VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NOS. 03-11 &
VERMONT STATE EMPLOYEES'	)	03-24
ASSOCIATION and DIANE DARGIE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 19, 2003, the Vermont State Employees' Association ("VSEA") filed a grievance (Docket No. 03-11) with the Vermont Labor Relations Board on behalf of itself and Agency of Transportation employee Diane Dargie alleging that the State of Vermont violated Articles 1, 3, 5, 6, 14 and 17 of the collective bargaining agreement between the State of Vermont and VSEA, effective July 1, 2001 – June 30, 2003, for the Non-Management Bargaining Unit ("Contract"), and the parties' past practice, by failing to notify the employee of the nature of a disciplinary investigation, charges and allegations against her prior to an investigative meeting; ordering the employee to not discuss the matter with other employees; failing to provide the employee and VSEA with reasonable relevant information necessary for VSEA to represent the employee; and by the conduct of the investigator during the investigative meeting.

On May 16, 2003, VSEA filed another grievance (Docket No. 03-24) on behalf of itself and Dargie, alleging that the State violated Articles 1, 3, 5, 6, 14 and 17 of the Contract and past practices through actions taken in the investigation of Dargie. The allegations included failing to provide Dargie with information relevant and necessary for her to obtain adequate and meaningful VSEA representation, denying her the right to VSEA representation, refusing to allow her to consult with her VSEA representative, failing to provide her with sufficient notice of the nature of the investigation, and

engaging in conduct that interfered with Dargie's exercise of her rights and the rights of VSEA to provide meaningful representation.

Docket Nos. 03-11 and 03-24 were consolidated for hearing and decision. Hearings were held on October 1 and 2, and November 20, 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 Non-Management 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 5**
> **NO DISCRIMINATION OR HARASSMENT;**
> **and AFFIRMATIVE ACTION**
>
> **1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**
> In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . membership or non-membership in the VSEA . . . or any other factor for which discrimination is prohibited by law.
> . . .

ARTICLE 6
EXCHANGE OF INFORMATION

. . .

5. The State will also provide such additional information as is reasonably necessary to serve the needs of VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such additional information shall not be unreasonably denied. . .

ARTICLE 12
PERFORMANCE EVALUATION

1. . . . An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued, and, when issued, shall not require the presence of a union representative. However, once Step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a prescriptive period for remediation) such notice or a written record of such notice shall be placed in the employee's personnel file and shall be fully grievable.

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. . . . (e) In performance cases, the order of progressive corrective action shall be as follows:
   (1) feedback, oral or written; (records of feedback are not to be placed in an employee's personnel file except in compliance with the Performance Evaluation Article);
   (2) written performance evaluation, special or annual, with a specified prescriptive period for remediation . . .
   (3) warning period . . .
   (4) dismissal.

. . .

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.

. . .

(State's Exhibit 1)

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 (Grievants' Exhibit 6, State's Exhibits 19-21 in Docket No. 02-31).

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 (Grievants' Exhibit 6, State’s Exhibits 19-21 in Docket No. 02-31).

4. At all times relevant, Diane Dargie was a permanent status employee of the Agency of Transportation employed as a Bridge Mechanic in District 7, and was in the Non-Management Bargaining Unit represented by VSEA.

5. Christine Boraker, Paralegal for the Department of Personnel, sent Dargie a letter dated January 16, 2003, that provided in its entirety:

> On behalf of AOT, I am conducting an investigation of possible misconduct. The allegations are generally that you may have harassed coworkers in violation of the State’s sexual harassment policy, the State’s Employee Conduct Policy, and/or the Agency’s expectations and directives to you regarding your treatment of coworkers. Accordingly, I am asking you to be available for an investigative interview with me on Thursday, January 23, 2003, at 9:00 a.m. The meeting will be held at the Department of Personnel, 110 State Street, Montpelier, third floor conference room. Dennis Priar, Personnel Administrator for AOT will also be in attendance at the interview. You have the right to have a union representative or private counsel, at no expense to the State, attend the meeting.
>
> In accordance with State of Vermont Personnel Policy number 17.0: “State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.”
>
> You are instructed not to discuss this matter with any employee of the State of Vermont except a union steward, Mr. Sidney Achilles, Mr. Priar or myself. You are cautioned that if you fail to follow this instruction, any effort that you make to discuss these issues with other Agency of Transportation employees may amount to interference with the investigation or retaliation, and could constitute misconduct. If you have any questions or concerns before our meeting next week, I can be reached at (802) 828-0534 (Grievants’ Exhibit 2, State’s Exhibit 3).

6. The January 23, 2003, investigative interview mentioned in Boraker’s January 16 letter was rescheduled to February 12, 2003.

7. At all times relevant, Dargie's immediate supervisor was Transportation Area Maintenance Supervisor Dennis Whitehill. Whitehill reported to District 7 General Foreman Ken Leach.

8. On Monday, January 27, 2003, Whitehill approached Dargie at approximately 11:00 a.m. and informed her that she was to meet with Leach and him either before or after lunch that day. Dargie indicated that she would meet after lunch. Dargie asked Whitehill if she needed a VSEA representative at the meeting. Whitehill replied that she needed to ask Leach. Dargie attempted to contact Leach by telephone. She left a voicemail message for Leach. She then had lunch.

9. After she finished lunch, Dargie entered the District 7 building shortly after noon. She met Leach in the hallway. Leach said "I did you one better, I came right over". Dargie asked Leach what the purpose of the meeting was and whether she needed VSEA representation. Leach did not inform Dargie of the purpose of the meeting. Leach then escorted Dargie into Whitehill's office and closed the door. Dargie then met with Leach and Whitehill. Leach asked Dargie about her day off work the previous Thursday. Dargie had been scheduled to work that day but she called into the office at about 6:30 a.m. and informed Leach's assistant that she would not be into work that day. Leach told Dargie at the January 27 meeting that she had to request leave in writing 24 hours in advance. Dargie responded that this was different from how other employees were treated. She mentioned that Leach had just called in recently and said he was not going to be into work that day, and she questioned why she could not do the same thing. Leach became angry with Dargie, and spoke to her in a loud voice. Dargie said words to the effect of "I don't have to take this". She then picked up the receiver to the telephone,

stated that she was going to call her VSEA representative, and began to call VSEA Senior Field Representative Gary Hoadley. Leach told Dargie to put the phone down. Dargie initially refused to put the phone down and said she was calling the VSEA. Leach told her to put the phone down or he would charge her with insubordination. Dargie placed the receiver back on the telephone. Dargie then left the office.

10. On Thursday, January 30, 2003, Dargie was working in Lyndonville. She received a message shortly after lunch to call Leach. Dargie telephoned Leach. Leach said that he wanted to meet with her at 3:00 p.m. Dargie asked Leach what the meeting was about. Leach did not tell her. After speaking with Leach, Dargie called Hoadley. She thought she probably was going to be disciplined. Dargie met Hoadley and they went together to the District 7 St. Johnsbury office.

11. When Dargie and Hoadley arrived at the St. Johnsbury office, they proceeded to Leach's office. Leach came out of his office and said to Hoadley: "You're here early. I didn't think you could be here today". Leach was referring to a scheduled meeting he had with Hoadley on a date after January 30. Hoadley attempted to accompany Dargie into the meeting in Leach's office. Leach indicated to Hoadley that he had no right to be at the meeting. Hoadley told Leach that he had to "stop disrespecting the union". Leach did not allow Hoadley into the meeting. He shut his office door to prevent Hoadley from entering the room.

12. Leach then handed Dargie a document that provided in its entirety:

Diane Dargie – Performance Feedback, 1/30/2003

Diane, this performance feedback is pursuant to certain elements of your performance observed on 1/23/03 and during my meeting with you on 1/27/03

> On 1/23/03, you took the day off without getting prior approval from your assigned supervisor, Dennis Whitehill. You, instead, left a message, unclear in intent, with another employee. There have been two other instances in the last year, for which you have received notice of performance deficiency, when you have failed to inform your supervisor when you were going to be unavailable and/or away from the workplace. It is important for you to understand the expectation that you appropriately request leave, as required by Article 30 of the Contract, and that you notify your supervisor when you have to be away from the workplace. Further incidents of performance deficiency will be addressed through progressive corrective action, as described in Article 14 of the Contract.
>
> On 1/27/03, I met with you to talk about this performance issue. TAMS Dennis Whitehill attended this meeting also. When I attempted to discuss the issue with you, you were completely uncooperative. Your unwillingness to communicate and your disruptive behavior constituted flagrant insubordination. As a result, I was unable to have an effective meeting with you to discuss your performance. I was unable to appropriately discuss my expectations; and you failed to reasonably discuss the issue. Any further incident of uncooperative, disruptive or insubordinate behavior will be addressed through progressive discipline, as described in Article 14 of the Contract (Grievants' Exhibit 3, State's Exhibit 7).

13. After receiving the document from Leach, Dargie left the room. She was in the room for one-half to one minute.

14. On February 12, 2003, at Department of Personnel offices in Montpelier, Boraker conducted an investigative interview with Dargie. Hoadley represented Dargie at the meeting. Boraker tape-recorded the meeting. Subsequently, a transcript of the meeting was prepared. At the beginning of the meeting, Hoadley made comments indicating that Dargie had not received adequate information on the investigation to respond to charges made against her. He also stated that Dargie could not be held accountable for any alleged violations of Boraker's general directive in her January 16 letter that Dargie not have discussions with state employees about the investigation due to the lack of information provided to her by Boraker as to the nature of the investigation. Hoadley also stated the directive violated Dargie's rights concerning with whom she could have

discussions. He further mentioned that the policies alleged to be violated by Dargie had not been provided to her. The following exchange then occurred:

> BORAKER: Okay, I do have a couple of the policies with me but certainly they are available on the Department of Personnel website and they're easily accessible that way so it might be faster for you guys to access that information via the web than for me to go print it and deliver it to you.
>
> HOADLEY: Diane, do you recall ever reading the State's Sexual Harassment Policy?
>
> DARGIE: No.
>
> BORAKER: Excuse me, we're going to continue now. So I will provide the materials to you that you have asked for.
>
> HOADLEY: I want you to understand she . . .
>
> BORAKER: Excuse me, Mr. Hoadley, you're interrupting me. You're interrupting me, Mr. Hoadley. This is my investigative interview. You may not interrupt me.
>
> HOADLEY: Yes, I may.
>
> BORAKER: And I will do my best not to interrupt you.
>
> HOADLEY: Yes, I may.
>
> BORAKER: No, you may not. If this is going to be an issue, we are going to stop the interview now . . .
>
> HOADLEY: Then you should stop the interview.
>
> BORAKER: . . . and we will continue this another time. We are stopping.
>
> (Grievants' Exhibit 1; State's Exhibits 14, pages 81 – 85, and 17)

15. Thomas Trahant, Agency of Transportation Personnel Administrator, sent Dargie a letter dated February 18, 2003, that provided in pertinent part:

> It has come to the Agency's attention that you may have been discussing your pending investigation with your co-workers and that you may have been engaging in retaliation against your co-workers, in direct violation of the terms of the letter that you received from Christine Boraker, on or about January 16, 2003. This

> behavior must stop immediately. Failure to do so on your part could lead to charges that you have interfered with the investigation or engaged in retaliation, and could constitute misconduct, which could lead to discipline, up to and including dismissal. Please contact me immediately if you need clarification on this directive. . . (State's Exhibit 13)

16. Boraker conducted another investigative interview with Dargie at Department of Personnel offices in Montpelier on February 24, 2003. Priar was at the meeting, and Hoadley was present to represent Dargie. Neither Dargie nor Hoadley had received any information from Boraker on the nature of the investigation of Dargie between the February 12 and 24 investigative interviews. Boraker tape-recorded the meeting. Subsequently, a transcript of the meeting was prepared. At the beginning of the meeting, Hoadley asked Boraker to indicate the basis for the allegations against Dargie. Boraker responded that a short-term employee in District 7, Dan Forthun, told Whitehill that he saw sexual harassment and stealing in the garage. Boraker told Dargie: "I want you to know I have no indication that you've been stealing anything but . . . I am going to ask you about it just because I have asked every other District 7 employee that I have interviewed about it . . ." Boraker asked Dargie if she witnessed any employees removing materials from a dumpster at the garage or talking about taking home state property. Dargie responded "no" (Grievants' Exhibit 1, State's Exhibits 14, pages 89-93, and 17).

17. Boraker then stated that when she asked employees about sexual harassment Dargie's name kept coming up. Boraker proceeded to ask Dargie about specific discussions and whether she had made certain comments. The following exchange occurred during that questioning:

> BORAKER: Now, I have had reports from numerous employees . . . that you have been saying things like is he fucking her and making remarks like that. Do you have any reason, do you know of any reason why they might be lying about that?

HOADLEY: That's not a question you can ask.

BORAKER: Yes it is a question I can ask.

HOADLEY: No it is not. You cannot ask . . .

BORAKER: Mr. Hoadley, I can ask her that.

HOADLEY: No, you cannot ask why someone would do something else.

BORAKER: Your obligation is to answer the question.

DARGIE: Can I speak to Gary privately?

BORAKER: No, you have to answer my question.

HOADLEY: She has a right to confer, she has a right . . .

BORAKER: You have to answer my question first and then you may break.

HOADLEY: No.

BORAKER: You have to answer my question and then you may break.

HOADLEY: No, no, that is what representation . . .

BORAKER: She has to answer my question and then you may break.

HOADLEY: You're denying her legal right to a protected activity . . .

BORAKER: She has to answer my question and then you may break.

HOADLEY: You are violating her legal and . . .

BORAKER: We can keep going through this, Mr. Hoadley.

HOADLEY: No, we're not going to. She has a contractual and legal right . . .

BORAKER: If you do not answer my question, you can be charged with insubordination.

HOADLEY: You are forcing her against her legal and contractual right to confer with her union representative.

BORAKER: If you don't answer my question you can be held accountable for it.

HOADLEY: Would you have any idea what anyone . . .

BORAKER: Excuse me, Mr. Hoadley, you are not asking the question.

HOADLEY: I would like to confer . . .

BORAKER: No.

DARGIE: I don't even remember the question at this point.

BORAKER: I will repeat it to you.

HOADLEY: I would like to take a break.

BORAKER: You may not until she answers the question. Ms. Dargie, I need to remind you your obligation . . .

HOADLEY: This is absolutely . . .

BORAKER: . . . as a state employee is to cooperate and answer my question no matter what Mr. Hoadley says at this particular point in time. Once you answer my question, which I will be glad to repeat for you, you may take a break.

HOADLEY: That is what representation is.

BORAKER: The question is . . .

HOADLEY: You do not have the right to circumvent her legal rights.

BORAKER: . . . why R or S might be lying about these allegations.

DARGIE: Because there were a lot of people discussing them at the garage, I'm sorry to say. And no it wasn't just me. I spent lots of time in Lyndonville and excuse me, a few years ago. Should I?

HOADLEY: No, I think you answered the question. We're done now. You answered, you said we could take a break when she answered the question. She answered the question. We want the break, thank you.
(Grievants' Exhibit 1; State's Exhibits 14, pages 93-105, and 17)

18. There was a break in the meeting. When the meeting resumed, Boraker asked Dargie if she had observed two co-workers engaging in improper behavior in the workplace. Dargie responded "no". Then, the following exchange occurred:

HOADLEY: Can I ask you why you're bullying her? Why you just won't be honest and . . .

BORAKER: Mr. Hoadley . . .

HOADLEY: . . . give her a question about why you asked her to come here.

BORAKER: Mr. Hoadley, I find your behavior to be very bullying. I'm asking her a simple question about what she has observed as an employee.

HOADLEY: Well you are violating her legal and contractual rights to representation and it's very difficult when I believe that you're well aware of what you are doing.

BORAKER: I do not agree with that assessment and if it is true, then whatever she says here cannot be used against her in any disciplinary proceedings.

HOADLEY: That is absolutely correct. That is absolutely correct.

BORAKER: If it is true, and I disagree it is true. We have a different assessment of the situation. So let's move on.

HOADLEY: Okay. But thank you for your comment there. I'm glad that you will recognize when you're wrong, that you are wrong.

BORAKER: Mr. Hoadley, I didn't say that I was wrong. I said I did not agree with your assessment.

HOADLEY: Well, you'll have that pointed out to you shortly because this is probably the most bullied, harassed investigation of my career which has been for over 25 years. I have never seen anyone's rights violated clearly, being harassed and bullied and not told why they're here as this investigation. This is an unbelievable, I've got to say you're precedent-setting here.

BORAKER: Well, that's your assessment and if it gets to the Labor Board there'll have to make that decision. In the meantime, I have a job that I have to do.

(Grievants' Exhibit 1; State's Exhibit 14, pages 105-109, and 17)

19. Shortly after this exchange, the following exchange occurred:

BORAKER: . . . I've had reports that since you received this letter of January 16th from me talking about the investigation that you may have engaged in behavior that is continuing harassment and retaliation . . .

HOADLEY: That is not a part of this investigation.

BORAKER: It has to do with . . .

HOADLEY: It is not a part of this investigation.

BORAKER: And you do have to answer my questions regardless of Mr. Hoadley's objections. Again if I am doing something that is wrong it cannot be used in future disciplinary proceedings . . .

HOADLEY: You called her in here and you asked her to answer questions involving an allegation that she harassed her co-workers. Why are you bringing up anything that happened after this fact? Why are you bringing, what are you doing? Why do you just continue? This is just a witch-hunt. You know, aren't you concerned with finding out the truth and actually giving her a chance to feel like the State of Vermont cares about her as an employee? You've done nothing but badger and harass her and ask has she ever, or could she ever or what's gone on, or who you talked to. If you think that she's engaged in some behavior, then clearly identify what it is and let her answer for it. But you're bringing up everything in the kitchen sink. You didn't even tell her who was involved with this and now you want to ask her if she somehow violated your letter which you didn't even know who it is or what the situation is.

BORAKER: We're going to continue now with the interview, Mr. Hoadley. . .

(State's Exhibit 14, pages 109-113)

20. After this exchange, Boraker asked Dargie questions concerning whether she had made certain statements to a co-worker after receiving Boraker's letter dated January 16, 2003 (Grievants' Exhibit 1; State's Exhibit 14, pages 113-141, and 17).

21. 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 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 the February 24 interview involving Dargie, the State had not prohibited Hoadley from taking breaks before the employee being investigated answered a question.

22. Prior to a December 6, 2001, investigative interview involving Department of Corrections employee Gary Peteani, VSEA Senior Field Representative Lucinda 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, 2001, interview, Kirk knew that the State was not obligated to provide her with investigative materials on employees being investigated for misconduct. Kirk has not advised employees to lie during investigative interviews. She has told employees that they need to tell the truth.

23. 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.

24. 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 not 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.

25. 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.

26. 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.

27. 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 meeting with an involved employee.

28. 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 him from obtaining an unrehearsed and unvarnished response to his questioning. He generally has allowed breaks upon request. 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.

29. 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.

30. 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.

31. 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.

32. 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 to 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

Grievants allege numerous violations of the Contract and past practice in these grievances. Before addressing the specific allegations in turn, we first dispose of general contentions made by Grievants on many of the issues in these grievances which claim that the State violated Articles 1 and 3 of the Contract through various actions involving employee Diane Dargie. Grievants did not establish violations 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 Dargie. The disputes in these grievances involve the extent of the right of VSEA representation of Dargie, not whether VSEA is the representative.

We next turn to the specific allegations. The first series of allegations concern actions primarily of Ken Leach in connection with meetings that Leach had with Dargie on January 27 and 30, 2003. Grievants first allege that Leach and Dennis Whitehill violated Articles 6 and 14 of the Contract, and binding past practices, by failing to provide Dargie with the information relevant and necessary for her to obtain adequate and meaningful representation prior to the January 27 and 30, 2003, meetings, and by

improperly denyng her VSEA representation during the conduct of the meetings. VSEA bases these contentions on its position that the January 27 and 30 meetings were investigative interviews concerning whether Dargie should be disciplined.

VSEA, as the exclusive bargaining agent of employees, has the right under Article 6, Section 5, to request and acquire information necessary to represent its members in grievance proceedings and pre-disciplinary meetings. *Grievance of VSEA, West and Cray*, 18 VLRB 461, 484 (1995); citing *Grievance of VSEA*, 15 VLRB 13, 22 (1992), and *Grievance of Munsell*, 11 VLRB 135, 144 (1988). Further, as discussed in detail in the companion decision to this case issued today, *Grievance of VSEA*, 27 VLRB 1, 20-25, 28-29; Article 14, Section 7, of the Contract requires an investigator considering whether an employee committed misconduct warranting discipline to provide the employee with notice of the general nature of the potential misconduct being investigated to ensure meaningful consultation between the employee and union representative prior to the employee being questioned by the investigator. The employee also has the right to effective union representation at an investigative interview that may result in disciplinary action. *Id.* at 17-19, 25-29.

Nonetheless, VSEA has not demonstrated that these requirements of Article 6, Section 5, and Article 14, Section 7, apply in this case. Quite simply, the evidence does not support a conclusion that the January 27 and 30 meetings were investigative interviews concerning whether Dargie should be disciplined. There is insufficient evidence to indicate that Leach was considering discipline as an option in advance of the meetings. Leach did not inform Dargie at the meetings that they were convened for the purpose of investigating whether she committed misconduct warranting discipline.

Dargie received no discipline in connection with the meetings. Under these circumstances, elements supporting a determination that the meetings were investigative meetings concerning whether to impose discipline are absent.

Nonetheless, Grievants request that we adopt the standard set forth in the U.S. Supreme Court decision in *N.L.R.B. v. Weingarten*, 420 U.S. 251, 257 (1975), that the employee has the right to request union representation as a condition of participation in an interview where the employee reasonably believes the investigation will result in disciplinary action. We conclude that this portion of the *Weingarten* decision has been superceded by Article 14, Section 7, of the Contract. It requires management to notify the employee of the right to the presence of a union representative, whereas *Weingarten* requires the employee to request such presence.

Grievants contend that the notification requirement by management did not eliminate the employee's right to request representation based on reasonable belief that discipline may result. We disagree. If the parties intended that the affirmative notification requirement only supplemented the employee request right, we believe they would have so explicitly stated in the Contract.

This does not mean that employees are somehow disadvantaged by Article 14, Section 7, superceding *Weingarten* in this regard. When a supervisor or investigator has improperly failed to inform the employee of the right to union representation, the Board has excluded as inadmissible evidence of any harmful or incriminating statements made by the employee at a meeting. *Grievance of Dustin*, 9 VLRB 296, 302 (1986). Where those statements form the sole basis for disciplinary action, the VLRB has rescinded the disciplinary action imposed. *Dustin, supra*. Thus, in this case, if Leach had improperly

failed to provide Dargie with the right to union representation at the December 27 and December 30 meetings, and then used any harmful or incriminating statements she made at the meetings against her by disciplining her, the harmful statements would have been ruled inadmissible and the disciplinary action would be at risk of being rescinded.

In sum, we conclude that Grievants have not demonstrated that violations of Article 6, Section 5, and Article 14, Section 7, occurred in connection with the January 27 and 30 meetings. Grievants further allege that Leach violated Article 5 of the Contract through his coercive conduct at the January 27 and 30 meetings which placed a chilling effect on the free exercise of employee rights and the rights of VSEA to provide meaningful representation as the exclusive bargaining representative. We do not find Leach's conduct rises to the level of coercion. Also, it is apparent that the claimed chilling effect on the free exercise of employee rights relates to the alleged right to union representation at the meetings. For the reasons set forth above, we find that no such rights existed at the meetings. Also, contrary to their contention, Grievants have not demonstrated that Leach and Whitehill violated any binding past practice through their actions.

Although Grievants have not demonstrated any violation of the Contract or a binding past practice in connection with the January 27 and 30 meetings, Leach disregarded reasonable management practices through his actions. Prior to both meetings, Dargie asked Leach the purpose of the meetings and he declined to tell her. No legitimate purpose was served by Leach failing to provide Dargie with such information. His failure to reasonably communicate with Dargie contributed to a climate of distrust between Dargie and her superiors and was destructive to harmonious labor relations.

The next series of allegations by Grievants contest actions primarily of investigator Christine Boraker in connection with her investigation in January and February, 2003, of whether Dargie committed misconduct. Grievants first allege that Boraker violated Articles 6 and 14 of the Contract, and binding past practices, by failing to notify Dargie of specific reasons as to the nature of the investigation, or charges or allegations against her, prior to a February 12, 2003, investigative interview.

As discussed above and in our companion decision issued today in *Grievance of VSEA, supra*, VSEA has the right pursuant to Articles 6, Section 5, of the Contract to information necessary to represent its members in pre-disciplinary meetings, and the employee has the right pursuant to Article 14, Section 7, of the Contract to be provided with notice of the general nature of the potential misconduct being investigated to ensure meaningful consultation between the employee and union representative prior to being questioned by the investigator. We conclude based on the evidence that there are no binding past practices that provide further rights to VSEA and the employee under investigation.

Prior to questioning Dargie at an investigative interview, Boraker provided her with written notice by letter dated January 16, 2003, that the "allegations are generally that you may have harassed coworkers in violation of the State's sexual harassment policy, the State's Employee Conduct policy, and/or the agency's expectations and directives to you regarding your treatment of coworkers." Grievants contend that this notice provided Dargie with no opportunity to meaningfully discuss with her union representative the matters for which the state was allegedly investigating her, and no opportunity to prepare for the investigative meeting.

We disagree. The notice to Dargie that she was being investigated for possible sexual harassment of coworkers was sufficient to provide notice of the general nature of the potential misconduct being investigated to ensure meaningful consultation with her VSEA representative prior to Boraker questioning Dargie about such allegations. It also provided her VSEA representative with the information necessary to represent Dargie in the investigative interview.

We recognize that Boraker did not provide notice to Dargie of the identity of the persons allegedly being harassed. However, in sexual harassment investigations, there are legitimate reasons, such as fear of retaliation, that may warrant the investigator not providing notice to the employee in advance of the meeting as to the identity of the persons allegedly being harassed. There is insufficient evidence for us to conclude that Boraker abused her exercise of discretion in this regard here. Thus, we conclude that Boraker did not violate Article 6 or 14 with respect to the notice and information provided to Dargie and her VSEA representative.

Grievants next allege that Boraker violated Articles 6 and 14 of the Contract by ordering Dargie not to discuss the matter under investigation with any state employee except a union steward, the AOT District Administrator, the District human resources officer, or Boraker, and warning Dargie that failure to follow this instruction could constitute misconduct. Such an order violates Article 14, Section 7, of the Contract to the extent that it hindered Dargie's ability to consult with the VSEA prior to the investigative interview and obtain effective representation. In this light, we conclude that the order was too restrictive to the extent that it prohibited Dargie from discussing the matter under investigation with a VSEA representative who was a state employee if that representative

was not a steward.

We note also for future guidance that the order was too restrictive to the extent that it prohibited Dargie from consulting with a state employee who by nature of their duties and responsibilities provide counseling services. An example would be an employee of the Employee Assistance Program, which program is recognized in Article 9 of the Contract as existing for "troubled employees to participate in an effort to avoid the necessity for discipline or corrective action because of impaired work performance". There is no evidence that Dargie would have sought assistance from a non-steward VSEA representative who was a state employee or that she would have invoked the Employee Assistance Program. However, this is not determinative of the appropriateness of the order. Such an order restricting employee communications is appropriate only to the extent that it serves the purposes of protecting state employees from potential harassment or coercive behavior, and preserving the integrity of an investigation process. The order as issued goes well beyond such purposes.

Grievants also are critical of the order on the basis that Boraker threatens discipline if it is not complied with, yet does not identify the complainant(s) or allegations. Grievants contend that, as a result, Dargie could unknowingly have violated the order. We do not find this contention persuasive. There was no threat of Dargie being disciplined for unknowingly violating the order as long as she stayed clear of discussing with the specified group of employees any past behavior on her part that could reasonably be construed as constituting sexual harassment.

Grievants also contend that, by her actions at the February 12, 2003, meeting, Boraker violated Articles 6 and 14 of the Contract, and binding past practices, concerning

right to union representation. Grievants allege that Boraker did not provide reasonable and necessary information to VSEA Representative Gary Hoadley, concerning the scope of the investigation of Dargie, to allow Hoadley to meaningfully represent Dargie.

The evidence does not support this contention. The February 12 meeting ended prematurely before there was any substantive discussion on the nature of the potential misconduct being investigated. This was due to Hoadley's inappropriate interruption of Boraker during her conduct of the interview. In so doing, Hoadley acted contrary to the Court's admonition in the *Weingarten* decision that the union representative not transform the investigative interview into an adversary contest. 420 U.S. at 263. Under these circumstances, we cannot fault Boraker for not providing information to Hoadley. She did not have a reasonable opportunity to provide such information due to Hoadley's conduct.

Grievants next contend that Boraker and the Agency of Transportation violated Articles 6 and 14 of the Contract, and binding past practices, by failing to notify Dargie of allegations of theft prior to questioning her about it at the February 24, 2003, investigative interview. If we were to accept Grievants' contention given the facts of this case, the result would be that employees would have to be given the opportunity of VSEA representation anytime management interviewed them about allegations of misconduct even if such allegations were not made against them.

During the February 24 interview, Boraker informed Dargie that she was going to ask her about stealing in the workplace. Boraker stated that she had "no indication that you've been stealing anything but . . . I am going to ask you about it just because I have asked every other District 7 employee that I have interviewed about it . . ." Boraker then

asked Dargie if she witnessed any employees removing materials from a dumpster at the garage or talking about taking home state property. Dargie responded “no”. Thus, there was no indication Dargie had engaged in theft and Boraker focused her questions to Dargie on whether she had observed other employees stealing.

Dargie would have been entitled to notice that she was going to be questioned about the theft issue if allegations had been made against her. This would derive from her right to VSEA representation pursuant to Article 14, Section 7, of the Contract “(w)henever 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”. However, when an employee is questioned about other employees’ potential misconduct and there is no indication that employee has engaged in the misconduct, they are not giving statements on an issue “which may lead to discipline against the employee”. That was the case when Boraker questioned Dargie about theft. Thus, Dargie was not entitled to notice that she was going to be questioned about theft at the February 24 meeting.

Grievants further contend that Boraker violated Article 14 of the Contract, and binding past practices, by questioning Dargie at the February 24 investigative interview about her alleged violation of the directives in the February 18, 2003, letter from Employer Personnel Administrator Tom Trahant. In the February 18 letter, Trahant informed Dargie that it had come to the Employer’s attention that she may have been discussing her pending sexual harassment investigation with coworkers, and may have been engaging in retaliation against coworkers, in violation of Boraker’s January 16, 2003, letter.

Grievants allege that it was inappropriate for Boraker to question Dargie on the issue raised in the Trahant letter because Dargie had not received notice of any investigation related to the letter. We disagree. The subject matter of the Trahant letter – i.e., alleged discussion with coworkers about the sexual harassment investigation, and retaliation against them – was intertwined with the central purpose of the February 24 meeting to investigate whether Dargie engaged in sexual harassment. There was no violation of the Contract or a binding past practice for Boraker to question Dargie on such a closely related issue to the central purpose of the meeting without specific notice.

Grievants also contend that Boraker violated Article 14 of the Contract, and binding past practices, at the February 24 investigative interview by refusing to allow Dargie to confer with her VSEA representative during questioning, and threatening her with insubordination if she failed to answer questions without conferral. VSEA contends that the past practice has always been that VSEA representatives freely consult with their clients at any time during investigative interviews.

As discussed in the companion decision issued today, *Grievance of VSEA*, 27 VLRB at 17, 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. *Id.* 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. *Id.*

This does not mean that an investigator has the unfettered ability to deny requests for a VSEA representative and the employee under investigation to consult during an investigative interview. 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. *Id.* at 29. The employee under investigation has the right during an investigative interview to be assisted by a knowledgeable union representative providing effective representation. *Id.* 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 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.* at 30.

Our views in this regard do not result in turning investigative interviews into adversarial contests as warned against in the *Weingarten* decision. *Id.* The employer, under *Weingarten*, has no obligation to bargain with the union representative. *Id.* The employer is free to insist on only being interested at that time in hearing the employee's own account of the matter under investigation. *Id.* 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. *United States Postal Service v. NLRB*, 969 F.2d 1064, 1071 (1992).

In applying these standards to the facts here, we conclude that Boraker did not improperly deny a break for consultation. Grievants contend that she did so when she denied Hoadley's request for a break to consult with Dargie before she answered Boraker's question concerning why employees might be lying about reported remarks attributed to Dargie that formed a basis of the sexual harassment investigation. It was

reasonable for Boraker to seek an unrehearsed answer to this question before allowing Dargie and Hoadley to consult during a break.

A management representative investigating potential employee misconduct has the right to conduct an investigative interview without the union representative turning it into an adversarial contest. We can think of no better example of a union representative turning an investigative interview into an adversarial proceeding than Hoadley's conduct during the February 24 interview. When Boraker asked the above question, she was entitled to hear Dargie's own account of the matter under investigation answer without Hoadley engaging in disruptive behavior. Instead, Hoadley engaged in lengthy argument objecting to the question.

Boraker eventually informed Dargie that she could be charged with insubordination if she did not answer the question. This constituted no violation of Dargie's right to VSEA representation under the circumstances. Boraker was entitled to an answer to her question, and threatened insubordination only after Hoadley repeatedly interfered with her ability to obtain the answer from Dargie.

Grievants finally allege that Boraker violated Article 14 of the Contract, and binding past practices, at the February 24 investigative interview by compelling Dargie to answer questions regardless of objections from her VSEA representative. Again, we find no violation by Boraker in this regard. When Hoadley persisted on demanding a break and repeatedly objecting to Boraker's question, well after Boraker informed Dargie she could be charged with insubordination, Boraker informed Dargie of her obligation "to cooperate and answer my question no matter what Mr. Hoadley says at this particular point in time". It was appropriate for Boraker to overrule Hoadley's objection and insist

on an answer. If Hoadley continued to believe that such question violated Dargie's right to VSEA representation after Dargie answered the question, and if the Employer relied on the answer in taking adverse action against Dargie, he had the recourse of filing a grievance over the adverse action and seeking to exclude Dargie's answer as inadmissible evidence.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievances of the Vermont State Employees Association and Diane Dargie are sustained in these matters only to the extent that the State of Vermont violated Article 14, Section 7, of the Contract through the order contained in Christine Boraker's January 16, 2003, letter to Diane Dargie that prohibited Dargie from discussing the matter under investigation with a VSEA representative who was a state employee if that representative was not a steward; and are dismissed in all other respects. It is ordered that the State shall cease and desist from prohibiting employees under investigation for possible disciplinary action from discussing the matter under investigation with a VSEA representative who is a state employee if that representative is not a steward.

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

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

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John J. Zampieri

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