VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION	)	DOCKET NO. 03-25
	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 16, 2003, 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, 6 and 14 of the collective bargaining agreement between the State of Vermont and VSEA, effective July 1, 2001 – June 30, 2003, for the Non-Management and Supervisory Bargaining Unit ("Contracts"), and the parties' past practice, by failing to notify State of Vermont Agency of Transportation employees of: 1) the nature of an investigation in which they could have been subjected to discipline, 2) the charges and allegations leading to the investigation, and 3) their rights to be represented by and to confer with a VSEA representative at a meeting where they were compelled to give statements that may lead to discipline against them. VSEA further alleged that these actions interfered with and restrained established practices that VSEA representatives can freely consult with employees under investigation at any time during investigative interviews and receive relevant information necessary as their exclusive bargaining agent.

A hearing was held on October 1, 2003, in the Labor Relations Board hearing room in Montpelier before Board Members Richard W. Park, Chairperson; Edward Zuccaro and John Zampieri. Assistant Attorney General William Reynolds represented the State. VSEA Deputy General Counsel Michael Casey represented VSEA. The parties filed post-hearing briefs on December 22, 2003.

FINDINGS OF FACT

1. The Contracts 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 . . . 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 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 14
DISCIPLINARY ACTION

. . .

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.

. . .

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.

3. Daniel Forthun worked in the Agency of Transportation District 7 garage in St. Johnsbury from December 16, 2002, until January 9, 2003. On or about December 27, 2002, Forthun approached Dennis Whitehill, Transportation Area Maintenance Supervisor, and told Whitehill that there were problems in the garage with respect to employee "horseplay". Whitehill informed his supervisor, Ken Leach, of Forthun's allegations (State's Exhibits 1, 2).

4. On January 7, 2003, Forthun made a telephone call to Richard Carey, Agency of Transportation Chief of Human Resources. Among the concerns that Forthun expressed to Carey were that: 1) there were inappropriate employee interactions in District 7, and 2) District 7 employees were stealing State equipment and materials from the garage. Cary asked Forthun to provide him with names of involved employees and specific details of his allegations. Forthun declined to do so.

5. Carey assigned Personnel Administrator Thomas Trahant to talk to Forthun about his allegations. Forthun told Trahant on January 8 that he was not interested in pursuing his allegations. Forthun declined to provide Trahant with any details of his allegations. Forthun resigned from his District 7 position on January 9.

6. Carey spoke with Department of Personnel General Counsel David Herlihy and paralegal Christine Boraker about Forthun's allegations. Carey informed Herlihy and Boraker that he did not find Forthun to be credible. Herlihy assigned Boraker to investigate the allegations. At the time she began her investigation, Boraker was only aware of general allegations made by Forthun that there was theft and sexual harassment in District 7. She did not have details as to any specific incidents and did not have any information as to which employees may be involved in misconduct.

7. Boraker decided to visit the St. Johnsbury garage and interview available employees there concerning Forthun's allegations. Boraker provided no advance notice to employees that she was going to interview them. The selection of employees she interviewed was random; she interviewed whichever employees were at the garage. Boraker interviewed eight employees on January 14, 2003, and asked them questions concerning Forthun's general allegations. On January 17, Boraker interviewed two additional employees, and had an interview with an employee she had questioned on January 14, concerning Forthun's allegations. Among the questions Boraker asked employees were whether they had witnessed employees throwing state equipment or property that was in usable condition into the dumpster, or witnessed employees removing items from the dumpster that had been thrown out. Boraker also asked employees about employee actions or conversations of a sexual nature. A few employees informed Boraker that they had been involved in sexual banter in the workplace. Boraker recorded the interviews of each of the employees except her interview of Whitehill.

8. Boraker did not inform the employees prior to interviewing them of the purpose of the interview nor that they had a right to VSEA representation at the interview. At the beginning of the interviews, Boraker told employees they had a duty to cooperate in the interview and answer questions truthfully. Prior to interviewing each employee on January 14 and 17, Boraker did not have information that the employee had engaged in theft or sexual harassment of other employees. None of the employees Boraker interviewed on January 14 and 17 were disciplined due to Forthun's allegations.

OPINION

VSEA alleges that the State violated Articles 1, 3, 6 and 14 of the Contracts, and the parties' past practice, by failing to notify State of Vermont Agency of Transportation employees of: 1) the nature of an investigation in which they could have been subjected to discipline, 2) the charges and allegations leading to the investigation, and 3) their rights to be represented by and to confer with a VSEA representative at a meeting where they were compelled to give statements that may lead to discipline against them. VSEA further alleged that these actions interfered with and restrained established labor relations practices that VSEA representatives can freely consult with their clients at any time during investigative interviews and receive relevant information necessary as the exclusive bargaining agent of employees.

VSEA did not establish a violation of either Article1 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. The dispute in this grievance involves whether employees had a right to VSEA representation at particular investigative interviews, not whether VSEA was the representative of employees.

The central issue in this case is whether VSEA demonstrated that the State committed violations of Articles 6 and 14 of the Contract or binding past practices. As discussed in one of the companion cases to this case issued today, 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. *Grievances of VSEA and Dargie*, 27 VLRB

33, 54; 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 other 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. We conclude based on the evidence that that there are no binding practices that provide further rights to VSEA and the employee under investigation. *Grievances of VSEA and Dargie*, 27 VLRB at 57.

When investigator Christine Boraker conducted the investigative interviews in question on January 14 and 17, 2003, she did not inform the employees prior to interviewing them of the purpose of the interview or that they had a right to VSEA representation at the interview. At the beginning of the interviews, Boraker told employees they had a duty to cooperate in the interview and answer questions truthfully. Among the questions Boraker asked employees were whether they had witnessed employees throwing state equipment or property that was in usable condition into the dumpster, or witnessed employees removing items from the dumpster that had been thrown out. Boraker also asked employees about employee action or conversations of a sexual nature. VSEA contends that Boraker violated Articles 6 and 14 of the Contract

through these acts and omissions.

If we were to accept VSEA's contentions 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 no allegations were made against them. *Grievances of VSEA and Dargie*, 27 VLRB at 59. At the time Boraker conducted the January 14 and 17 interviews, she was only aware of general allegations made by a former employee that there was theft and sexual harassment in District 7. She did not have details as to any specific incidents. Prior to interviewing each employee, Boraker did not have credible or specific information that could reasonably lead her to suspect that any District 7 employees had engaged in theft or sexual harassment of other employees.

The employees would have been entitled to notice that they were going to be questioned about theft and sexual harassment if such allegations had been made against them, and also would have had the right to VSEA representation during the investigative interview. This would derive from their 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". *Grievance of VSEA and Dargie*, 27 VLRB at 60. 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". *Id.* That was the case when Boraker questioned the employees about theft and sexual harassment. Thus, they were not entitled to notice that they were

going to be questioned about theft and inappropriate employee interaction at the January 14 and 17 investigative interviews, and did not have the right to VSEA representation at such interviews.

Our conclusion in this regard should not be construed broadly as permitting employers to engage in general "fishing expeditions" without granting employees the right to VSEA representation. Unique circumstances were present in this case. Serious allegations of theft and sexual harassment were made warranting investigation, but the investigation was significantly hampered by vague allegations made by a complainant who was not credible and refused to cooperate. Under such circumstances, Boraker was entitled to a reasonable belief that none of the employees whom she interviewed on January 14 and 17 would provide her with information that may result in their discipline. Accordingly, it was appropriate for her to not provide the employees with the opportunity for VSEA representation during the interview.

The situation would be different during the course of interviewing employees if it becomes reasonable for the investigator to believe that an employee was beginning to provide information that may result in such employee being disciplined. At such time, which did not occur in this case, the investigator would have an affirmative duty pursuant to Article 14, Section 7, of the Contract to notify the employee of the right to presence of a VSEA representative. The investigator would operate at the employer's peril by failing to do so. When a supervisor or investigator has improperly failed to inform the employee of the right to VSEA representation, the Board has excluded as inadmissible evidence of any harmful 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*.

In this case, for instance, a few employees whom Boraker had not provided the opportunity for VSEA representation informed Boraker that they had been involved in sexual banter in the workplace. If the Employer disciplined the employees for these statements to Boraker, the harmful statements could have been ruled inadmissible and the disciplinary action could be at risk of being rescinded. In fact, none of the employees Boraker interviewed on January 14 and 17 were disciplined.

Boraker could have provided all employees whom she interviewed on January 14 and 17 with the opportunity for VSEA representation. This would have eliminated the risk that the Employer was proceeding at its own peril by not providing employees with the opportunity for VSEA representation. Nonetheless, it was permissible for her to not provide the opportunity for VSEA representation because she was entitled to a reasonable belief that none of the employees whom she interviewed would provide her with information that may result in their discipline.

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

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John J. Zampieri

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Edward R. Zuccaro