in a similar role since 1981. He primarily has been involved with the Department of Health and the Department of Corrections. He has conducted 50 – 60 investigations of employees alleged to have engaged in misconduct. At the outset of an investigation, Garon sends, or requests to have sent, a memorandum to the employee being investigated informing the employee that: 1) management has received an allegation that the employee's behavior may have violated a specified policy and/or rule of the employer; 2) an investigation will be conducted regarding the matter, and the employee has a right to be represented by VSEA or other legal counsel; and 3) the employee is to refrain from talking about the investigation or any incident with which it is concerned, and the employee is not to retaliate against anyone making allegations against the employee or cooperating in the investigation. Garon then sends, or requests to

have sent, a follow-up memorandum to the employee directing the employee to attend an investigative meeting at a specified place, date and time concerning the allegations, and advising the employee of the right to be represented by the VSEA or private counsel due to possible disciplinary action resulting from the investigation.

23. Garon's practice prior to investigative interviews, in cases where employees have not been temporarily removed from duty with pay, is to provide the involved employee and the VSEA representative with a broad outline of the issue being investigated without specific details. In cases where sexual harassment is alleged, Garon specifies the person allegedly harassed in some instances and not in others. When VSEA representatives ask Garon what he can tell them about the investigation, he gives them some information so employees will have a general idea why they are being investigated. Garon provides information to the extent that it will not adversely impact his investigation. Garon has not provided substantive materials (e.g., tapes, and reports) to VSEA or the involved employee prior to an investigative interview with an involved employee.

24. During investigative interviews that he conducts, Garon asks questions of the employee under investigation. The employee's representative generally does not direct questions to the employee except to seek clarification. Garon allows breaks for the employee to consult with the VSEA representative or private attorney unless he believes the break will prevent his obtaining an unrehearsed and unvarnished response to his questioning. There have been a few occasions where Garon has not allowed a break upon request. Garon, not the employee's representative, decides whether breaks will occur.

25. Lieutenant Timothy Bombardier of the Vermont State Police was State Police Internal Affairs Investigator for three years from 1997 – 1999. During that period, he conducted more than 100 investigations concerning allegations against State Police members for violation of the State Police Code of Conduct. His general practice was to provide the employee under investigation with notice of the allegations of misconduct, and the specific rules alleged to be violated provided such notification would not impede the investigation. He also informed the employee of the right to be represented by VSEA in the investigation, as well as letting them know there would be an investigative meeting. In providing notice of the allegations of misconduct, Bombardier provided the name of the complainant in most cases. He did not provide materials gathered during the investigation to the involved employee or the VSEA representative prior to the investigative interview. No grievances were filed against Bombardier for not providing sufficient information to the involved employee or VSEA prior to the investigative interview.

26. Prior to going on the record at investigative interviews, Bombardier had a practice of informing the employee under investigation of the questions he was going to ask during the interview. During the investigative interview, Bombardier then asked those questions of the employee under investigation. Bombardier did not allow breaks to be taken for consultation between the employee and the employee's representative in the middle of a line of questioning. This was because Bombardier was seeking the employee's best recollection based on what they knew at the time of the incident being investigated. No grievances were filed against Bombardier for not allowing employees to confer with the VSEA representative.

27. James Cronan, a former Vermont State Police Captain, has conducted approximately 50 investigations for the State since his retirement from the State Police several years ago. He has not sent out notices to employees informing them that they are being investigated or confirming an investigative meeting. The required notices are provided by the employing agency. Cronan does not provide materials to the employee under investigation or to the employee's VSEA representative prior to the investigative meeting. He has contact with the employee or the VSEA representative only if the investigative meeting with him has to be rescheduled. Infrequently, a VSEA representative asks Cronan questions concerning the scope of the investigation. Cronan provides general responses to these questions.

28. Cronan provides employees with a chance to meet with their VSEA representative prior to beginning an investigative interview. During investigative interviews, Cronan ensures that employees know why they are being investigated by informing them shortly after the beginning of the interview of the nature of the investigation and which persons are primarily involved. If Cronan asks a question during an investigative interview that is material to the investigation, he does not allow a break until the question is answered so that he receives an unrehearsed answer. If Cronan believes that an employee is not being completely truthful and the VSEA representative recognizes this and asks for a break, Cronan generally allows the break. At the end of an investigative interview, Cronan allows the VSEA representative and employee to confer and provide information to him on matters which have not been covered during the investigative interview. There have been instances where Cronan has permitted a VSEA representative to ask limited questions of the employee under investigation.

OPINION

The issues in this case are: 1) whether the State violated Articles 1 and 3 of the Contract by refusing to recognize VSEA as the representative for employee Jules Peteani at the December 6, 2001, disciplinary investigative interview; 2) whether the State violated Article 14, Section 9, of the Contract by failing to provide Peteani with specific reasons as to the nature of the investigation, charges and allegations prior to the December 6 investigative interview of him concerning whether to discipline him; and by refusing to allow him to consult with his VSEA representative throughout the December 6, 2001, investigative interview; 3) whether investigator Christine Boraker violated a binding past practice by refusing to allow Peteani to consult with Kirk throughout the entire December 6 investigative interview; and 4) whether Boraker and Department of Personnel General Counsel David Herlihy denied Peteani the right to meaningful and effective VSEA representation at the December 6 investigative interview in violation of Article 14, Section 7 of the Contract.

The first three issues can be quickly addressed. VSEA did not establish a violation of either Article 1 or Article 3 of the Contract. These general articles simply provide that VSEA is the representative of employees covered by the Contract. The State does not question that VSEA is the representative of employees, and took no action indicating a refusal to recognize VSEA as the representative of Peteani in connection with the December 6 interview. The dispute in this grievance involves the extent of the right to VSEA representation, not whether VSEA is the representative.

Similarly, VSEA has not demonstrated that Article 14, Section 9, applies to VSEA's representation of Peteani at the December 6 interview. Article 14, Section 9,

provides that "(e)mployees 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. Notice 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." These provisions were complied with when the Employer sent Peteani a letter on September 18, 2001, notifying him: 1) the Employer was contemplating dismissing him due to having an inappropriate romantic relationship with offender NF while she was on furlough; 2) he had a right to representation by VSEA or private counsel during proceedings connected with this action; and 3) he was temporarily relieved from duty with pay.

The applicability of Article 14, Section 9, ended when this letter was sent and was not resurrected when a subsequent investigative interview was held while Peteani remained on temporary relief from duty. For us to so conclude would be to inappropriately read terms into a contract that do not arise by necessary implication. In re Stacey, 138 Vt. 68, 71 (1980).

Further, Boraker did not violate a binding past practice by refusing to allow Peteani to consult with Kirk throughout the entire December 6 investigative interview. In deciding grievances, the Board has concluded that past practices are encompassed within the statutory definition of grievance. Grievance of Cronin, 6 VLRB 37, 67-69 (1983). The Board has recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Hanifin, 11

VLRB 18, 27 (1988). Grievance of Cronin, supra. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982). If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Cronin, 6 VLRB at 68-69.

VSEA contends that the past practice has always been that VSEA representatives freely consult with their clients at any time during investigative interviews. VSEA has not demonstrated by a preponderance of the evidence that this has been the past practice. The evidence indicates that, although VSEA representatives usually are allowed by investigators to consult with their clients upon request, there have been occasions where investigators have not allowed a break upon request to ensure that they will receive the employee's unrehearsed response to a question or line of questions based on their recollection. Thus, VSEA has not established a binding past practice mutually accepted by the parties that VSEA representatives freely consult with their clients at any time during investigative interviews.

This leaves the final and central issue of whether Boraker and Department of Personnel General Counsel David Herlihy denied Peteani the right to meaningful and effective VSEA representation at the December 6 investigative interview in violation of Article 14, Section 7, of the Contract. The determination on this issue involves elaboration of the rights established by the U.S. Supreme Court in *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975). In *Weingarten*, the Court upheld the National Labor Relations Board decision that the denial by an employer of an employee's request that her union representative be present at an investigative interview, which the employee

reasonably believed might result in disciplinary action, constituted an unfair labor practice in violation of Section 8 (a)(1) of the National Labor Relations Act because it interfered with, restrained and coerced the individual right of the employee, protected by Section 7 of the Act, to engage in concerted activities for mutual aid or protection. 420 U.S. at 260-262. The Vermont Labor Relations Board has determined that *Weingarten* rights apply under the State Employees Labor Relations Act. *Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO v. Vermont State Colleges*, 16 VLRB 255, 258-259 (1993).

Although *Weingarten* involved an unfair labor practice case, its holding is equally applicable to this grievance. Article 14, Section 7, of the Contract provides that "whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, . . . he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting." This language is essentially identical to the U.S. Supreme Court's holding in the *Weingarten* decision except that it requires management to notify the employee of the right to presence of a union representative, whereas *Weingarten* requires the employee to request such presence. The parties agree that *Weingarten* and its progeny provide guidance in interpreting the meaning of Article 14, Section 7, of the Contract. We concur, and thus examine the holdings of *Weingarten*, and subsequent National Labor Relations Board and federal appeals court decisions elaborating on *Weingarten* rights, to provide guidance which is generally applicable in this case.

The *Weingarten* Court stated as follows with respect to the presence of a union representative at an investigative interview and the representative's role at the investigative interview:

> (T)he Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *(citation omitted)* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *(citation omitted)* Viewed in this light, the Board's recognition that Section 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section " 'read in the light of the mischief to be corrected and the end to be attained.'" *(citation omitted)*
>
> The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them. 420 U.S. at 262-264.

Since the issuance of the *Weingarten* decision in 1975, federal circuit courts of appeal and the National Labor Relations Board have issued decisions elaborating on *Weingarten*. We first will discuss these cases to the extent they address the notice that must be provided to an employee under investigation concerning the nature of the investigation, and an employee's right to consult with a union representative, prior to the

investigative interview. Then, pertinent cases will be discussed concerning the role of the union representative at the investigative interview.

Notice and Consultation Prior to Investigative Interview

In *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), the National Labor Relations Board found that an employer violated an employee's *Weingarten* rights by refusing to permit a union representative to consult with two employees on company time prior to an investigatory meeting which the employee reasonably believed would result in disciplinary action. The Board majority concluded that "*Weingarten's* provision for union representation at investigatory interviews which may result in disciplinary action logically permits prior consultation if the union's presence is to be an effective presence." 227 NLRB at 1189. The Board majority cited directly from the Court's *Weingarten* decision in stating:

> Surely, if a union representative is to represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and is to be "knowledgeable" so that he can assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident," these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action. These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in *Weingarten*. Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation. 227 NLRB at 1190.

The Board majority dismissed the argument of the dissenting opinion that advance union consultation may result in unions regarding investigative interviews as "adversarial", contrary to the *Weingarten* decision. The majority stated:

> The greater knowledgeability acquired by prior consultation obviously does not alter the nature of the interview but only advances the factfinding process. Nor will prior consultation, as the dissent suggests, cause unions to bring "pressures to bear on an employee to withhold the facts." 227 NLRB at 1190.

On appeal, the 10th Circuit Court of Appeals denied enforcement of the NLRB decision. *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360 (1978). In so doing, however, the 10th Circuit did not quarrel with an employee's right to consultation with a union representative prior to an investigative interview. Instead, the Court disagreed with the Board's application of the standards to the facts of the case.

The Court agreed with the employer that its refusal to permit the union representative to consult with the employees on company time prior to the investigative interview was proper because the employees had not sought to consult with the union representative despite a time lapse of over 17 hours between the time they were advised of the interview and the time it took place. The Court stated: "To hold that an employer must permit employees to consult with union representatives on company time, when the employees could have, but elected not to, consult with the union representatives on their own time is to place a harsh and unfair burden upon the employer." 584 F.2d at 363. The Court also concluded that the facts of the case indicated that the *Weingarten* Court's admonition that investigative interviews should not be adversarial in nature would be defeated in this case because union officials had urged employees not to cooperate with management in investigative interviews. 584 F.2d at 363-64.

Nonetheless, the Court made it clear that *Weingarten* required that an employee has a right to consultation with a union representative prior to an investigative interview. The Court stated that "*Weingarten* requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time". 584 F.2d at 365.

In a subsequent case, the NLRB and the 9th Circuit Court of Appeals addressed the related issue of whether employers need to inform employees or their union representative of the nature of the matter being investigated before an investigative interview. In *Pacific Telephone and Telegraph Co.*, 262 NLRB 1048 (1982), the Board majority concluded that such a requirement exists, stating:

> In *Climax*, the Board held that the *Weingarten* right encompassed the right of an employee to confer with his representative before any interview which the employee reasonably fears could result in discipline. The Board reasoned that the *Weingarten* right is ineffective without prior consultation since the representative is precluded from performing his envisioned role as a "knowledgeable" representative. Prior consultation, and the "knowledge" which results therefrom, enables the representative to "assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident." At the same time, it enables the representative to counsel and assist the employee who may be "too fearful or inarticulate to relate accurately the incident being investigated." As the Board stated in *Climax*, "knowledge is a better basis than ignorance for the successful carrying on of labor-management relations." Also the representative can provide the "aid for protection" which the employee seeks. For these reasons, the Administrative Law Judge correctly found that the (employer) violated Section 7 by refusing to inform the employees of the nature of the matter being investigated. If the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation.
>
> Contrary to our dissenting colleague, we view *Climax* and our decision herein to be fully consistent with, and required by, the *Weingarten* Court's interpretation of Section 7. Indeed, the act of "consultation" is no less "concerted activity for mutual aid or protection" than the act of "representation" itself. (footnote omitted) It is likewise activity aimed at countering employer action which threatens the employee's terms and conditions of employment. Moreover, it need not interfere with legitimate employer prerogatives any more than the act

> of representation. When faced with an employee's insistence on concerted action, the employer is still free to reject the collective course and forego the interview. Further, the employer controls the manner, form, and timing of its investigatory and disciplinary process and can take steps to protect its legitimate interests, while at the same time giving due regard to the exercise of Section 7 rights.
>
> Nor does a requirement of prior consultation and information regarding the matter being investigated present any greater possibility of transforming the interview into an adversary proceeding. The employer, under *Weingarten*, has no obligation to bargain with the representative and "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *(citations omitted)*
>
> We emphasize that our construction of Section 7 does not, as our dissenting colleague suggests, require that an employer's investigatory or disciplinary process take on attributes even remotely akin to "full-scale criminal proceedings." All *Climax* requires is that, as a function of an employee's right to engage in concerted activity for mutual aid or protection, a preinterview consultation with his *Weingarten* representative be permitted. This consultation need be nothing more than that which provides the representative an opportunity to become familiar with the employee's circumstances. To require that the employer inform the employee as to the subject matter of the interview does not dictate anything resembling "discovery". The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A *general* statement as to the *subject matter* of the interview, which identifies to the employee and his representative the misconduct for which discipline will be imposed, will suffice. 262 NLRB at 1048-49.

The Board concluded that the "nature of the investigation" requirement was not met in the *Pacific Telephone* case where the employer informed the employee and the union representative prior to the investigative interview at most that there was a "problem" involving two installers that had occurred the previous week. 262 NLRB at 1049, n.10; 1053-55.

The 9th Circuit Court of Appeals affirmed the Board's holding in this regard on appeal. *Pacific Telephone and Telegraph Co. v. NLRB*, 711 F.2d 134 91983). The Court stated:

> If the right to insist on concerted protection against possible adverse employer action encompasses union representation at interviews such as those here involved, then in our view the securing of information as to the subject matter of the interview and a pre-interview conference with a union representative

> are no less within the scope of that right. The Board's order that failure to provide such information and grant such pre-interview conferences constituted unfair labor practices is as permissible a construction of section 7 as was the construction upheld in *Weingarten*. Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be severely diminished. 711 F.2d at 137.

In subsequent decisions, the Board held to its earlier views. The Board rejected the argument of the employer in one case that the failure of the employer to permit a requested preinterview consultation between a union representative and an employee was justified on the grounds that the representative and employee would interfere with a criminal investigation or proceeding, or suppress or fabricate evidence. *United States Postal Service and Bell*, 288 NLRB 864, 865-67 (1988). Similarly, in *United States Postal Service*, 303 NLRB 463, 468-70 (1991), the Board concluded that the employer committed an unfair labor practice by refusing to permit a union representative to consult with an employee prior to the resumption of an investigative interview where the employee had requested union representation immediately prior to the break in the interview. The District of Columbia Circuit Court of Appeals affirmed; *United States Postal Service v. NLRB*, 969 F.2d 1064, 1071 (1992); stating:

> Management is not stripped . . . of effective control of employee misconduct by allowing employee-union representative consultation in advance of interrogation. The employer remains in command of the time, place and manner of the interview, and can concentrate on hearing the employee's account with "no duty to bargain with the union representative" at the interview. *(citation omitted)*

Role of the Union Representative at the Investigative Interview

The National Labor Relations Board has held that the Supreme Court in *Weingarten* intended to strike a balance between the right of an employer to investigate the conduct of its employees at an interview and the role of the union representative

present at such interview. *Texaco, Inc.*, 251 NLRB 633, 636 (1980). Although the NLRB recognizes the *Weingarten* Court's admonition that the presence of a union representative need not transform the interview into an adversary contest, the NLRB maintains that the employer's right to regulate the role of the representative at such interview cannot exceed that which is necessary to ensure the reasonable prevention of such adversary confrontation with the representative. *Id.* at 636. In applying such a standard, the NLRB concluded that the employer violated an employee's right to union representation at an investigative interview by requiring the union steward to be a silent observer during the interview. *Id.* at 633-34, 637. The 9th Circuit Court of Appeals affirmed the NLRB on appeal. *NLRB v. Texaco, Inc.*, 659 F.2d 124 (1981).

An employer did not violate an employee's right to union representation at an investigative interview by insisting that the employer was only interested at that time in hearing the employee's own account of what occurred, and directing the union representative to not answer any of the questions asked of the employee during the interview. *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 472-73 (5th Cir.1982). The employer properly respected the employee's rights to union representation by allowing the employee time to consult with the union representative prior to the interview, and informing the union representative that, after the management representative concluded questioning the employee, the union representative would be free to ask questions and make clarifications. *Id.*

In a subsequent decision involving the same employer, the 5th Circuit Court of Appeals concluded that the employer violated a consent judgment issued by the Court by not allowing union representatives to take active roles in assisting employees to present

the facts in investigative interviews in which the employees had reasonable grounds to believe may result in discipline. *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 171-72 (1984). The employer either required union representatives to remain silent during the interviews or allowed the representative to only make a few comments. *Id.* at 169-171.

The issue before the NLRB in *System 99*, 289 NLRB 723 (1988) was whether the employer violated *Weingarten* rights by insisting that an employee decide whether he would submit to a sobriety test without allowing the employee to consult privately with an employee representative. The employer told the employee that management believed he was intoxicated, and that he would be fired if he refused to take the sobriety test because his refusal would cause management to presume he was intoxicated.

The NLRB concluded that the employer violated the employee's representation rights under such circumstances. The NLRB affirmed the Board Administrative Law Judge's recommended decision, which stated that "(w)here, as here, an employee is advised by his employer . . . that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of a representative before deciding what he will do". 289 NLRB at 727. The Administrative Law Judge also stated that the employee "was on the spot; and it was hardly unreasonable of him to believe that a private, candid conference with an employee representative might give him a more reliable basis for deciding how to answer (the employer's) question than would the statements made by the managers who had declared their inclinations to fire him." *Id.*

The focus in two other NLRB decisions was on the behavior of union representatives at investigative interviews. *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992), presented the issue of whether a union representative may permissibly direct that questions by management at an investigative interview may only be asked once, and prevent management from repeating its questions. The Board concluded:

> . . . (W)e cannot find that *Weingarten* grants to a union representative the right to preclude an employer from repeating a question to an employee at an investigatory interview. The Supreme Court directly cautioned against the transformation of an investigatory interview into an adversarial contest by virtue of the presence of a union representative. Incorporation of such a rigid limitation on questioning would only serve to turn an investigatory interview into a formalized adversarial forum. This is clearly contrary to *Weingarten*.
>
> Furthermore, it is within an employer's legitimate prerogative to investigate employee misconduct in its facilities without interference from union officials . . . The limitation on questioning that the Union seeks to impose under the aegis of *Weingarten* would severely circumscribe an employer's legitimate prerogative to investigate employee misconduct. Such a limitation in effect vests in a union representative the authority to terminate an investigatory interview following a single series of questions by the employer. We cannot reconcile such a restriction with the Court's explicit intention to preserve legitimate employer prerogatives, and our duty to maintain the careful balance of the rights of employer and employee articulated by the Court.
>
> Our conclusion does not detract from the right . . . of a *Weingarten* representative to object to questions that may reasonably be construed as harassing. 308 NLRB at 279.

In *Yellow Freight System*, 317 NLRB 115 (1995), the Board concluded that the employer did not discriminate against employee Otis Cross due to his union activities by reprimanding Cross for his behavior while acting as a union steward during the investigative interview of another employee. The Board affirmed the following conclusion of the Board Administrative Law Judge:

> . . . Cross was not entitled to disrupt the process by verbally abusive and arrogantly insulting interruptions, by conduct that grossly demeaned Zimmerman's managerial status in front of an employee and fellow manager and that consisted of violent desk-pounding and shouted obscenities, and finally by point-blank falsely calling Zimmerman a liar and thereby refusing to immediately

> leave the office. Cross was not entitled to convert the (interview) into an adversarial confrontation . . . By so doing, and by doing it in the manner described above, I find that he lost protection of the Act. Accordingly, I find the allegation of the complaint relating to (the) warning letter to Cross to be without merit. 317 NLRB at 115, 124.

Discussion

The above cases make it evident that the notice to employees of the nature of an investigative interview, prior consultation between the employee and union representative, and the role of the union representative at the investigative interview are intertwined and necessarily dependent on each other. The extent of notice to an employee and the employee's ability to meaningfully consult with a union representative prior to an investigative interview significantly affect the extent of necessary involvement by the union representative at the interview to adequately represent the employee's interests.

The investigator needs to provide the employee with notice of the general nature of the potential misconduct being investigated to ensure meaningful prior consultation between the employee and union representative. We reiterate the views expressed by the NLRB in the *Pacific Telephone and Telegraph Co.* case cited above that "(i)f the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation."

In this case, the Employer notified Peteani prior to the December 6 investigative interview that the Employer "is continuing the investigation into your apparent violations of DOC work rules", and that Boraker had been assigned to conduct an investigative interview. The investigation up to that point had involved allegations that Peteani took part in an inappropriate romantic relationship with offender NF. The notice to Peteani did

not indicate whether the December 6 interview would concern continued examination of his relationship with NF or would be expanded to discuss other matters.

Peteani's VSEA representative, Lucinda Kirk, sought elaboration on this general notice to allow Peteani and her to meaningfully consult prior to the investigative interview. During a telephone conversation with Boraker three days before the December 6 interview, Kirk asked Boraker for information concerning new allegations under investigation. Boraker understood that Kirk was seeking whatever investigative information she had at that time on Peteani. Kirk understood her request to be limited to notice identifying the nature of any new allegations under investigation. Boraker ultimately responded to Kirk's request later in the day by informing her through a voicemail message that no information would be provided. The miscommunication between Kirk and Boraker left Kirk without sufficient knowledge at that point for Peteani to meaningfully consult with her prior to the investigative interview.

During the December 6 investigative interview, Boraker provided Peteani with a list of sixteen female offenders either on furlough or pre-approved for furlough the previous spring and then began to ask him questions about one woman. When Kirk indicated at this point that she wished to take a break, Boraker initially would not allow the break.

In deciding whether to permit a break, an investigator needs a reasonable basis to deny a break and does not have the right to prohibit reasonable consultation. As indicated in the cases discussed above, the investigated employee has the right during an investigative interview to be assisted by a knowledgeable union representative through the providing of effective representation. Here, neither Kirk nor Peteani had prior

knowledge that information was going to be elicited on female offenders other than NF, and they had not been able to meaningfully consult on this. The inability of prior consultation meant that Boraker did not have a reasonable basis to deny the break and prohibit reasonable consultation between Kirk and Peteani. The expanded scope of the investigation resulted in entitlement of Kirk and Peteani to know that Peteani was going to be questioned about possible inappropriate relationships with offenders other than NF whose identity did not need to be disclosed in advance, and entitlement to consult, prior to Boraker questioning Peteani about the other offenders.

It is unfortunate that this was Boraker's first disciplinary investigation and she was headed down a path of unreasonably denying an employee the right to effective union representation. We caution that our views in this regard do not result in turning investigative interviews into adversarial contests contrary to the *Weingarten* decision. The employer, under *Weingarten*, has no obligation to bargain with the union representative. 420 U.S. at 260. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. *Id.* The employer, however, is free to insist on only being interested at that time in hearing the employee's own account of the matter under investigation. *Id.*

Although Boraker was headed towards unreasonably denying Peteani the right to effective union representation, the temporary harm caused by Boraker's initial denial was remedied after Boraker and Kirk discussed the matter with Herlihy. As a result of this discussion, Peteani was permitted to consult with Kirk for five minutes before resuming the interview and answering questions on other female offenders. VSEA has not

presented sufficient evidence for us to conclude that this five minute consultation was insufficient to allow Kirk to effectively represent Peteani during the interview.

Our conclusion in this regard is bolstered by Boraker, at the conclusion of her questioning, allowing Peteani and Kirk to break and meet privately and then present additional information to Boraker. Accordingly, we ultimately conclude that the State did not deny Peteani his right to effective VSEA representation during the December 6 investigative interview. Accordingly, we conclude that the State did not violate Article 14, Section 7, of the Contract.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of the Vermont State Employees' Association is dismissed.

Dated this 23rd day of February, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
John J. Zampieri

_____
Edward R. Zuccaro