

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES' ASSOCIATION,)	
LELONIE ADAMS, TAWNY ALLEN, VALERIE)	
AUSTIN, PETER BAEZ, COLEEN BEAN, KAREN)	
BOGERT, KIMBERLY BRESET, BARRIE BRIGHAM,)	
RANDALL BRONSON, ARMINDA BROWN, IVY)	
BURNELL, DANIEL CARVER, KATELYN CHASE,)	
AMBER CLEVELAND, ASIMA COSABIC, BRADY)	
CORRIGAN, JESSE COVEY, JON CREIGTON,)	
MILTON DEGEORGE, PATRICIA DUDA, MICHELLE)	
DUNN, DREW EMORY, PETER EVERETT, TERI)	
GALFETTI, NICOLE GRAY, JACLYN HARMAN,)	
RICHARD HARMON, GWEN HOADLEY, JANET)	
ISHAM, PATRICIA KENNEDY, DAN KENNEY,)	DOCKET NO. 12-18
ANNE KLEIN, JANE LAIRD, ROBYN LAMBERT,)	
KATHERINE LANGDELL, BRYNN LORD, JENNIFER)	
LYFORD, CORRINE LYNCH, CHRISTOPHER MACK,)	
KEVIN MACLEAN, JOHN MANGIONE, PATRICIA)	
MCCUEN, COLEEN MCGINNIS, THOMAS)	
MCGLENN, ALLISON MCMAHON, DYLAN)	
NEWTON, PAUL O'KANE, JAMES O'NEILL,)	
LAURIE MONAHAN, TERRI PICARD, JUDYANN)	
PIERCE, TYLER RAYMOND, JODI ROSSI, MICHAEL)	
RYAN, MARY SALLERSON, CINDY SCHAEFER,)	
THOMAS SNYDER, LAURIE SPENCER, MARNY)	
SPOO, JESSICA STOLTZ, DIANE STONECLIFFE,)	
KEVIN TIERNEY, JOYCE WHITE, JULIE YOUNG)	
(RE: TROPICAL STORM IRENE))	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 16, 2012, the Vermont State Employees' Association ("VSEA") filed a grievance on its own behalf and on behalf of the employees identified in the case heading set forth above. Grievants allege that the State of Vermont ("State"): 1) violated the Emergency Closing article of the collective bargaining contracts between the State and VSEA ("Contracts"), and State Personnel Policy 11.3, by failing to pay employees who

were required to work during the emergency closing resulting from Tropical Storm Irene additional compensation besides their regular pay which they would have earned regardless of their worksite being closed, while paying employees who were not required to work while their worksites were closed their regular pay ; 2) violated the Sick Leave and Annual Leave articles of the Contracts, and applied State Personnel Policy 11.3 in a discriminatory manner, by requiring employees to use their accrued leave during the time that their assigned worksites were closed due to Tropical Storm Irene, while not requiring co-workers who were not required to work and were receiving their regular pay to use leave time; 3) violated the Employee Workweek/Work Location/Work Shift article of the Contract by attempting to retroactively relocate employees' worksites; and 4) violated Article 6 of the Contracts by failing to provide information requested by VSEA.

On September 18, 2012, Grievants and the State filed a joint request to bifurcate this grievance. On October 2, 2012, the Labor Relations Board issued an order granting the joint request to bifurcate, and providing: that the Board would conduct a hearing scheduled for February 21 and 28, 2013, solely on whether Grievants have established that the alleged violations of the Contracts and policies and procedures described in the grievance have occurred. The Board order further provided that, if the Board determines that Grievants established any alleged violations after this hearing, the Board would allow the parties adequate time for further discovery and settlement discussions prior to scheduling a second hearing in which the parties would address the issue of specific backpay due each grievant.

The Board conducted hearings before Board Members Richard Park, Chairperson; James Kiehle and Alan Willard on February 21 and 28, and April 19 and 22, 2013. The

February 21 and 28 hearings were held in Noble Lounge, Noble Hall, Vermont College of Fine Arts in Montpelier, Vermont. The April 19 and 22 hearings were held in the Board hearing room. Abigail Winter, VSEA Associate General Counsel, represented Grievants. Assistant Attorney Generals William Reynolds and Lindsay Browning represented the State. The parties filed post-hearing briefs on May 14, 2013.

FINDINGS OF FACT

1. The Contracts provide in pertinent part as follows:

ARTICLE 2 MANAGEMENT RIGHTS

1. Subject to law, rules and regulations, . . . subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible; and with the approval of the Governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation. . .

. . .

ARTICLE 6 EXCHANGE OF INFORMATION

. . .

5. The State will also provide such additional information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such information shall not be unreasonably denied. Failure to provide information as required under this Article may be grieved through the grievance procedure to the Vermont Labor Relations Board . . .

. . .

ARTICLE 20 EMPLOYEE WORKWEEK/WORK LOCATION/WORK SHIFT

An employee's basic weekly salary and eligibility for overtime compensation shall be based on a forty (40) hour workweek schedule.

. . .

3. **SELECTION FOR ASSIGNMENT TO A NEW SHIFT/NEW WORKWEEK/NEW GEOGRAPHIC AREA**

(a) Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (for fifteen (15) days or more) of any employee to a different or new shift, workweek, or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous State service) seniority, i.e., the most junior employee(s) will be selected. . .

...

(c) The State will give two (2) weeks' prior notice of any such assignment to a new shift or new workweek, or four (4) weeks prior notice in the case of an assignment to a new geographic area, and will try to accommodate those persons who need extra time to make the change or move. The State will also try to give additional notice of such changes or moves if feasible.

(d) The State will give good-faith consideration to seniority as a significant element in the reassignment of an employee from one building to another for more than fifteen (15) miles within a geographic area. An employee can petition the appointing authority, and with the approval of the Commissioner of Human Resources, the employee may be approved for a hardship RIF . . . if the assignment within the geographic area exceeds fifteen (15) miles.

...

ARTICLE 24¹

OVERTIME

...

5. COMPUTATION OF OVERTIME

...

(c) It is expected that travel between work locations shall be conducted during normal working hours. Travel time between work locations and work location or between home, if designated as office, and work location shall be considered as time worked for purposes of computing overtime. . .

...

(i) Compensation for Travel Time.

(1) Employees on short-term field assignments (i.e., assignments to field locations in a geographic area for a period of time not exceeding ten (10) consecutive work days) will be compensated for time actually spent traveling to the short term field assignment and return, whether such travel is during normal working hours or not. This should not be construed to prevent management from directing an employee to remain overnight at any field assignment, in accordance with rules and regulations of the department.

...

(j) Expenses

(1) All employees directed to work at field assignments . . . shall receive mileage for their travel, and meal reimbursement as appropriate, in accordance with this Article and the provisions of the Expense Reimbursement Article. Any employee

¹ This is Article 24 under the Non-Management Unit Contract, Article 28 under the Supervisory Unit Contract, and Article 28 under the Corrections Unit Contract.

directed to remain overnight at a field assignment (or who has received authorization to remain overnight at department expense) shall be reimbursed for the cost of overnight lodging and meals in accordance with the Expense Reimbursement Article.

. . .

ARTICLE 30²

ANNUAL LEAVE

1. PURPOSE

To establish the policies and procedures by which a classified employee shall receive time off from work for vacation or personal convenience.

2. POLICY

(a) A classified employee is provided opportunity to accrue annual leave in order to have periods of rest and relaxation from his or her job for health and well being, consistent with workload requirements of the agency or department.

. . .

(n) Vacation scheduling is the exclusive prerogative of the appointing authority. Leave must be requested in advance by the employee and is subject to approval by the appointing authority . . . Such approval shall not be unreasonably withheld.

. .

ARTICLE 31³

SICK LEAVE

1. PURPOSE

To establish the State's policies and practices which provide for a classified employee to be absent from duty with pay in the event of illness or injury.

2. POLICY

It is the policy of the State to help protect the income of a classified employee who cannot work due to illness or injury . . .

(b) Use of sick leave

(1) The use of earned sick leave credits shall be authorized by an appointing authority or his her delegated representative for an employee who is absent from work and unable to perform his or her duties because of illness, injury, or quarantine for contagious disease. . .

² This is Article 30 under the Non-Management Unit Contract, Article 34 under the Supervisory Unit Contract, and Article 34 under the Corrections Unit Contract.

³ This is Article 31 under the Non-Management Unit Contract, Article 35 under the Supervisory Unit Contract, and Article 35 under the Corrections Unit Contract.

ARTICLE 44⁴
EMERGENCY CLOSING

1. Management shall decide when, if and to what extent State facilities shall remain open or closed during emergencies, such as adverse weather conditions, acts of God, equipment breakdown, inoperable bathroom facilities, extreme office temperatures, etc.
2. The State shall designate one (1) person in each district area who will be responsible to call the Secretary of Administration or his/her designee if office, weather or other conditions exist which suggest closing is appropriate.
3. In facilities that must remain in operation despite emergency conditions, continued operations with a reduced work force may be authorized. In such instances, employees who are authorized to leave work early may do so without loss of pay or benefits. Employees who are required to remain at work shall receive compensatory time at straight time rates.
4. An employee who is unable to report to work due to weather or other emergency conditions shall have the absence charged against accumulated compensatory time or annual leave, in that order.
5. If management authorizes the complete closing of a State office or facility for emergency reasons, employees who leave the workplace shall receive their regular pay for time they are out of the closed office.
6. Employees required by management to work during complete emergency closings under (5) above, shall receive hourly pay at straight time rates for the hours so worked. This payment will be in addition to the employee's regular pay.

...

ARTICLE 53⁵
EXPENSES REIMBURSEMENT

1. All State employees, when away from home and office on official duties, shall be reimbursed for actual expenses incurred for travel accommodations . . . and reasonable subsistence . . .

...

⁴ This is Article 44 under the Non-Management Unit Contract, Article 48 under the Supervisory Unit Contract, and Article 49 under the Corrections Unit Contract.

⁵ This is Article 53 under the Non-Management Unit Contract, Article 57 under the Supervisory Unit Contract, and Article 58 under the Corrections Unit Contract.

ARTICLE 54⁶
MILEAGE REIMBURSEMENT

1. For authorized mileage actually and necessarily traveled in the performance of official duties, a State employee shall be reimbursed at the rate established by the GSA, unless the employee is traveling in a State-owned or leased vehicle.

...

APPENDIX A
DEFINITIONS

...

BASIC WEEKLY SALARY – the minimum compensation to which an employee is entitled under the State’s compensation plan.

...

GEOGRAPHIC AREA - the area within a thirty-five (35) mile radius of an employee’s regular duty station.

...

(Grievants Exhibits 1, 2, 3; State Exhibit 1)

2. The Emergency Closing article of the Contracts was first negotiated in 1979. In the early 1980’s, the language of the article was changed to centralize the decision-making authority in the Secretary of Administration. Since then, the language of the article has not significantly changed.

3. The State in practice has not limited the applicability of Section 5 of the Emergency Closing article solely to employees who “leave the workplace” during a complete closing for emergency reasons. The State also has applied this section to cover employees who are not working when a complete closing for emergency reasons occurs. Thus, if a complete closing for emergency reasons is announced prior to the beginning of an employee’s workday, then the employee who does not work this day receives his or her regular pay for the day. The State further has applied Section 5 of the article so that

⁶ This is Article 54 under the Non-Management Unit Contract, Article 58 under the Supervisory Unit Contract, and Article 60 under the Corrections Unit Contract.

covered employees are not charged leave during a complete closing for emergency reasons even if the employee has scheduled leave for this day.

4. State Personnel Policy 11.3 provides in pertinent part as follows:

EMERGENCY CLOSING

Effective Date: March 1, 1996

. . .

PURPOSE AND POLICY STATEMENT

There are occasions when management must decide if and to what extent State facilities should remain open or be closed during emergencies such as adverse weather conditions, acts of God, equipment breakdown, inoperable bathroom facilities, extreme office temperatures, etc. This policy clarifies who has the authority to make such decisions, and under what circumstances.

GENERAL INFORMATION

The following defines the different types of emergency closing situations that may arise and specifies who has authority to close a State office or facility.

1. Reduced Work Force:

In a reduced work force situation, State offices and facilities are still open for business, but with a reduced level of service. The following are examples of a reduced work force situation:

- DELAYED OPENING of State offices and facilities.
- EARLY CLOSING of State offices and facilities.
- FULL DAY OF CONTINUED OPERATIONS with a reduced work force.
This is most frequently used when one office or facility is closed in the case of fire, malfunctioning furnace, or some other localized emergency.

Employees who are required to remain at work in a reduced work force situation will receive their regular pay plus **compensatory time off at straight time rates** for all hours worked (including overtime). . .

Employees who are authorized to be absent will receive their regular pay without charge to their accrued leave balances for the duration of the reduced work force situation.

2. Complete Closing:

The Secretary of Administration may authorize the complete closing of a State office or facility for emergency reasons. In these situations, State offices are closed for business.

Employees who leave the workplace in these situations will receive their regular pay for the time they are out of the closed office without charging to any leave balances.

Employees who are **required** by management to work during a complete emergency closing will receive **cash for all hours worked while the office or facility is closed, in addition to** the employee's regular pay. . .

. . .

PROCEDURES

1. The Secretary of Administration (or designee) is the person who has the authority to decide on the appropriate response in an emergency situation. . . .

COMPENSATION FOR EMPLOYEES

Employees who are on authorized annual leave, sick leave, personal leave, compensatory time off, or on other paid leave, will not be charged leave time for the period of the emergency closing. The same provisions apply to delayed openings, early closing, or reduced work force situations.

. . .

(Grievants Exhibit 4, State Exhibit 3, emphasis in original)

5. On Sunday, August 28, 2011, Tropical Storm Irene passed through Vermont, causing extensive damage throughout the state. The National Weather Service reported that Irene entered Vermont during the day on August 28, and exited the State at approximately 10 p.m. that evening. The National Weather Service reported:

. . . In Vermont and Northern NY, Irene delivered copious amounts of rainfall which produced deadly record flooding resulting in several deaths and historical road, home and infrastructure damage. Also, the combination of flooding and damaging winds left at least 50,000 customers without electricity. The widespread deadly flooding across Vermont is likely the second greatest natural disaster in the 20th and 21st century (November 1927 Flood being 1st) for Vermont. . .
(State Exhibit 21)

6. The Brooks Rehabilitation Unit was located in the basement of the Vermont State Hospital in the Waterbury Complex. During the storm, staff and patients of the unit relocated from the basement to the second floor of the unit due to flooding of the unit. The hospital lost electricity during the storm. The staff assigned to the hospital at the time remained on duty until the following morning to assist patients.

7. The employees working at the Emergency Operations Center (“EOC”) in the Department of Public Safety building in the Waterbury complex during the storm evacuated the building at approximately 10 p.m. due to flooding. The EOC relocated to a temporary location on Lakeside Avenue in Burlington where EOC employees continued performing their necessary functions during the emergency situation.

8. Flooding caused by Tropical Storm Irene resulted in extensive damage to the State Office Complex in Waterbury, Vermont, including the Vermont State Hospital. In addition, flooding from Irene resulted in damage to the Department of Motor Vehicles (“DMV”) office located in Rutland, Vermont.

9. Governor Peter Shumlin authorized the complete closure of Vermont state government on August 29, 2011. The Department of Human Resources (“DHR”) posted on its website a notice providing:

Due to weather conditions, all State offices have been authorized to be completely closed on Monday, August 29, 2011. State offices are not open for business, and only specifically authorized critical staff members should report to work at their designated alternate work sites.

ATTENTION: Second shift employees at the Vermont State Hospital should report to work as scheduled. Employees should park in the Ladd Hall parking area.

All other employees should pay close attention to news and website updates for additional information.

(State Exhibit 11, p.91)

10. On August 29, 2011, Vermont State Hospital evacuated all patients to alternate locations throughout the state. Hospital employees who were scheduled to work on August 29, and those who had stayed at work the previous night, assisted the patients with their relocations. Some employees traveled with the patients to their new locations.

11. DHR posted on its website on August 29, 2011, at 4:34 p.m., a “Revision of Emergency closing August 29, 2011”. It provided in pertinent part:

All State of Vermont Employees with the exception of those noted below should plan to report to work at usual times on Tuesday, August 30, 2011.

The Waterbury State Office Complex has sustained significant water damage as a result of Irene. It is estimated that it could be two weeks or more before this facility will be fully operational. Agencies and departments with offices located at the Waterbury State Office Complex have implemented Continuity of Operations Plans (COOP). In accordance with these plans, only those specifically authorized critical staff members should report to work at designated alternate work sites.

Rutland DMV offices, located at 101 State Place, are not operational at this time and may not be operational for the next week or two. DMV will implement their COOP plan. In accordance with this plan, only specifically authorized critical staff members should report to work at designated alternate work sites.

All other employees who are assigned to duty stations in Waterbury Complex or at Rutland DMV should not report to work unless specifically authorized to do so by a supervisor. Employees should pay close attention to news and website updates, which we will issue periodically.

Employees of the Vermont State Hospital, Disability Determination Unit, Vermont Department of Health and the Department of Vermont Health Access should report to work as usual on Tuesday, August 30.

...

(State Exhibit 11, p.92; emphasis in original)

12. The COOP plans referenced in the email had been developed by state departments and agencies with offices in the Waterbury State Office Complex to ensure that their mission-essential functions can be carried out if an emergency threatens or

incapacitates operations. They are designed to ensure that the departments are prepared to respond to emergencies, recover from them, mitigate their impacts and provide critical services during an emergency. They facilitate the return to normal operations as soon as practical. The COOP plans provide for relocation of selected employees and functions that are essential. They do not apply to temporary disruptions of service during short-term building evacuations or other situations where services are anticipated to be shortly restored at the applicable facility (Grievants Exhibit 23).

13. The Winooski River, which had flooded Waterbury on August 28, had receded back within its banks by August 30. No buildings in the Waterbury State Office Complex were used by state employees from August 29, 2011, through the end of September. Some managers of the affected agencies and departments met on the grounds of the Waterbury Complex on August 29 to discuss plans for conducting operations in the aftermath of Tropical Storm Irene.

14. The Waterbury State Office Complex was a disaster area on August 30, 2011, as a result of the flooding from Irene. There was no electricity or heat at the complex. Communication systems were destroyed. The sewage pump system and fire alarm systems were not operational. There was trash, muck, destroyed office equipment and waste material throughout the complex. The State Department of Buildings and General Services developed a security system to keep most persons out of the complex and only allow persons into the complex if it was necessary. Some employees were allowed access to buildings to retrieve materials.

15. DHR Commissioner Kate Duffy sent an email to Agency of Human Services Secretary Doug Racine, Agency of Natural Resources Secretary Deb

Markowitz; and Department of Public Safety Commissioner Keith Flynn at 4:35 p.m. on August 30, 2011, which provided as follows:

Below is a note from Labor Relations about pay for work during an emergency closing. Of key importance: employees who are asked to work during the emergency closing will be paid double time, which, obviously, could have an impact on your budgets. Properly designated managers receive straight time pay so you may want to rely upon these folks during the emergency. Please let me know if you have any questions.
(Grievants Exhibit 31)

16. The “note” Duffy referred to in her email, which was contained in her email message, was from John Berard, DHR Labor Relations Specialist, and provided in pertinent part:

The Emergency Closing Article . . . mandates that employees assigned to work in the Waterbury Complex and Rutland DMV and who are required to work during this complete emergency closing receive hourly pay at straight-time rates in addition to their regular pay for all hours worked (i.e., double time or double time and one-half for OT).

This benefit is extended to Confidential employees, but NOT to designated Managers and above.

...
(Grievants Exhibit 31, emphasis in original)

17. The Department of Human Resources posted on its website on September 1, 2011, at 4:46 p.m., a “Revision of Worksite Closings – Updated”. It provided in pertinent part:

All State Offices with the exception of those noted below are open for business at their regularly scheduled hours and locations.

As you are aware, the Waterbury State Office Complex sustained significant water damage as a result of Irene. It is unknown when this facility will again be operational. Agencies and departments with offices located at the Waterbury State Office Complex have implemented Continuity of Operations Plans (COOP). In accordance with these plans, only those specifically authorized critical staff members should report to work at designated alternate work sites.

Rutland DMV offices, located at 101 State Place, are not operational at this time. Authorized employees should report to work at their designated alternate worksites.

Employees of the Vermont State Hospital should call 241-2424, 241-2429, or 241-2472 or report for duty as scheduled at their assigned alternate work locations.

All other employees who are assigned to duty stations in the Waterbury Complex should not report to work unless specifically authorized to do so by a supervisor. Employees should pay close attention to news and website updates, which we will issue periodically.

...

(State Exhibit 11, p.99; Grievants Exhibit 5)

18. The State maintained security barriers and checkpoints, and stationed security staff at the Waterbury State Office Complex, from August 31 to October 31, 2011. Security staff restricted access to the complex, generally restricting access to individuals who obtained advance permission from the Department of Buildings and General Services and showed identification. Some employees who worked in the complex were granted permission during the month of September to return to their offices to retrieve work files, other work materials, and personal belongings. The goal of BGS during this period was to stabilize the buildings in the complex, not to reoccupy them.

19. On Saturday, September 3, 2011, Human Resources Commissioner Kate Duffy sent an e-mail message to State managers which informed them: "DHR has prepared a FAQ sheet that addresses some of the common questions employees will have as a result of Irene. It is posted on our site and Vermont.gov, but I wanted to provide it to you directly. If you want to distribute it, it might allay some of employees' concerns." The attached sheet, which had been posted on the DHR website on September 2, 2011, provided in pertinent part:

Office Closing Frequently Asked Questions

...

My office is closed. Am I getting paid?

Yes. Until you receive notice of reassignment to an alternate work location, classified employees who would normally be scheduled to work but are not currently required to work, will receive their base pay for their regular hours they miss.

...

Can I be required to work at an alternate work location?

Yes, subject to operational needs. You may be eligible to be paid for your travel time and to be reimbursed for any mileage actually and necessarily traveled to the alternate work location. However, if the alternate work location is more than 15 miles from your original duty station, you may request a hardship reduction-in-force.

...

(Grievants Exhibit 6; State Exhibit 5; State Exhibit 11, p.104-105)

20. The State assigns all state employees to an official duty station. The State may change an employee's official duty station by informing the employee that his or her official duty station has changed. Requiring an employee to work in an alternate work location temporarily does not in itself change the employee's official duty station. When employees are assigned to work in locations other than their official duty station, they are entitled to mileage reimbursement, and the time they spend commuting to the alternate worksite is included in their work time.

21. ANR Secretary Markowitz sent an email to DHR Commissioner Duffy at 1:39 p.m. on September 5, 2011. It provided:

We have many employees who were not asked by supervisors to work but who did so. How does this impact them? Also, we had many employees who are assigned to the Waterbury complex but who work in the field. They all continued their field work without any specific discussions with supervisors or management. How does this impact them?

(Grievants Exhibit 31, State Exhibit 28)

22. Duffy forwarded this email to Berard at 2:01 p.m. on September 5. Berard responded at 2:45 p.m. on September 5 as follows: "See my thoughts below. These are

both good questions and I'd like to be able to get coding information out to the field by close of business tomorrow if possible." Berard made the following response to the first question of Markowitz concerning employees who were not asked by supervisors to work but who did so: "Two conflicting schools of thought – 1) If the employee is being paid anyway then this is a moot point; or 2) If we knew and allowed an employee to work, in spite of all of our 'don't work unless authorized' instructions, then they should be paid Emergency Closing Pay (EMC) since they were working while others were not and still receiving their base pay. Personally, I could go either way on this one, but am leaning a little bit towards #2." Berard made the following response to Markowitz's second question concerning employees assigned to the Waterbury Complex who worked in the field: "Again two schools – 1) Duty station is closed and they kept working, they should be eligible for EMC; or 2) Duty Station assignment is more of a "formality" and for all intent and purpose they were not impacted by the duty station closing, so no EMC. The reality is probably more fact specific. How often does the employee normally report to the duty station? How many days are spent in the field?" (State Exhibit 28, Grievants Exhibit 31).

23. Duffy forwarded the chain of emails containing Markowitz's questions and Berard's responses to Secretary of Administration Jeb Spaulding at 2:53 p.m. on September 5, 2011, and stated:

Sec. Markowitz has asked compensation questions below. Our labor relations group has responded in red to me. If we take the position that these folks are not entitled to double comp, we will get grievances and litigation, and could lose. I just want you to be making the calls with full knowledge. Can you let me know how would like to proceed. Thanks.
(Grievants Exhibit 31)

24. On Tuesday, September 6, 2011, Duffy sent an email to State managers which provided in pertinent part:

I know that many of you, in addition to ANR and AHS, need to relocate staff as a result of Irene. DHR has prepared and attached guidelines on the type of notice you must give employees about their new location and prepared draft letters for you to use. To the extent you have people who have already been relocated to another work site or will be relocated, please contact your DHR representative who will work with you to prepare letters to reassign their duty stations. In this way, we can get those people back to work as soon as possible. . .
(State Exhibit 6)

25. Attached to the email sent by Duffy was a document which provided in pertinent part:

**GUIDELINES
IMPLEMENTATION OF THE EMPLOYEE WORKWEEK/WORK
LOCATION/WORK SHIFT ARTICLE OF THE COLLECTIVE BARGAINING
AGREEMENTS**

Subject to the operating needs of an Agency or Department, employees may be assigned to new work weeks, work locations, and work shifts. Such assignments may require notice under the Collective Bargaining Agreements (CBA) and/or may require an affirmative decision on the part of the employee. The following information assumes a change of workweek, work location or work schedule for fifteen (15) or more calendar days.

1. Assignments to work locations that are fifteen (15) road miles or less from the current work location and require no change to an employee's work schedule do not require notice under the CBA. . .
2. Assignments to work locations that are fifteen (15) road miles or less from the current work location and require a change to an employee's work schedule, require two (2) weeks' notice under the CBA. . .
3. Assignments to work locations that are between sixteen (16) and thirty-five (35) road miles from the current work location and require no change to an employee's work schedule do not require notice under the CBA. However, an impacted employee may request a Hardship Reduction-in-Force. . .
4. Assignments to work locations that are between sixteen (16) and thirty-five (35) road miles from the current work location and require a change to an employee's work schedule require two (2) weeks' notice under the CBA. However, an impacted employee may request a Hardship Reduction-in-Force. . .
5. Assignments to work locations that are thirty-six (36) or more road miles from the current work location, and require no change to an employee's work

schedule, require four (4) weeks' notice under the CBA. However, an impacted employee may refuse such a transfer, in which case the employee is subject to a Reduction-in-Force and eligible to receive mandatory offers of reemployment in accordance with the CBA. . .

6. Assignments to work locations that are thirty-six (36) or more road miles from the current work location, and require a change to an employee's work schedule, require four (4) weeks' notice under the CBA. However, an impacted employee may refuse such a transfer, in which case the employee is subject to a Reduction-in-Force and eligible to receive mandatory offers of reemployment in accordance with the CBA. . .

...

For those situations that require notice to employees, employees may still be immediately assigned to the new work location until the new assignment becomes effective. However, these employees may be eligible for compensation for travel time and reimbursement for mileage.

...

(State Exhibit 6, emphasis in original)

26. Attached to the above Guidelines were twelve sample letters to be issued to employees depending on which of the above six situations noted in the Guidelines applied to the employee, and depending on whether the employee: 1) was required to report to the new work location on a specified date, or 2) at this time was not required to report to work at a new work location, but would instead be contacted by their supervisor at a later date when required to report to work (State Exhibit 6).

27. The State and VSEA attempted during the period August 30 to September 7 to reach a common understanding with respect to the wages due Waterbury State Office Complex employees who worked at alternate worksites following Tropical Storm Irene. They were unable to reach an agreement during this period.

28. On Thursday, September 8, 2011, Karin Tierney, Labor Relations Specialist with the Department of Human Resources, sent an email to State managers attaching "timesheet coding instructions that apply to the Emergency Closing on

8/29/11.” The attached document, which also was posted on the DHR website on September 8, provided in pertinent part:

Time Report Coding Instructions in Connection with Tropical Storm Irene

A. The following guidelines are provided to assist you in processing Time Reports for employees who were scheduled to work in a facility during the Emergency Closing on Monday, August 29, 2011.

1. **Employees who did not report for work and/or left work early, or who were sent home on arrival during this emergency closing,** should code their time reports as though they had worked (Payroll code “01”) for any regularly scheduled hours on August 29, 2011.
2. **Employees who were REQUIRED by their Supervisor to work during their regularly scheduled hours, or who were REQUIRED by their Supervisor to work overtime, during this emergency closing,** should report “01” for any regularly scheduled hours. Any overtime worked should be coded normally. These employees should also use code “10” to report all hours they actually worked (including overtime hours) during the specified emergency closing period. This provision only applies to employees who were contacted by a supervisor or manager and **required** to work during the emergency closing period. It does not apply to employees who worked without being specifically required to do so.
3. **Employees on authorized paid leave** should not charge their leave balances (annual, personal, sick, compensatory time, etc.) for the regularly scheduled hours they were absent during the emergency closing period, and should report these hours on their time report as though they had worked (Payroll Code “01”).
...

B. For dates within the pay period, other than Monday, August 29, 2011, Time Reports should be coded normally with the following exceptions:

1. **Employees, including Temporary employees hired directly by the State of Vermont, who were unable to report to work due to the inaccessibility of the Waterbury State Office** Complex, will receive their regular pay (Payroll code “01”) for any regularly scheduled hours.
2. **Employees who were unable to report to work at locations other than the Waterbury State Office Complex due to conditions that resulted from the emergency, on Tuesday, August 30, 2011 and/or Wednesday August 31, 2011,** do not have to charge their absence to accumulated compensatory time or annual leave. These employees will receive their regular pay (Payroll code “01”) for either or both of the identified days as appropriate.

Employees who are/were unable to report to work due to conditions that resulted from the emergency after August 31, 2011 listed above will have the absence charged against accumulated compensatory time or annual leave, in that order. If an employee believes s/he should not have to charge leave balances for any described absences beyond Wednesday August 31, 2011, s/he should contact the HR Administrator assigned to his or her department.

...

(Grievants Exhibit 18; State Exhibit 7; State Exhibit 11, p.107, emphasis in original)

29. The Department of Human Resources posted on its website on September 8, 2011, at 3:30 p.m., a “Revision of Updated Information”. It provided in pertinent part:

As you are aware, the Waterbury State Office Complex sustained significant water damage as a result of Irene. It is unknown when this facility will again be operational. Please be advised, that as part of the State’s post-Irene recovery, all employees impacted by the inaccessibility of the Waterbury State Office Complex have been reassigned to alternate work locations. If you have not yet received official notification of your new work location, you will be receiving notification in the near future. In addition, your supervisor will advise you when to report to your new work location. . . .

...

Also included along with this statement were the Answers to Frequently Asked Questions document, the Timesheet Coding Instructions that applied to the Emergency Closing on August 29, 2011; and a document entitled “FAQ Hardship RIF for Reassignments of Duty Station” (State Exhibit 11, p.108-112).

30. In the days and weeks following Tropical Storm Irene, some state employees who were required to work at other locations did not receive a written notice of relocation to a new worksite from management. Some state employees with Waterbury worksites received written notices of relocation that identified an earlier date as the effective date of relocation to a new worksite.

31. The State agencies and departments located in the Waterbury Complex, the State Agency of Administration, the State Department of Human Resources, and the

State Department of Buildings and General Services experienced extraordinary challenges in locating suitable alternate work space for the approximate 1,500 employees displaced by Irene. The disruption created by the storm resulted in chaos and confusion. The scope of displacement made it difficult to procure sufficient office space. The workspace had to be tailored to meet the particular needs of departments and agencies. The State had to negotiate lease terms with landlords. It was necessary in some cases to renovate the rented space. Furniture, equipment, telephone and internet connectivity needs had to be met. The difficulties in these areas significantly affected the ability to get relocation notices to employees.

32. Subsequent to August 29, 2011, the majority of the approximate 1,500 state employees whose duty station at the time of Tropical Storm Irene was the Vermont State Hospital or one of the other state agencies in the Waterbury Office Complex, or the DMV office in Rutland, were required by the State to work at other locations because of the flood damage to state buildings from Irene. These included employees from: 1) the Department of Public Safety; 2) the Vermont State Hospital; 3) the Agency of Human Services, including the Department for Children and Families, the Department of Disabilities, Aging and Independent Living, and the Department of Corrections; and 4) the Agency of Natural Resources, including the Department of Environmental Conservation, the Fish and Wildlife Department, and Forests and Parks Department.

33. The Emergency Operations Center (“EOC”) of the Department of Public Safety has four stages of operations due to an emergency: 1) response, 2) recovery, 3) mitigation, and 4) planning. The EOC was activated on August 28, 2011, prior to Tropical Storm Irene reaching Vermont. Once activated, EOC staff changed from

working regular business hours and 8 hour shifts in their regular jobs to working 12 to 14 hour shifts to provide 24-hour coverage. They continued working this schedule for the next two to three weeks. EOC remained in the response stage until switching to the recovery stage in October of 2011. After EOC staff were evacuated from the Public Safety building of the Waterbury State Office Complex during the storm on August 28, EOC operations were performed in Burlington in a building occupied by the Federal Management Emergency Agency (“FEMA”). EOC staff did not have the same state of the art equipment they had in Waterbury, but they did have telephone capability with call forwarding, internet access, State-issued cell phones, State email access, and State-issued laptop computers. Some EOC staff were not assigned to work while the EOC was operating in Burlington. The EOC reopened in the Department of Public Safety building in the Waterbury Complex in early October 2011.

34. The Vermont Crime Information Center (“VCIC”) of the Department of Public Safety was located in the basement of the Weeks Building in the Waterbury State Office Complex. VCIC maintains Vermont’s criminal records database, including an automated fingerprint identification system (“AFIS”). The VCIC offices were flooded during Irene, eliminating use of AFIS. The AFIS mainframe, located in Concord, New Hampshire, serves the three states of Vermont, New Hampshire and Maine. VCIC employees were told not to work in the first week following the flooding. On September 6, 2011, VCIC staff met at the home of a VCIC supervisor, and it was reported that a VCIC employee was needed to work in Concord, New Hampshire to perform necessary work in the AFIS system to ensure that AFIS continued to process Vermont’s criminal cases without interrupting services to Maine and New Hampshire. Jon Creighton, the

most senior Identification Specialist, agreed to perform the work. Creighton worked in Concord from September 6 to 12, and then again from September 20 through September 29, 2011. Creighton received overtime compensation, pay for travel time and mileage reimbursement in connection with his work in Concord. Some VCIC staff were not required to work in September of 2011. Other VCIC employees were relocated to an alternate worksite in Berlin, Vermont, in mid-September 2011. VCIC staff returned to work in the Waterbury Complex in the Forensics Lab Building in early October, 2011.

35. The Department of Public Safety building in the Waterbury Complex reopened and department employees returned to the building the week of October 17, 2011. Department of Public Safety employees were the only employees whose official duty stations reopened in Waterbury after Irene.

36. Following the flooding and evacuation of the Vermont State Hospital (“VSH”) on August 28 and 29, VSH employees were assigned to work in various private hospitals and facilities, and the Southern State Correctional Center in Springfield, to provide a continuity of care for the psychiatric patients formerly housed at the VSH. Employees were assigned to work with patients in Brattleboro, Springfield, Burlington, Williamstown, Middlebury, Rutland, and a facility in Waterbury outside of the Waterbury State Office Complex. The VSH set up an operations office in Waterbury on the Green Mountain Coffee Roasters premises to assign employees. Scheduling of employees primarily occurred through employees at the staffing office contacting employees by telephone. VSH employees, who previously worked set 8-hour shifts on an assigned unit at VSH, were assigned varying 12-hour shifts at different locations. At the new locations, VSH employees worked with other VSH employees and non-VSH

employees of the various hospitals and facilities which had varying procedures for critical incidents, restraints, approaches to patients, record-keeping and security. The VSH employees generally were supervised by VSH supervisors in these locations. The duties VSH employees performed at these locations were similar to the duties they had performed at VSH, although they did not generally perform the entire range of duties they had performed at VSH. Some VSH employees were not assigned to work full-time, and some were not assigned to work at all. The Vermont State Hospital has not reopened since Irene.

37. The Economic Services Division (“ESD”) Call Center in the Department for Children and Families was located on the first floor of the “A Building” in the Waterbury State Office Complex. The ESD Call Center was staffed by over 20 Benefits Programs Specialists, three supervisors, and Director Paul Madden. The Call Center handled all calls coming in statewide from ESD clients, using a software program called Interaction Client, which enables supervision of ESD employees through live call supervision, call recording, feedback and real-time coaching. The Call Center was flooded due to Irene and inoperable in its A Building location. Beginning on Friday, September 2, 2011, some Call Center supervisors and Benefits Programs Specialists were assigned to work in temporary locations in ESD district offices in the state, including Barre and Burlington. They performed work fielding calls coming in statewide from ESD clients without the use of the Interaction Client software of the Call Center. Supervisors understood from discussions with Madden and department-wide conference calls that they would receive double time pay while working in the district offices. Some Benefits Programs Specialists were not assigned to work in the district offices. The ESD Call

Center was relocated to Williston near the end of September, 2011. Supervisors and Benefits Programs Specialists then were able to resume their regular functions using the Interaction Client software.

38. The Family Services Division (“FSD”) of the Department for Children and Families had offices in the Osgood Building of the Waterbury State Office Complex. The Osgood Building was flooded during Irene. Among the critical functions of the FSD were centralized intake and the emergency services after-hours program. Approximately 15 FSD employees normally assigned to work at the Waterbury Complex were assigned beginning on Tuesday, August 30, 2011, to work in a conference room at the department’s Burlington District Office in Williston to staff the child abuse and neglect hotline. Other FSD employees were working in other state offices and from home after Irene. In anticipation of the possible effects of Irene, FSD management had asked its employees to take their laptop computers home; this allowed employees to perform some critical work functions from their homes. Approximately half of the FSD Waterbury employees were not asked to work in the first two weeks after Irene. The approximately 200 FSD employees formerly based in Waterbury eventually were relocated to new offices opened in Williston and Essex.

39. The Child Development Division (“CDD”) of the Department for Children and Families was located in the 3 North Building in the Waterbury State Office Complex. The 3 North Building was uninhabitable after Irene. Prior to Irene, CDD Helpdesk Specialists reset passwords, answered childcare questions, assisted subsidy specialists, and processed payments for the Bright Futures Program, which reimbursed childcare providers statewide. These employees continued to perform many of these duties after

August 29, 2011. The employees successfully processed the Bright Futures payments on September 2, 2011. CDD management informed these employees they would receive double pay for the work they were doing. They continued to perform their duties at alternate locations, including their homes, until they were relocated to an office in the IBM building in Essex in late September 2011.

40. On September 6, 2011, CDD Director Reeva Murphy sent an email to certain Child Development Division staff which provided in pertinent part:

We decided this AM that we need to manage work authorizations carefully as there are expenses related to staff working while Waterbury is closed and we want to be clear on who is authorized to work from home or an alternate location and who is not. Mileage to an alternate location will be paid. All staff must be available to work if called in or use leave time to be paid while Waterbury is closed.

...

(Grievants Exhibit 13, p.68)

41. The ESD Application Document Processing Center (“ADPC”) was located on the first floor of the Dale Building in the Waterbury State Office Complex. The ADPC received and processed all statewide mail for ESD benefits. ADPC staff opened the mail, batched it, scanned it, and indexed it into the ESD electronic case management system so that it could be processed by the district offices. The flooding of the office from Irene made the office space inhabitable and destroyed the ADPC equipment. Beginning on August 30, 2011, ESD mail was taken to a conference room in a state facility in Middlesex, where ADPC employees worked part-time to process applications manually without the use of the scanners, mail openers and computers they had in the ADPC. The employees did not work full-time in the early days following the flood because they did not have access to the equipment needed to perform their jobs as they had in Waterbury. Some ADPC employees continued to work in the Middlesex office for weeks following

the flood, and others were temporarily assigned to work at various ESD district offices. The ADPC reopened in Williston at the end of October 2011. ADPC employees had the equipment there which they needed to perform their duties as they had prior to Irene.

42. The Department of Disabilities, Aging, and Independent Living (“DAIL”) had approximately 93 employees working in the Weeks Building and Ladd Hall in the Waterbury State Office Complex prior to Irene. Beginning on August 30, 2011, DAIL conducted its business at various other locations. The Commissioner’s office was relocated to Williston. Many DAIL employees worked from field offices or their homes. The Adult Protective Services abuse hotline continuously operated from August 29, 2011, forward with staff previously based in the Waterbury complex. DAIL relocated several divisions to Williston: Blind and Visually Impaired, Vocational Rehabilitation, Licensing and Protection, Disability and Aging Services. Employees were performing the various functions of the department within the first week after Irene. Most of Vocational Rehabilitation staff were back to work by September 6, 2011. The DAIL Business Office was relocated to Montpelier where employees were timely able to process payroll.

43. The Department of Corrections (“DOC”) had approximately 60 employees working in offices in 5 South, the Dale Building, and the southern connector of the Waterbury Complex at the time of Irene. No DOC employees were assigned to work in Waterbury after Irene. Beginning on August 30, 2011, and on a few other occasions, DOC management met outside on the grounds of the Waterbury Complex to discuss relocating DOC employees to alternate locations. DOC relocated the Commissioner’s Office and the Planning, Research, Evaluation and Policy Development Division to

Williston. The DOC Business Office was relocated to Montpelier and staff were able to successfully process the first payroll due after Irene. DOC relocated staff in the Education Division, Program Services Division and Health Services to alternate locations, including Burlington, Morristown and Williston. The Offender Work Program was relocated to Burlington.

44. The Agency of Natural Resources (“ANR”) had many offices in different buildings in the State Office Complex in Waterbury at the time of Irene. None of these offices were habitable after Irene. During the week following Irene, agency staff began working from regional offices and alternate work locations. ANR’s Information Technology staff successfully relocated its electronic servers to Montpelier on August 30, 2011. All ANR servers, files and email systems were running by August 30 (Grievants Exhibit 10).

45. Approximately 35 employees of the Fish & Wildlife Department of ANR worked in the Waterbury Complex before Irene. Some employees of the Fish & Wildlife Department met at the complex on August 30, 2011, and gathered tools and equipment necessary to perform their duties at alternate locations. Member of the public were able to contact Fish & Wildlife’s Law Enforcement Division, and Fish & Game Wardens assisted with search and rescue missions, that day. On or around that day, Fish & Wildlife moved its Wildlife Division to various alternate locations. Fish and Wildlife relocated its Business Office, Licensing Division and Central Office to its Barre Regional Office by September 1, 2011. The Barre Regional Office also became the location to procure hunting, fishing and trapping licenses. In a September 1, 2011, press release, Fish & Wildlife announced its offices were up and running in its Barre regional office. Many

Fish & Wildlife employees are stationed outside of Waterbury; they were able to continue performing their duties normally (Grievants Exhibit 10).

46. The Department of Forests and Parks in ANR removed fallen trees in the week following Irene. The department's Vermont State Parks reservation call center was relocated to the Barre regional office (Grievants Exhibit 10).

47. The management of the Department of Environmental Conservation ("DEC") of ANR met at the Waterbury Complex on August 30, 2011, to discuss alternate work locations for DEC employees. Beginning August 30, many DEC employees who were stationed at the Waterbury Complex prior to Irene continued to perform their regular duties in the field or at DEC's regional offices. DEC's river engineers worked and answered questions from concerned landowners and municipalities affected by the storm. The DEC Spill Team continuously operated and performed their regular duties. DEC's Drinking Water and Protection Division addressed the functioning of municipal waste water facilities. DEC Solid Waste Program worked on debris issues.

48. On Tuesday, September 6, 2011, Justin Johnson, DEC Deputy Commissioner, sent an email to all Waterbury-based staff of the Department. The email stated in pertinent part: "The Waterbury office is under an emergency closing (just like as if we had a big blizzard). In any emergency closing staff not required to work are still paid their regular salary. Everyone is getting paid their regular salary. Many staff required to work are entitled to more than their regular salary. DEC's budget simply cannot cover a universal increase in everyone's salary, which is why managers are trying to clarify who is required to work and who isn't. . ." (Grievants Exhibit 11).

49. Prior to sending out the September 6 email, Johnson did not discuss its contents with Agency of Natural Resource management, Department of Human Resources staff, Secretary of Administration Jeb Spaulding or Deputy Secretary of Administration Michael Clausen. Johnson did not have the authority to inform staff that employees working were entitled to more than their regular salary.

50. State employees who were required to work at other locations as a result of damage to state buildings caused by Tropical Storm Irene received their regular pay. State employees whose duty station was located in the Waterbury Office Complex or the DMV office in Rutland at the time of Tropical Storm Irene, and who were not required to work in the days and weeks following Irene after their offices were damaged by the storm, continued to receive their regular pay.

51. The State expected employees who were not required to work, but were paid their regular salary, to remain available to report to work. If such employees were not available to report for work, they were required to use accrued leave or go off payroll if they did not have accrued leave balances. Employees who were authorized and assigned to work, and were unavailable to do so, were required to use accrued leave or go off payroll if they did not have accrued leave balances.

52. The State compensated employees for mileage, overtime, lodging, and travel time due to working at alternate work locations prior to their official duty stations being changed. There was evidence of one exception to this; Katelyn Chase, an employee of the Family Services Division of the Department for Children and Families was not reimbursed for mileage traveled to and from a temporary work location for four days in September. Also, Chase was charged for use of previously scheduled annual leave for

four days that she was not assigned to work. She further was placed in an “off-payroll status” on another day she was not scheduled to work, and had previously requested use of annual leave, because she did not have an annual leave balance.

53. Governor Shumlin made a public announcement on October 20, 2011, that Vermont State Hospital in Waterbury would not reopen, and outlined his plan to provide Vermont’s mental health community with access to mental health services throughout the state (Grievants Exhibit 9).

54. Most of the Agency of Human Services and Agency of Natural Resources employees who were displaced from the Waterbury State Office Complex due to Tropical Storm Irene were relocated by December 13, 2011. The Waterbury State Office Complex itself was in a “stabilization mode” at this point. Most of the buildings had been cleaned and dried, but the State was still working on re-establishing the basic infrastructure that served the entire complex (Grievants Exhibit 15).

55. The buildings in the Waterbury Office Complex, with the exception of the building housing the Department of Public Safety, have not been used by state employees since Tropical Storm Irene occurred.

56. When the Winooski River flooded in March 1992, the State decided that state offices in certain sections of Montpelier would be subject to an emergency closing for one day. The employees whose work stations were subject to emergency closing for one day, and were required to work, received double pay for their hours worked. Employees who did not work received regular pay without use of leave time for these days. The State also ordered a reduced workforce situation for offices in Montpelier and Waterbury on another day as a result of this flood. Employees who were required to work

in these offices during the reduced workforce situation were granted compensatory time for the number of hours they worked (Grievants Exhibit 21, p.133-135).

57. On January 8 and 9, 1998, due to an ice storm, the State Department of Human Resources issued a notice announcing both that the “State closed all state work sites”, and that a reduced workforce situation was in effect for state offices, in various counties in Vermont. Employees who were required to work in those offices during the reduced workforce situations were granted compensatory time for the number of hours they worked. The VSEA filed a grievance alleging in part that state offices in these counties were not under a reduced workforce situation, but instead were under a complete closing (Grievants Exhibit 21, p.136-37).

58. On October 11, 2011, Chris Teifke, VSEA Director of Operations, sent a letter to DHR Commissioner Duffy which provided in pertinent part as follows:

Pursuant to Articles 6 of the (Contracts), VSEA hereby requests the following information which is reasonably necessary to serve the needs of VSEA as the exclusive bargaining agent of all bargaining unit employees impacted by Tropical Storm Irene and the Emergency Closing of the Waterbury State Office Complex:

1. A list of every bargaining unit member who meets the following criteria:
 - a. was assigned to the Waterbury State Office Complex as his or her official work location as of August 27, 2011; and
 - b. was required to perform any work for the State on or after August 30, 2011 without being provided notice of assignment to a different work location.
2. The number of hours each member listed in response to paragraph 1 was required to perform any work for the State on or after August 30, 2011 prior to being provided notice of assignment to a different work location, and the dates those hours were worked;
3. The hourly rate of pay for each member listed in response to paragraph 1;
4. The timesheets pertaining to the hours worked by the members listed in response to paragraph 2;
5. Any written correspondence to or from any member identified above concerning whether he or she should or should not work on or after August 29, 2011;

6. Any written correspondence to or from any member identified above concerning the status of returning to work on or after August 29, 2011;
7. Any written correspondence to or from any member identified above concerning his or her assignment to a different work location on or after August 30, 2011;
8. Any written correspondence to or from any member identified above concerning how to claim and/or code work time and expense reimbursements for any time period after August 28, 2011.

As this information is highly pertinent to the grievances filed, we hope to receive this information as quickly as possible. . .
(Grievants Exhibit 25)

59. VSEA submitted amended Step III grievances to Duffy on October 13, November 17, and December 6, 2011, to add and remove grievants. VSEA Associate General Counsel Abigail Winters sent a fourth letter to Duffy amending the grievance on December 21, 2011, to remove and add Grievants. In the December 21 letter, Winters stated:

... (W)e have been waiting more than two months to receive the information we requested from you concerning the Grievants and other employees who were impacted by the Emergency Closings. Our original request to you was sent on October 11, 2011. I have sent you numerous letters concerning this matter since that time, and you have not provided me with any response whatsoever to any of my letters. Nevertheless, I assume the information request would take up a significant amount of time for your office, and I am willing to narrow the request if that would move this case forward faster. Please contact me to discuss ways to simplify this process, and to schedule a Step III grievance hearing as soon as possible.

(Grievants Exhibit 20, p.125)

60. Winters sent a letter to Duffy on December 30, 2011, attaching an amended grievance removing and adding grievants, and stating in pertinent part:

...
We still have not received any of the information we requested on October 11, 2011. You have not responded to any of our correspondence to you concerning this grievance, nor have you identified any concerns or objections to our amendments. I will continue to request that you contact me to schedule this Step III hearing and to advise when the information we have requested will be made

available. Thanks in advance for your cooperation and assistance with this difficult matter.

(Grievants Exhibit 20, p.128-29)

61. Winters sent a letter to Duffy on February 14, 2012, attaching an amended grievance removing and adding grievants, and stating in pertinent part:

We still have not received any of the information we requested on October 11, 2011. You have not identified any concerns or objections to our amendments. On numerous occasions, I requested that you advise when the information we have requested will be made available. Because we still have not received any information from you in response to the October 11, 2011, request, we have also amended the grievance to add the allegation that DHR is in violation of Article 6 of the CBA. We would like to schedule this matter for a Step III hearing as soon as possible.

62. Winters sent Duffy additional letters on March 1 and 12, 2012, attaching amended grievances adding and removing grievants (Grievants Exhibit 20, p.130-132).

63. The State and VSEA engaged in negotiations to attempt to resolve this grievance starting after Christmas in 2011 through the middle part of February 2012.

64. On March 9, 2012, DHR Labor Relations Specialist John Berard informed Winters that the Step III hearing in the grievance was scheduled for April 6, 2012. He also stated: "Steve asked me to let you know that legal was working on finishing up the information request associated with this grievance." "Steve" referred to DHR General Counsel Steven Collier. On April 4, 2012, Berard notified Winters that the "documents you requested regarding the Double Pay/Emergency Closing grievance will not be available for your review prior to the grievance hearing scheduled for" April 6 (State Exhibit 10, p.86-87).

65. The State gathered the information requested by VSEA from the various departments and agencies which had employees working in the Waterbury Complex. The State reviewed the gathered materials for privileged information that required redaction.

66. On June 19, 2012, Collier sent a letter to Winters which provided in pertinent part:

. . . I am responding to Chris Teifke's October 12, 2011 Article VI request related to potential double pay following Tropical Storm Irene. Please allow me to apologize for the delay. A variety of factors contributed – including the broad scope of the requests and intervening settlement discussions – but I intended to produce the documents more quickly. Please do accept my apology, and thank you for your patience.

Please find enclosed a compact disc with documents Bates stamped 1-1774. The documents were gathered from individual departments, and appear to be responsive to one or more of your requests. . .

In my opinion, much of the information VSEA requested was not “reasonably necessary” under Article VI. The State promptly informed VSEA of its position on double pay and the emergency closing, and I believe VSEA could have elicited sufficient information from its members to both evaluate its position and communicate with potential grievants. Nevertheless, the State opted to expend considerable resources to attempt to respond to your requests, and as a result of its efforts, is producing nearly 2,000 pages of material.

. . .
(Grievants Exhibit 26, State Exhibit 20)

67. VSEA representatives regularly request information from the State pertaining to negotiations, processing grievances and complaints, personnel investigations involving potential discipline, and general collective bargaining contract administration matters. There are cases where the State and the VSEA disagree at lower steps of the grievance procedure whether information should be provided. There are other cases where there is not such disagreement. Recently, it has been more common that it has taken longer for the State to provide information to VSEA at the lower steps of the grievance procedure. VSEA recently has been more likely to submit broad, discovery-like requests to the State at lower steps of the grievance procedure. These requests sometimes implicate confidentiality concerns. They further may require significant State

time and resources to respond. VSEA and the State have experienced an increase in the settlement rates of grievances at the lower grievance steps over the past few years.

OPINION

Grievants allege that the State: 1) violated the Emergency Closing article of the collective bargaining contracts between the State and VSEA (“Contracts”), and State Personnel Policy 11.3, by failing to pay employees who were required to work during the emergency closing resulting from Tropical Storm Irene additional compensation besides their regular pay which they would have earned regardless of their worksite being closed, while employees who were not required to work while their worksites were closed received their regular pay ; 2) violated the Sick Leave and Annual Leave articles of the Contracts, and applied State Personnel Policy 11.3 in a discriminatory manner, by requiring employees to use their accrued leave during the time that their assigned worksites were closed due to Tropical Storm Irene, while co-workers who were not required to work and were receiving their regular pay were not required to use leave time; 3) violated the Employee Workweek/Work Location/Work Shift article of the Contract by attempting to retroactively relocate employees’ worksites; and 4) violated Article 6 of the Contracts by failing to provide information requested by VSEA.

In interpreting provisions of the Contracts, we follow the rules of contract construction developed by the Vermont Supreme Court. The cardinal principle in the construction of any contract is to give effect to the true intention of the parties.⁷ A contract must be construed, if possible, so as to give effect to every part, and from the

⁷ Grievance of Cronan, et al, 151 Vt. 576, 579 (1989).

parts to form a harmonious whole.⁸ The contract provisions must be viewed in their entirety and read together.⁹ A contract will be interpreted by the common meaning of its words where the language is clear.¹⁰ If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense.¹¹

Ambiguity exists where the disputed language will allow more than one reasonable interpretation.¹² The threshold question of whether a contract is ambiguous is a question of law.¹³ In making this determination, we may consider evidence as to the circumstances surrounding the making of the agreement as well as the object, nature and subject matter of the writing.¹⁴ Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.¹⁵ If a contract is ambiguous, extrinsic evidence may be relied upon to construe it.¹⁶

If this analysis concerning whether contract language is ambiguous results in a determination that the language is clear and unambiguous, extrinsic evidence under such circumstances should not be considered as it would alter the understanding of the parties

⁸ In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980).

⁹ In re Stacey, 138 Vt. 68, 72 (1980).

¹⁰ Id. at 71.

¹¹ Swett v. Vermont State Colleges, 141 Vt. 275 (1982).

¹² In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005).

¹³ Isbrandtsen v. North Branch Corp., 150 Vt. 575, 577 (1988). Breslauer v. Fayston School District, 163 Vt. 416, 425 (1995).

¹⁴ Isbrandtsen, 150 Vt. at 578. Breslauer, 163 Vt. at 425. Grievance of Verderber and Vermont State Colleges Faculty Federation, 173 Vt. 612, 616 (2002).

¹⁵ Isbrandtsen, 150 Vt. at 579. Breslauer, 163 Vt. at 425.

¹⁶ Breslauer, 163 Vt. at 425.

embodied in the language they chose to best express their intent.¹⁷ The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions.¹⁸ If the analysis instead leads to a conclusion that the contract language is ambiguous because the disputed language allows more than one reasonable interpretation, it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract.¹⁹

Grievants contend that the plain meaning of Section 5 of the Emergency Closing article of the Contracts, and Personnel Policy 11.3, clearly require the State to pay employees additional compensation for working when their offices were completely closed due to Tropical Storm Irene. Grievants contend that the conditions of Section 5 of the Emergency Closing article were met following August 29, 2011, because the State authorized “the complete closing” of all offices within the Waterbury State Office Complex “for emergency reasons”. Therefore, Grievants contend that employees were entitled to regular pay if they did not work, and double time under Section 6 of the Emergency Closing article for any hours they were required to work. Grievants contend that the Waterbury State Office Complex remained completely closed after the one-day emergency closing declared by the State on August 29, and that employees in these offices were required to be paid double time for any work they performed from August

¹⁷ Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).

¹⁸ Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

¹⁹ Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988).

29 until these employees' offices were no longer closed. Grievants assert that their offices were no longer closed under the Emergency Closing article when the State issued relocation notices to them assigning them to a new duty station.

The State contends to the contrary that there was only a one-day emergency closing authorized by the State, on August 29, 2011, and that there was no emergency closing after this date entitling employees who worked to double pay under the Emergency Closing article or Personnel Policy 11.3. The State contends that the Emergency Closing article of the Contracts clearly provides the State with the exclusive authority to decide whether to authorize a complete emergency closing, and to decide the extent of any such closing, and that it authorized the complete closure of the State for only one day. The State takes the position that the Board has no authority to override this discretionary decision of the State. The State asserts that no state offices were in "complete emergency closing" after August 29, 2011; that State operations immediately resumed and State offices were open for business to perform its mission to serve the public. The State submits that, while the State immediately resumed operations, it was not able to immediately relocate all 1,500 displaced employees and willingly paid its employees who were unable to work their regular pay because it guarantees them a "basic weekly salary" of 40 hour pay pursuant to Article 20 and Appendix A of the Contracts. The State contends that Grievants' position that they are entitled to double pay for working after Tropical Storm until they were officially reassigned to a different location is devoid of any contractual support. The State asserts that a comprehensive reading of the Contracts, including the Work Location Article, demonstrates that the parties did not

intend to authorize the Board to override the State and declare an ongoing emergency closing because of building damage caused by a discrete weather event.

In determining whether the State violated the Contract by failing to pay Waterbury State Office Complex employees double their regular rate of pay if they worked after August 29, 2011, we view the contract provisions in their entirety and read them together to seek to give effect to the true intention of the parties. This review of the Contracts leads us to first conclude that we are not persuaded by Grievants' contention that they were required to be paid double time for any work they performed from August 29 until the State issued relocation notices to them assigning them to a new duty station.

Employees are entitled to such double pay pursuant to Sections 5 and 6 of the Emergency Closing article if "management authorizes the complete closing of a State office or facility for emergency reasons". If we were to accept Grievants' theory, this would mean that the parties intended that such a complete closing for emergency reasons could last for at least several weeks. This is because the Employee Workweek/Work Location/Work Shift article of the Contracts provides that the State "will give . . . four weeks prior notice in the case of assignment (of an employee) to a new geographic area, and will try to accommodate those persons who need extra time to make the change or move."

Given a choice, a rule of contract construction favors interpretation of a contract which makes it fair and reasonable.²⁰ The common meaning of "emergency" is a "situation or occurrence of a serious nature, developing suddenly and unexpectedly, and

²⁰ Grievance of Gorruso, 150 Vt. 139, 145 (1988).

demanding immediate action.”²¹ The Emergency Closing article sets forth the following examples of emergency which conform to this definition: “adverse weather conditions, acts of God, equipment breakdown, inoperable bathroom facilities, extreme office temperatures, etc.” An emergency typically would be of relatively short duration, and it would be an unfair and unreasonable interpretation of the Contract to conclude that the parties intended that the State would be obligated to pay employees double pay for any work performed pursuant to the Emergency Closing article for several weeks absent explicit wording in the Contract so providing. There is no indication in the language of the Contracts, bargaining history or past practice that the parties intended a link between the Emergency Closing article and the Work Location article of the Contracts. We are not inclined under these circumstances to interpret the Contracts to provide such a link.

Similarly, in viewing contract provisions in their entirety, we are not persuaded by Grievants’ contention that there is necessarily a “complete closing of a state office or facility” requiring double pay for any work performed if the physical location in which employees are assigned is inhabitable. It is undisputed that the Waterbury State Office Complex became entirely inhabitable in the wake of Tropical Storm Irene in late August 2011, and remains mostly inhabitable to the present time of the summer of 2013. Again, double pay for work performed is required if there is a complete closing for emergency reasons, and an emergency typically would be of a relatively short duration. There is no indication that the parties intended that providing employees double pay for work performed for a complete closing for emergency reasons could extend for the lengthy period of time advocated by Grievants.

²¹ Grievance of Roessner, 12 VLRB 266, 277. Grievance of Bagley, 19 VLRB 280, 288 (1996).

Instead, when the Contracts are viewed in their entirety, a fair and reasonable interpretation of their provisions is that, in the event of inhabitable State buildings, the reference in the Emergency Closing article to “a State office or facility” refers to the operations of a state department or agency. Any other interpretation of the Contracts would hinder the ability of State departments and agencies to carry out its mission to serve the public without an excessive drain on State funds. We will not presume the parties intended such a dramatic impact on public resources absent any indication they contemplated this result. This is particularly so given that emergencies typically are of relatively short duration.

We also reject the State’s proffered interpretation of the contract language to the extent the State contends that Grievants’ claim of entitlement to double pay can be simply rejected on the grounds that: 1) Section 1 of the Emergency Closing article clearly grants the exclusive authority to authorize emergency closings to the State through providing “(m)anagement shall decide when, if and to what extent State facilities shall remain open or closed during emergencies”; 2) the State only authorized one day of emergency closing here; and 3) the Board has no authority to override the State’s discretionary decision.

It is true that the parties have left to management’s sole discretion the determination when, if and to what extent State facilities and offices shall remain open or closed during emergencies. Also, this discretion is accompanied by the rights of the State set forth in the Management Rights article of the Contracts to “carry out the statutory mandate and goals of the agency, . . . utilize personnel, methods and means in the most appropriate manner possible; and with the approval of the Governor, take whatever action

may be necessary to carry out the mission of the agency in an emergency situation”. However, as further set forth in the Management Rights article, these express rights of management are “subject to terms set forth in this Agreement”. Specifically, in the grievance before us, the determination whether Grievants are entitled to double pay for performing work after Tropical Storm Irene is to be decided by the Board after applying the provisions of the Emergency Closing article in its entirety to the pertinent facts before us.

In addition to the language in Section 1 of the Emergency Closing article relied on by the State, Sections 5 and 6 of the article provide that “(e)mployees required by management to work during complete emergency closings” shall receive double their regular hourly pay “if management authorizes the complete closing of a State office for emergency reasons.” In sum, we need to determine “when, if and to what extent” the State authorized the “complete closing” of the operations of State departments and agencies which previously had been performed in the Waterbury State Office Complex “for emergency reasons.”

It is clear and undisputed that there was such a complete closing for all of State government on August 29, 2011, the day after Tropical Storm Irene struck Vermont. Governor Shumlin authorized the complete closure of state government this day, and this complete closing was broadly communicated by the State. State offices were not open for business, and only specifically authorized critical staff members reported for work.

The central issue in this case is if, and to what extent, there was a “complete closing” of the operations of State departments and agencies which previously had been performed in the Waterbury State Office Complex “for emergency reasons” after August

29, 2011. The State did not specifically announce a complete closing for any day after August 29, but a fair reading of the evidence indicates that the State did not make clear until September 8 that August 29 was the only day the State considered to be subject to a complete emergency closing for Waterbury Complex employees. Under these circumstances, we examine the evidence to determine whether a complete emergency closing existed in effect on any days other than August 29. If so, the State would be required to provide double pay to any affected Grievants required to work on these days.

In determining whether the operations of State departments and agencies which previously had been performed in the Waterbury Complex were subject to a complete closing on August 30 and thereafter, we examine any developments in their operations following the complete closing on August 29. The operations of a few departments and agencies previously performed in the Waterbury Complex were ongoing from the onset of Tropical Storm Irene. The Emergency Operations Center of the Vermont Department of Public Safety, and the operations of Vermont State Hospital, continued throughout the storm and in its aftermath.

The bulk of operations of affected departments and agencies did not occur on August 29. It was estimated by late in the day on August 29 that it could be two weeks or more before the Waterbury Complex would be fully operational. Agencies and departments with offices located at the complex implemented Continuity of Operations Plans (“COOP”).

A review of these plans informs a decision whether a complete closing for emergency reasons existed on August 30. The COOP plans had been developed by state departments and agencies with offices in the Waterbury State Office Complex to ensure

that their mission-essential functions can be carried out if an emergency threatens or incapacitates operations. They are designed to ensure that the departments are prepared to respond to emergencies, recover from them, mitigate their impacts and provide critical services during an emergency. They facilitate the return to normal operations as soon as practical. The COOP plans provide for relocation of selected employees and functions that are essential.

In accordance with these plans, only specifically authorized critical staff members from the Waterbury Complex were to report to work at alternate work sites as of August 30. The evidence indicates a partial resumption of operations of State departments and agencies which previously had been performed in the Waterbury State Office Complex beginning on August 30 beyond what existed on August 29. Some managers and non-management employees of divisions and departments in the Agency of Human Services and the Agency of Natural Resources gathered that day in Waterbury to discuss the relocation of employees and gather materials to move to alternate locations. A significant number of employees were relocated effective that day to regional offices or other alternate work locations to perform critical and other services they previously had performed in the Waterbury complex. In the days immediately following August 30, significantly more operations were resumed at alternate work locations.

Given this evidence, we conclude that there was not a “complete closing” of the operations of State departments and agencies which previously had been performed in the Waterbury Complex “for emergency reasons” after August 29, 2011. The affected agencies and departments obviously were a long way from resuming normal operations as of August 30 and immediately thereafter, and many employees did not work these

days. The State experienced extraordinary challenges in locating suitable alternate work space for the approximate 1,500 employees displaced by Irene. The scope of displacement made it difficult to procure sufficient office space. Nonetheless, operations of state agencies and departments partially resumed on August 30 and there was a movement that day and the days immediately following towards a resumption of normal operations. State operations were open for business to resume the carrying out of the missions of affected agencies and departments. This was consistent with the design of COOP plans to move towards normal operations.

Tropical Storm Irene was an unprecedented occurrence with devastating effects not remotely similar to any previous event in which the Emergency Closing article of the Contracts was implicated. Given the understandable uncertainty and confusion, and the massive displacement, resulting from the storm, the evidence before us indicates that the State acted reasonably within the requirements of the Contract in paying affected employees. The State reasonably decided that the Contracts required them to pay its employees who were unable to work their regular pay because the Contracts guarantee them a “basic weekly salary” of 40 hours pay pursuant to Article 20 and Appendix A of the Contracts. The State also reasonably decided that a complete emergency closing did not exist after August 29 within the meaning of the Emergency Closing article of the Contract. The State thus was justified in not paying Grievants double pay for the work they performed after August 29.

We recognize Grievants may believe the State did not act equitably since they had to work for the regular pay they received while some co-workers received regular pay for not working. However, if Grievants did receive double pay for the work performed, they

would in some cases be working alongside other employees receiving regular pay whom reasonably could question the equity of Grievants receiving the additional compensation. Also, there were thousands of other State employees receiving regular pay in the aftermath of the storm.

Further, there was compensation for the upheaval in employees' lives caused by the effects of Irene. The State, consistent with contract provisions, compensated employees such as Grievants displaced from the Waterbury Complex for mileage, overtime, lodging and travel time when they worked at alternate locations prior to their official duty stations being changed.

In concluding that Grievants did not establish that the State violated the Emergency Closing article of the Contracts in not paying employees double pay for work they performed after August 29 pursuant to Sections 5 and 6 of this article, we note that Grievants did not make an alternative claim that the State violated Section 3 of the Emergency Closing article. Section 3 provides for employees receiving compensatory time in addition to their regular pay in instances where "continued operations with a reduced work force" are authorized "in facilities that must remain in operation despite emergency conditions". The failure of Grievants to make such a claim, accompanied by lack of sufficient evidence presented in this case on the applicability of this section to the situation in the wake of Irene, forecloses the validity of any claim that Section 3 was implicated in this matter.

We now turn to addressing the remaining allegations of Grievants. Grievants contend that the State violated the Sick Leave and Annual Leave articles of the Contracts, and applied State Personnel Policy 11.3 in a discriminatory manner, by requiring

employees to use their accrued leave during the time that their assigned worksites were closed due to Tropical Storm Irene, while co-workers who were not required to work and were receiving their regular pay were not required to use leave time. The validity of Grievants' claim depends on a conclusion that there was a complete emergency closing situation pursuant to the Emergency Closing article of the Contract after August 29, 2011. Since we have concluded there was no such closing, there was no violation of the Sick Leave and Annual Leave articles of the Contract in this regard.

Further, we note that Grievants' allegation that co-workers who were not required to work, and were receiving their regular pay, were not required to use leave time is not supported by specific evidence. The State expected employees who were not required to work, but were paid their regular salary, to remain available to report to work. If such employees were not available to report for work, they were required to use accrued leave or go off payroll if they did not have accrued leave balances. Although there was some testimony from Grievants that co-workers in these situations did not use leave time in these situations, the testimony was general and vague, and thus was insufficient to test its substance.

Grievants further alleged in their grievance filed with the Board that the State violated the Employee Workweek/Work Location/Work Shift article of the Contract by attempting to retroactively relocate employees' worksites. Grievants did not address this issue in their post-hearing brief. Thus, this claim apparently has been withdrawn by Grievants. In any event, Grievants have not presented evidence establishing a violation of this article.

The final allegation made by Grievants is that the State violated Article 6 of the Contracts by failing to provide information requested by VSEA. Grievants contend that the State's delay of nine months after Grievants made the request for information to provide any information to VSEA is unreasonable and unacceptable. Grievants also maintain that the Employer's June 2012 response does not provide all the information requested. Further, Grievants assert that the State's failure to give any update or explain the reasons for its delay for many months demonstrates a violation of the Contract.

The State contends that VSEA requested voluminous amounts of information from the State, and the State subsequently gathered the information from various departments and provided 1,774 pages of documents to VSEA. The State asserts that it was practically unable to provide some of the information requested by VSEA because it would have required interviewing 1,200 employees and their supervisors, a task neither contemplated nor required under Article 6 of the Contracts. In sum, the State contends that it has provided all required information to VSEA, there is no actual controversy and Grievants' claim is moot.

Article 6 provides that the State "will . . . provide such . . . information as is reasonably necessary to serve the needs of VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law," and that "(a)ccess to such information shall not be unreasonably denied." "Failure to provide information as required under this Article may be grieved" to the Board.

In applying the provisions of this article to the facts of this case, we conclude that Grievants have not demonstrated that the State has failed to produce information reasonably necessary for Grievants to seek to establish that the State has violated the

emergency closing, annual leave, sick leave, and work location articles of the Contracts which are at issue at this stage of the grievance. Nonetheless, this does not necessarily mean that no actual controversy exists and that Grievants' claimed violation of Article 6 is moot. The Board has declined to dismiss cases as moot if they are "capable of repetition, yet evading review."²²

The lack of any response to VSEA's request for information for a period of many months presents the question of whether this is a matter that is capable of repetition, yet evading review. Article 6 provisions involve a right central to the obligation of the VSEA as bargaining unit representative to represent its members – the presenting and processing of employee grievances.²³ An employer that has not expressly refused to furnish information requested by a bargaining unit representative in fulfilling its obligation to present and process grievances can violate this article by failing to make a diligent effort to obtain or provide the information reasonably promptly.²⁴ The requirement is a reasonable good faith effort to respond to the request as promptly as circumstances allow.²⁵ In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information.²⁶

The State failed in its obligations here through its lack of any response to VSEA's request for information for many months. Two months after VSEA made the request, the

²² Burlington Fire Fighters Association v. City of Burlington, 4 VLRB 379, 384-85 (1981). South Burlington Board of School Directors v. South Burlington Educators' Association and Vermont-NEA, 32 VLRB 56, 81 (2012).

²³ Grievance of United Academics and AAUP/AFT and Campo, 29 VLRB 1, 5 (2007).

²⁴ NLRB v. John Swift Co., 277 F.2d 641, 645 (7th Cir. 1960).

²⁵ West Penn Power Co. dba Allegheny Power, 339 NLRB 585, 587 (2003).

²⁶ House of the Good Samaritan dba Samaritan Med. Ctr., 319 NLRB 392 (1995).

VSEA attorney notified the State Commissioner of Human Resources: “I assume the information request would take up a significant amount of time for your office, and I am willing to narrow the request if that would move this process forward faster. Please contact me to discuss ways to simplify this process and to schedule a Step III grievance as soon as possible.” Despite this offer by VSEA to narrow the information request and invitation to discuss ways to simplify the process of receiving the information, and even though VSEA made two other written requests to obtain the requested information in the next few months, the State failed to communicate in any way with VSEA to discuss this issue.

This failure by the State, accompanied by a nine month period before any information was provided to VSEA, constituted a violation of its obligations under Article 6 of the Contracts to make a diligent effort to provide the information reasonably promptly. This is an action that is capable of repetition, yet evading review in a timely manner. Thus, we do not dismiss this claim on mootness grounds and shall issue a cease and desist order to the State.

In closing, we would like to make an observation with respect to this grievance as a whole that it would have been better for productive labor relations if the parties were able to balance respective interests and informally reach an understanding to resolve this grievance. State managers and employees represented by VSEA made many substantial contributions to meet the needs of the public in the wake of the devastating Tropic Storm Irene. It is unfortunate that the dispute involving pay due employees in this matter has festered and has adversely affected the focus on these laudable contributions.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. This grievance is sustained to the extent that the State of Vermont has violated Article 6 of the Contracts in this matter as set forth in the Opinion, and shall cease and desist from failing to make a diligent effort to provide information requested by the Vermont State Employees' Association in grievance processing in a reasonably prompt manner; and
2. This grievance is dismissed in all other respects.

Dated this 8th day of July, 2013, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard