VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	
	)	DOCKET NO. 06-30
STATE OF VERMONT (RE: DEPARTMENT OF CORRECTIONS DISCIPLINARY GUIDANCE MEMORANDUM)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 2, 2006, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont Department of Corrections ("Employer"), contending that the Employer interfered with employee rights and violated its duty to bargain in good faith, in violation of 3 V.S.A. Section 961(1) and (5), through issuance of a revised disciplinary guidance memorandum. Following investigation of the charge, the Labor Relations Board issued an unfair labor practice complaint on November 17, 2006.

The Board held a hearing on the complaint on February 7, 2007, in the Board hearing room in Montpelier before Board Members James Dunn, Acting Chairperson; Joan Wilson and Leonard Berliner. VSEA General Counsel Michael Casey represented VSEA. Assistant Attorney General William Reynolds represented the Employer. The parties filed post-hearing briefs on March 8, 2007.

FINDINGS OF FACT

1. VSEA is the exclusive bargaining representative of Department of Corrections employees in the Supervisory and Corrections Bargaining Units.

2. Article 14 of the collective bargaining agreements between the State and VSEA covering the Corrections and Supervisory Bargaining Units provide in pertinent part as follows:

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

(a) act promptly to impose discipline or corrective action within a reasonable time of the offense;

(b) apply discipline or corrective action with a view toward uniformity and consistency;

(c) impose a procedure of progressive discipline or corrective action;

(d) In misconduct cases, the order of progressive discipline shall be:

(1) oral reprimand;
(2) written reprimand;
(3) suspension without pay;
(4) dismissal.

(e) In performance cases, the order of progressive corrective action shall be as follows:

(1) feedback, oral or written . . .
(2) written performance evaluation, special or annual, with a specified prescriptive period for remediation specified therein. . .
(3) warning period . . .
(4) dismissal.

(f) The parties agree that there are appropriate cases that may warrant the State:

(1) bypassing progressive discipline or corrective action;
(2) applying discipline or corrective action in different degrees;
(3) applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression; as long as it is imposing discipline or corrective action for just cause.

. . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two (2) weeks' notice or two weeks' pay in lieu of notice. . .

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee

immediately without two (2) weeks' notice or two weeks' pay in lieu of notice for any of the following reasons:

(a) gross neglect of duty;
(b) gross misconduct;
(c) refusal to obey lawful and reasonable orders given by supervisors;
(d) conviction of a felony;
(e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

. . .

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

. . .

3. The Department of Corrections Work Rules provide:

1. No employee shall violate any provision of the collective bargaining agreement or and (sic) State or Department work rule, policy, procedure, directive, local work rule or post order.
2. An employee shall not use State property or equipment for his/her private use or for any other use other than that which serves the public interest.
3. No employee shall, while on duty or on State property, endanger the safety of any member of the public. Employees shall be responsible to promptly report, to their immediate supervisor, any such conduct by another employee, volunteer or offender which endangers the safety of others.
4. Employees shall be honest and complete in their descriptions, whether given orally or in writing, to the employer of events occurring in the work place and in all other circumstances related to their employment.
5. Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.
6. No employee shall, while on duty or engaged in an activity associated with the Department of Corrections, engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude (such as ignoring a visitor who attempts to gain entrance to the building) or treating inmates in a demeaning manner with no legitimate rehabilitative justification. No

employee shall exhibit behaviors which are physically or mentally abusive towards offenders.

7. No employee shall engage in a sale or lease of property to or from an offender, hire offenders for work or provide services or goods to offenders, except with the permission of supervisory authority. No employee shall lend money to or borrow money from an offender or accept gifts or gratuities from and give gifts or gratuities to an offender.
8. No employee shall report to work under the influence of alcohol or with the odor of alcohol on the breath or possess or use alcohol while on duty. No employee shall report to work under the influence of or in the possession of any regulated drug which is unprescribed by his/her physician. Any employee taking prescribed medicine which could cause either a mental or physical limitation must immediately bring this to the attention of the immediate supervisor.
9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.
10. No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.
11. Any employee shall report in writing to his/her supervisor of his/her arrest or citation for criminal activity as soon as possible, but no later than the first day he/she reports to work following the arrest or citation. The disposition of the charge must be reported immediately. The employee shall also immediately report, when known by the employee, that he/she is being investigated for criminal conduct by a law enforcement agency.
12. While engaged with an activity associated with the Department of Corrections, unless expressly approved by the Commissioner, the possession or use of firearms is prohibited.
13. 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 an employee and an offender. These include, but are not limited to: hugging, kissing, hand-holding and unofficial correspondence. Employees, while on duty, on State property or while otherwise associated with State business, shall conduct themselves in a professional manner in their interactions with co-workers.

I certify that I have read and fully understood the above Department of Corrections' Work Rules.

_____	_____
Employee Signature	Supervisor Signature
_____	_____
Date	Date

(VSEA Exhibit 13, State Exhibit 1)

4. Sister Janice Ryan was appointed Deputy Commissioner of the Department of Corrections effective August 4, 2003. In 2003, seven inmates died while under the supervision of the Department of Corrections. The Employer arranged for an independent investigation to be conducted into the deaths. The investigation was completed in the spring of 2004.

5. Among Ryan's duties as Deputy Commissioner was overseeing the investigation of employees for alleged misconduct and any resulting discipline imposed on employees. Meetings concerned with the investigation and discipline of employees regularly included Ryan; the Employer's Facilities Executive; the Employer's Director of Field Services; the correctional facility superintendent or probation and parole office manager of the involved employee; Peter Garon, the Personnel Administrator assigned to the Department of Corrections; and attorneys. Beginning around June 2004, this group decided to develop a memorandum to be issued to employees providing guidance on imposition of discipline for misconduct. It took the group approximately fifteen months to complete a final draft of the memorandum after preparation and review of numerous drafts.

6. The group working on the disciplinary guidance memorandum did not ask VSEA to participate in, or provide input on, the development of it. The group

intentionally excluded VSEA from involvement in the preparation of the memorandum. The group did not share any of the drafts of the memorandum with VSEA, and decided that the memorandum would not be provided to VSEA until a few days before its issuance to Department employees.

7. In February 2005, Robert Hofmann became Commissioner of the Department of Corrections. Hofmann became aware that the group was drafting a memorandum to employees concerned with providing guidance on imposition of discipline for misconduct.

8. On August 29, 2005, Garon wrote the following paragraph about the disciplinary guidance memorandum for inclusion in the Employer's report to the Governor:

> For some time the Department has been working with staff from the Department of Human Resources to develop a new paradigm for discipline. We are taking a common sense step to eliminate ambiguity and to put us in a stronger position in holding employees accountable for misconduct. We anticipate that these steps will allow us to respond more appropriately to egregious employee misconduct. Starting September 12 the Department will introduce an updated statement of expectations to all staff. We expect that our actions will create a measure of concern and reaction from VSEA. (VSEA Exhibit 5)

9. On Thursday, September 8, 2005, Commissioner Hofmann mailed a letter to VSEA Director Anne Noonan enclosing a copy of the disciplinary guidance memorandum. Hoffman informed Noonan that "it is our plan to assure that all staff receives this memo", and that the Employer would "begin the process of introducing it to staff during the week of September 12, 2005". The letter was received at the VSEA office on September 9. Hofmann called Noonan on the morning of September 9 and left her a message requesting that she call him. At this time, Noonan was attending VSEA's annual

meeting in Burlington and did not return Hofmann's call that day (VSEA Exhibit 6, State Exhibit 3).

10. On Monday, September 12, 2005, Hofmann sent a copy of the disciplinary guidance memorandum to all Department employees. He requested that employees sign a copy of the memorandum (VSEA Exhibit 7, State Exhibits 2 and 4).

11. On Tuesday, September 13, 2005, Noonan telephoned Hofmann and requested that he stop the process of distributing the memorandum and gathering employee signatures concerning it. Noonan indicated to Hofmann that the Employer had an obligation to bargain with the VSEA over the memorandum.

12. On September 23, 2005, VSEA filed an unfair labor practice charge with the Labor Relations Board concerning the issuance of the disciplinary guidance memorandum. After investigation, the Board issued an unfair labor practice complaint on March 10, 2006, and scheduled an April 13, 2006, hearing on the complaint. The Employer and VSEA engaged in settlement discussions over the matter. As a result of discussions, the Employer changed portions of the disciplinary guidance memorandum to address some of the concerns raised by VSEA, but the parties did not resolve all issues in dispute (VLRB Docket No. 05-39).

13. On April 7, 2006, Commissioner Hoffman sent an e-mail message to all Department of Corrections employees which provided:

> All Department of Corrections employees should have received a Disciplinary Guidance memorandum dated September 8, 2005 that discussed the Department's expectations for employee conduct and views on discipline. The Vermont State Employees' Association, Inc., objected to that memorandum and filed an action at the Vermont Labor Relations Board. Department and union representatives discussed the language of the memorandum at length, and the union representatives offered many suggestions about ways in which the memorandum could be changed. The

Department agreed to make many of those suggested changes; however, to date, we have not been able to reach a final, overall agreement about the memorandum so the case before the Vermont Labor Relations Board is still an open matter.

Nevertheless, the Department believes that the agreed upon changes make for a better memorandum that more clearly communicates the Department's views. Therefore, we have decided to distribute the revised memorandum at this time even though the original communication continues to be the subject of litigation before the VLRB. The attached revised Disciplinary Guidance memorandum replaces the September 8, 2005 memorandum, which is no longer in effect. We are asking employees to sign this new revised guidance just for the purpose of acknowledging that it has been received and read. Copies of that earlier memorandum will be removed from employees' files and destroyed; but, our intent to provide employees with better guidance has not changed. Specifically, our goal is to clarify expectations concerning the Department's work rules, provide employees additional information about what the Department believes constitutes serious misconduct, and promote fairness and consistency in the administration of discipline. The focus of these changes is to emphasize the fact that this is not establishing rules or changing standards, but only communicating our views.

I repeat my statement of our appreciation that appears in the memorandum for all the professionalism and hard work of the vast, vast majority of our employees – we recognize the value of your contributions and the distribution of this memorandum should not be taken as diminishing our regard for you. Thank you for all your hard work.
(VSEA Exhibit 9, State Exhibit 8)

14. Attached to this April 7 e-mail message was a document providing:

Over the past eighteen months, there have been a number of changes within the Department designed to help us better achieve our core values. For example, we have enhanced our training curriculum for CSS's and made other changes at the Academy, instituted a supervisory training program, and have reinstituted the Quality Assurance Unit.

An important and vital core activity is accountability. Just as employees deserve praise when they excel, so too must they be held accountable when they fall below expectations, or worse, betray the public's confidence in their ability to conduct themselves in a manner beyond reproach.

Of late, we have heard two concerns that relate to the subject of personal accountability. The first is that certain Work Rules are couched in terms

too general to provide employees with concrete explanations regarding their performance. We have considered this concern carefully. At this time, we do not believe the Work Rules should be amended. However, we do believe that it may be helpful to provide employees with concrete examples of conduct that is likely to substantially impair, if not immediately end, their career with the Department.

The second concern is that the DOC Policies have been applied inconsistently and unfairly. Again, we have considered this complaint carefully. While in the great majority of cases the DOC Policies have been applied with uniformity, there have indeed been cases where inconsistencies have emerged. We believe providing more detailed guidance to managers and staff regarding the Department's expectations will work to reduce any further inconsistencies.

The list that follows is designed to address the two concerns of accountability and the past inconsistent application of DOC Policies. This list sets forth the Department's current emphasis on the behavior and performance expected of Department employees and the consequences Department employees can expect for failure to abide by Department expectations and Policies.

The vast majority of our colleagues consistently adhere to the behavior expected for staff. Therefore, for most staff there will be no surprises and no dispute over the content of this list. However, if it is established that an employee's actions violate DOC work rules in the manner noted below, the Department will likely, subject to its collective bargaining agreements with the Vermont State Employees' Association, impose severe disciplinary action up to and including immediate dismissal against that employee. Please note that the specific level of discipline will be established after appropriate and thorough review of the facts.

After reviewing this document, everyone should be aware that the Department is at this time clarifying expectations for employee conduct and providing guidance on what discipline may be expected for failure to meet these expectations.

The items that follow are examples of misconduct, which in the Department's view will likely lead to severe discipline up to and including immediate dismissal. This list is not all-inclusive and there are other actions that may fall under the same category.

A. <u>Welfare of Individuals Under the Supervision of the Department</u>

1. Physically or mentally abusing anyone under the supervision of the Department; (See DOC Work Rules #1, 3, 6, 9)

2. Failing to protect an inmate in a facility from physical or mental abuse by others; (See DOC Work Rules #1, 3, 6, 9)
3. Violation of DOC Work Rule #13 in interactions with anyone under the supervision of the Department; (See DOC Work Rules #1, 6, 9, 13)
4. Providing contraband (see lists in each facility) to an inmate in a facility whether or not compensation is received; (See DOC Work Rule #1, 7, 9)
5. Failing to perform required checks of inmate(s) in a facility (See DOC Work Rules #1, 3, 6, 9)
6. Engaging in unlawful discrimination (for example, discrimination based on race, sexual orientation, sex). (See DOC Work Rules #1, 9, 10)

B. Other Employee Misconduct

1. Failure to fully and truthfully report events in the workplace or in other circumstances related to employment; (See DOC Work Rules #1, 4, 5)
2. Conviction of a felony; (See DOC Work Rules #1, 9, 10)
3. Incarceration as a result of conviction for any crime; (See DOC Work Rules #1, 9, 10)
4. Conviction of a crime involving violence. (See DOC Work Rules #1, 9, 10)

If there are any Department employees who previously believed that the foregoing conduct would or should result in relatively light discipline, *they must change their expectations immediately.* (emphasis in original)

We recognize, of course, that it is impossible to provide an exhaustive list of all potential employee misconduct that could lead to discipline up to and including immediate dismissal. Nonetheless, we believe that the foregoing list will prove helpful in guiding Department employees' future performance as well as future disciplinary decisions.

The purpose of this Disciplinary Guidance memo is to clarify what is expected of employees and to ensure they are treated fairly and equitably. This memo does not change the Department's Work Rules, does not alter any terms in the collective bargaining agreement, nor is it intended to impose conditions of employment over and above those set forth in the Department's work rules or its collective bargaining agreement with the VSEA. An employee's signature acknowledges that an employee has received the Disciplinary Guidance memo and does not mean that an employee necessarily agrees with the statements contained herein. An employee's signature on this memo does not constitute a waiver of an

employee's right to contest any discipline under the collective bargaining agreement. Any employee who does not understand the contents of this memo or what is expected of them in light of this memo is directed to contact their supervisor for further clarification. Any employee who is not aware of their rights with respect to discipline can contact their VSEA representative.

Finally, the Department expresses our appreciation to the vast majority of employees who refrain from the above behavior and perform their jobs in a professional manner, day in and day out, under very difficult circumstances.

I certify that I have received and read the contents of this memo:

_____
Employee Signature

_____
Employee Name Date
(emphasis in original)
(VSEA Exhibit 9, State Exhibit 11)

15. On April 7, 2006, Michael Casey, VSEA Associate General Counsel, sent an e-mail message to "VSEA Corrections Activists and Stewards" that provided in part:

> . . .
> It is VSEA's view that you, our members, should ask whoever is trying to collect your signatures on this new document, "Am I required to sign this?" If you are told that you must sign it, you should do so to avoid being accused of violating an order. But if you are told you do not have to sign it, you shouldn't, as it is our belief that requiring employees to sign this new memo constitutes a term and condition of employment that must be bargained with the union, not imposed upon individual employees. . . (State Exhibit 18).

16. Peter Garon sent an e-mail message to Department managers on April 7, 2006, providing in part:

> The disciplinary guidance revised memo was sent to all employees on April 7, 2006. In the communication employees are asked to sign the memo indicating that they have received and read it. This is not an order and <u>no one should be directed or ordered or otherwise coerced into signing it if they do not wish to do so.</u> (emphasis in original) As before if an

> employee refuses to sign the form, please have a supervisory staff person note on the form "It was given to the employee on (date) and the employee did not sign". Please use that language.
>
> In those cases where an employee did not sign the memo, they should receive the following feedback, signed by you and not anyone else in the work site. The feedback should say, "This is supervisory feedback. You were asked to sign a memo indicating that you had received and read the Disciplinary Guidance memo. You did not do so. This does not meet expectations."
> . . .
> (VSEA Exhibit 10, State Exhibit 9)

17. On April 14, 2006, Garon sent a further e-mail message to Department managers providing in part:

> . . . If all managers and supervisors are following our directions, employees will be told that they are not being required to sign. We will follow up with feedback as noted in my earlier memo to you should they choose not to sign. THEREFORE, IT IS IMPERATIVE THAT ALL MANAGERS AND SUPERVISORS WHO DISCUSS SIGNATURES ON THE GUIDANCE MEMO WITH EMPLOYEES UNDERSTAND THAT THEY ARE TO DO NOTHING TO SUGGEST OR REQUIRE THAT AN EMPLOYEE SIGN THIS DOCUMENT. COMMISSIONER HOFMANN'S MEMO *ASKS* EMPLOYEES TO SIGN AND ANY QUESTIONS ABOUT THE PROCESS SHOULD BE REFERRED BACK TO THE LANGUAGE IN HIS MEMO. (emphasis in original)
> . . .
> (VSEA Exhibit 11, State Exhibit 12).

18. On April 25, 2006, Garon sent another e-mail message to Department managers providing in part:

> I have provided less than stellar advice to you about how to handle individuals who do not sign the Discipline Guidance memo. Although it made sense from where I sit, it did not sufficiently take into account the impact of that advice on your relationship with your staff. Several of you had provided me with this feedback, but it was made even more clear to me yesterday afternoon after a conversation with a group of your peers.
>
> . . . I have reviewed this note with the Commissioner and Deputy Commissioner who are in agreement. You may ask, but still not demand directly or indirectly, that staff sign the memo. When asked if you are

> directing them to sign, please tell them that they are not being directed to do so.
>
> If an employee does not sign, have a supervisor (or above) note on the form that the employee was given a copy, and have the supervisor date and sign it. Make sure that the employee has actually been given a copy of the form. No other action should be taken with regard to the employee. **Do not give anyone supervisory feedback for not signing the form.**
>
> If you have already provided feedback to anyone, please retract it, and destroy any copies you have. . . (VSEA Exhibit 12, State Exhibit 13)

19. The Employer did not provide those employees who had already signed the memorandum prior to the decision to stop issuing supervisory feedbacks with the opportunity to withdraw their signatures on the memorandum. The Employer has not issued a communication to non-management employees informing them that they are not obligated to sign the revised memorandum. The Employer has gathered a large stack of employee signatures on the revised disciplinary guidance memorandum. The Employer intends to place the signed memorandum in employees' personnel files if the Board determines that the Employer did not commit an unfair labor practice by issuing the memorandum.

OPINION

The issue before us is whether the Employer interfered with employee rights and violated its duty to bargain in good faith, in violation of 3 V.S.A. Section 961(1) and (5), through issuance of a disciplinary guidance memorandum on April 7, 2006. VSEA contends that issuance of the memorandum, and requesting that employees sign it, constituted a unilateral change in conditions of employment for employees.

It is clear that the unilateral imposition of changes in required subjects of bargaining when the employer is under an obligation to bargain in good faith is the very

antithesis of bargaining and is a *per se* violation of the duty to bargain. Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435-36 (1983). In determining whether such an improper unilateral change occurred here, we apply the broad scope of bargaining provisions of the State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* ("SELRA"). Under SELRA, an employer must bargain over a subject if it is a "matter relating to the relationship between the employer and employees" and is not "prescribed or controlled by statute". 3 V.S.A. Section 904(a). Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980).

A unilateral change by an employer impacting the employer's decision whether to discipline employees clearly concerns the employer-employee relationship. VSEA v. State of Vermont (Re: Polygraph Examinations), 7 VLRB 256, 259 (1984). Thus, we need to decide whether the disciplinary guidance memorandum issued by the Employer created a unilateral change in the required subject of bargaining of disciplining employees.

Our review of the memorandum results in a conclusion that such an improper unilateral change occurred. The memorandum states: "The items that follow are examples of misconduct, which in the Department's view with likely lead to severe discipline up to and including immediate dismissal." Following this provision is a listing of ten categories of conduct.

The Employer's listing of specific instances of misconduct that "likely will lead to severe discipline up to and including immediate dismissal" crosses the line of appropriate notice to employees of existing standards constituting just cause for discipline. The Employer in effect has inappropriately simplified the determination

whether “just cause” exists for a particular disciplinary action. The determination whether just cause exists cannot be so simplified, as is evident of our application of the twelve factors set forth in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983); to determine the reasonableness of a particular disciplinary action. As the Board stated in Grievance of Sherman, 7 VLRB 380, 405 (1984); “each case involves a question of degree and we must look to all the circumstances of a case to determine whether a” particular disciplinary action “is just”.

A few examples will illustrate the inappropriate nature of the Employer’s issuance of the disciplinary guidance memorandum. The Employer lists “(e)ngaging in unlawful discrimination” as an example of misconduct that likely will lead to severe discipline up to and including dismissal. There is a wide range in the degree of seriousness of discrimination that may be engaged in by employees. The State and VSEA recognized this in the Contracts by providing in Article 5, Section 3: “The employer will notify employees, supervisors or managers at every level that any person who by action or condonation subjects another employee to harassment in the form of uninvited physical or verbal attention, insults or jokes based upon a factor for which discrimination is prohibited by law, or who invites or provokes such conduct, shall be subject to appropriate discipline”.

The parties have not specified a particular penalty or penalties that would constitute “appropriate discipline”, but instead have left the determination of the penalty to the general standards of discipline set forth in Article 14. Article 14 provides for discipline being imposed for “just cause”, establishes a procedure of progressive

discipline (i.e., oral reprimand, written reprimand, suspension, dismissal), and provides that progressive discipline may be bypassed in appropriate cases.

Thus, the "appropriate discipline" in cases of unlawful discrimination may be verbal reprimand, written reprimand, suspension or dismissal depending on the degree of seriousness of the employee's misconduct. The Employer has gone beyond these contractually agreed upon standards in the disciplinary guidance memorandum by providing that engaging in unlawful discrimination likely will lead to severe discipline up to and including dismissal. The Contracts, unlike the disciplinary guidance memorandum, do not provide that severe discipline is "likely" in cases of unlawful discrimination. Instead, the determination of appropriate discipline pursuant to the Contracts can only be made after consideration of the particular circumstance of a case.

The disciplinary guidance memorandum elsewhere lists "failure to fully and truthfully report events in the workplace or in other circumstances related to employment" as an example of misconduct that likely will lead to severe discipline up to and including dismissal. It is too simplistic to provide that failure to "fully" report events will likely lead to severe discipline.

It is not difficult, for example, to conceive of situations where an employee omits some detail from a report of an incident because the employee reasonably believes that the detail is not of consequence or understands from an accepted prior practice in the workplace that it is not necessary to report the detail. The likeliness of severe discipline in such circumstances is not apparent.

The determination of appropriate discipline pursuant to the Contracts can only be made after consideration of the particular circumstances of a case. Again, the Employer

has gone beyond these contractually agreed upon standards in the disciplinary guidance memorandum by providing that failure to fully report events likely will lead to severe discipline up to and including dismissal.

These examples are illustrative of the disciplinary guidance memorandum going beyond notice to employees of existing standards constituting just cause for discipline, and instead announcing more stringent disciplinary standards. Nonetheless, the Employer contends that the disciplinary guidance memorandum constitutes protected free speech pursuant to Section 966 of SELRA. Section 966 provides: "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, oral or visual form, shall not constitute or be evidence of an unfair labor practice under this chapter, if such expression contains no threat of reprisal or force or promise of benefit". The Employer contends the memorandum is the expression of views falling squarely within the broad protection of Section 966.

We conclude differently. It is true that the disciplinary guidance memorandum itself, and the accompanying e-mail message from the department commissioner, make reference to the memorandum constituting the "views" of the Employer. However, the memorandum contains the following statements which indicate that the memorandum goes well beyond a protected expression of views:

- "we do believe that it may be helpful to provide employees with concrete examples of conduct that is likely to substantially impair, if not immediately end, their career with the Department."
- "This list sets forth the Department's current emphasis on the behavior and performance expected of Department employees and the consequences Department employees can expect for failure to abide by Department expectations and policies."
- "After reviewing this document, everyone should be aware that the Department is at this time clarifying expectations for employee conduct and

providing guidance on what discipline may be expected for failure to meet these expectations."

- "The items that follow are examples of misconduct, which in the Department's view will likely lead to severe discipline up to an including immediate dismissal."
- **If there are any Department employees who previously believed that the foregoing conduct would or should result in relatively light discipline, *they must change their expectations immediately.*** (emphasis in original)

These statements make it clear that the memorandum is a statement of Employer expectations that employees can disregard only at their peril concerning imposition of disposition, rather than an expression of protected "views" of the Employer. Given the power that the Employer generally has over employees, and the particular power that the Employer has in imposing discipline, a mere statement that the Employer is expressing views cannot shield the Employer from the obvious mandated effects of its issuance of the disciplinary guidance memorandum.

The effect of the memorandum was recognized by the Employer it its report to the governor when it referred to the disciplinary guidance memorandum as developing "a new paradigm for discipline" that would "put us in a stronger position in holding employees accountable for misconduct". In its post-hearing brief, the Employer downplays the significance of these statements by indicating they were hastily-written and subject to possible editing. Nonetheless, the person who drafted the statements, the Employer's personnel administrator, was integrally involved in the drafting of the memorandum and the statements accurately reflect the effects of the memorandum.

The Employer justifies its issuance of the memorandum as appropriately addressing concerns that relate to personal accountability of employees. The first concern is that certain work rules are too general to provide sufficient guidance to employees on the behavior that is expected of them. The second concern is that Employer policies have

been applied inconsistently and unfairly. The memorandum addresses these concerns, the Employer maintains, by providing employees with clarification and specific guidance regarding the Employer's expectations for behavior.

However, the clarification of expectations set forth in the memorandum goes beyond articulating existing standards of discipline, and instead creates greater accountability for employees. This greater accountability necessitates bargaining with the VSEA. Further, the Employer had no need to issue the memorandum to address its second concern of inconsistent and unfair application of discipline. Consistent and fair imposition of discipline already is in the control of the Employer through the staffing group that meets to discuss and decide the discipline of employees.

In sum, we conclude that the Employer made an improper unilateral change in the required subject of bargaining of disciplining employees by issuance of the disciplinary guidance memorandum. The Employer violated its duty to bargain in good faith by taking such action absent bargaining with VSEA, and interfered with employee rights by issuing the memorandum and requesting that employees sign it for inclusion in their personnel files and availability in potential disciplinary proceedings against them.

In deciding what remedy to apply as a result of Employer's unfair labor practice, we look to Section 965 of SELRA. This authorizes the Board to require a party committing an unfair labor practice "to cease and desist from the unfair labor practice, and to take such affirmative action as will carry out the policies" of SELRA. In exercising broad powers to remedy unfair labor practices, Board orders are remedial "make whole" orders, and are not punitive. VSCFF v. VSC, 17 VLRB 1, 17 (1994). In ordering affirmative action, the task of the Board is to restore the economic status quo,

and recreate the conditions and relationships, that would have existed but for the employer's wrongful act. VSCFF v. VSC, 17 VLRB at 17.

We will require the Employer to rescind the disciplinary guidance memorandum and give it no further force and effect, and to cease failing to bargain in good faith with VSEA over the required subject of bargaining of the disciplining of employees. Such a cease and desist order is not sufficient by itself to remedy the Employer's unfair labor practice due to the Employer's broad distribution of the memorandum to employees accompanied by a request to sign it.

The Employer further needs to destroy all copies of the memorandum containing employee signatures that were received by the Employer and to rescind any supervisory feedback or other actions taken against employees for failure to sign the memorandum. The Employer also needs to ensure that our decision that an unfair labor practice has been committed is communicated as broadly to employees as was the issuance of the disciplinary guidance memorandum. This will require the Employer to post this decision on bulletin boards normally used for employer-employee communications, and to send employees an e-mail transmission of our Order in this matter.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons in this unfair labor practice case, Labor Relations Board Docket No. 06-30, Vermont State Employees' Association v. State of Vermont (Re: Department of Corrections Disciplinary Guidance Memorandum), it is ordered:

1. The State of Vermont Department of Corrections ("Employer") refused to bargain in good faith and interfered with employees' exercise of rights, in violation of 3 V.S.A. Section 961(1) and (5), through issuing a disciplinary guidance memorandum on April 7, 2006, and requesting employees to sign it for inclusion in their personnel files and availability in potential disciplinary proceedings against them;
2. The Employer shall rescind the disciplinary guidance memorandum and give it no further force or effect;
3. The Employer shall cease and desist from failing to bargain in good faith with the Vermont State Employees' Association over the required subject of bargaining of the disciplining of employees;
4. The Employer shall destroy all copies of the disciplinary guidance memorandum containing employee signatures received by the Employer;
5. The Employer shall rescind any supervisory feedbacks or other actions taken against employees for failure to sign the memorandum;
6. The Employer shall forthwith post copies of the Findings of Fact, Opinion and Order issued herein at all places in Department of Corrections workplaces normally used for employer-employee communications; and
7. The Employer shall forthwith transmit by e-mail to all employees sent the disciplinary guidance memorandum this order page in PDF format (provided by the Vermont Labor Relations Board), accompanied by an e-mail message that states in its entirety as follows: "Attached is the Order issued by the Vermont Labor Relations Board in an unfair labor practice case involving the disciplinary guidance memorandum distributed to employees on April 7, 2006, by the Department of Corrections."

Dated this ____ day of May, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
James J. Dunn, Acting Chairperson

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Joan B. Wilson

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Leonard J. Berliner