VERMONT LABOR RELATIONS BOARD

Vermont State Employees' Association	)	
	)	
v.	)	Docket No. 08-11
	)	
State of Vermont (Re: Electronic Communications Policy)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 18, 2008, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge, alleging that the State of Vermont interfered with employee rights and violated its duty to bargain in good faith by unilaterally issuing an electronic communications policy. The State of Vermont ("State") filed a response to the charge on April 11, 2008. VSEA filed a reply to the State response on May 27, 2008. Following investigation of the charge, the Labor Relations Board issued an unfair labor practice complaint on November 5, 2008.

The Labor Relations Board held a hearing on the complaint on February 19, 2009, in the Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Leonard Berliner and James Dunn. VSEA Associate General Counsel Abigail Doolittle represented VSEA. Assistant Attorney General Margaret Vincent represented the State. The parties filed post-hearing briefs on March 9, 2009.

FINDINGS OF FACT

1. Secretary of Administration Kathleen Hoyt approved Personnel Policy 11.7 effective July 1, 1999. The policy provided in pertinent part as follows:

Subject: **ELECTRONIC COMMUNICATIONS AND INTERNET USE**

Applicable to: All classified, temporary and exempt employees of the State of Vermont . . .

PURPOSE AND POLICY STATEMENT:

Internet services and e-mail capabilities are a resource to facilitate the work of State government. This policy provides for use by authorized State employees which is consistent with **Personnel Policies and Procedures**, Number 5.6, titled "Employee Conduct" which states that employees shall not use, or attempt to use State personnel, property or equipment for their private use or for any use not required for the proper discharge of their official duties. That policy has been interpreted to allow a limited degree of personal use of State telephones for private calls when such use meets certain guidelines. Similar allowances will be applied to internet services and e-mail capabilities where personal use meets all of the following tests. No such use will be allowed where any of the following is not met:

- The user must be authorized to use the equipment by management. Managers will exercise reasonable discretion in determining which employees will be denied personal use of internet services, including when such use is denied because of abuse or violation of this policy.
- The use must not interfere with an employee's performance of job duties.
- The use must not impose a burden on State resources as a result of frequency or volume of use.
- The use must not otherwise violate this policy, including the prohibition on access of sites that include potentially offensive or disruptive material. The fact that the use occurs in a private setting or outside of scheduled work hours does not affect this prohibition.

The State of Vermont purchases Internet services for use by State agencies to meet the operational and programmatic needs of their units. This policy provides guidelines for acceptable access and use and prohibits any Internet use by State employees that violates Federal or State law or regulations.

As defined by this policy, systems and information are State property. All systems and information therein are, and shall remain, the property of each agency, subject to its sole control. Each agency owns all legal rights to control, transfer or use all or any part or product of its systems. All uses must comply with this policy. Nothing in this policy shall be construed to abridge any rights of an agency to control its systems, their uses or information. **This policy does not impair the right and obligation of agencies to limit access to systems and records that contain information that is subject to any statutory, regulatory, or common law privilege or obligation to limit access, nor does it alter any agency's rights or obligations under the Vermont public records law (1 V.S.A. Section 315, et seq.)**

Each State agency has full control and access as defined below:

Control. An appointing authority of an agency reserves and intends to exercise all rights relating to information used in its systems. An agency may trace, review, audit, access, intercept, block, restrict, screen, delete, recover, restore, publish or disclose any information at any time without notice.

Access. Passwords, scramblers or various encryption methods may not be used without agency approval, access and control. No user may attempt to access, copy, forward, delete, or alter the messages of any other user without agency authorization. An agency system may not be used to attempt unauthorized access to any information system.

DEFINITIONS

. . .

"Agency systems" or "systems" means all agency software, electronic information devices, interconnections, intranet and technical information related to them. Systems include other systems accessed by or through those devices, such as the Internet, e-mail, or telephone services. Systems include designs, specifications, passwords, access codes and encryption codes.

"Electronic communications" means electronic mail and internet service access.

"Information" means information of any kind, used in any way, in agency systems. Examples include messages, communications, e-mails, files, records, recordings, transmissions, signals, programs, macros, and data.

GUIDELINES FOR GENERAL USE OF SYSTEMS OR INTERNET SERVICES

. . .

7. State employees must conform to reasonable professional standards for use of Internet services as detailed in this guideline. This includes a prohibition against any activity that impairs operation of any state computer resource. Such activities include, but are not limited to, sending junk mail or chain letters, injecting computer viruses or mass mailings via e-mail.

. . .

9. Use of the Internet is for State business. The only exception is for personal use that fully complies with the limited personal use described by this policy. Any use that is not for State business or authorized limited personal use consistent with this policy may result in revocation of Internet access, other appropriate administrative action, or disciplinary or corrective action.

10. Use of agency systems or printers for offensive or disruptive purposes is prohibited. This prohibition includes profanity, vulgarity, sexual content or character slurs. Inappropriate reference to race, color, age, gender, sexual orientation, religions, national origin or disability is prohibited.

11. State agencies have the right to monitor the systems and Internet activities of employees. Monitoring may occur, but is not limited to, occasions when there is a reason to suspect that an employee is involved in activities that are prohibited by law, violate State policy or regulations, or jeopardize the integrity and/or performance of the computer systems of State government. Monitoring may also occur in the normal course of network administration and trouble-shooting, or on a random basis. **Agencies must ensure that systems administrators and technicians involved in monitoring, or who otherwise have access to systems and records that contain information that is subject to any statutory, regulatory, or common law privilege or obligation to limit access, are appropriately trained on the requirement to respect such privilege or confidentiality and directed to do so.**

. . .

(Exhibit 1, **emphasis in original**)

2. Policy 11.7 was originally implemented without bargaining with VSEA in 1999.

3. On September 18, 2007, Secretary of Administration Michael Smith approved a revised Personnel Policy 11.7. The revised Policy 11.7 superseded the original Policy 11.7 implemented on July 1, 1999. The effective date indicated on the policy is September 18, 2007. The policy provides in pertinent part as follows:

> Subject: **ELECTRONIC COMMUNICATIONS AND INTERNET USE**
> . . .
> **PURPOSE:**
> To prescribe rules of conduct and procedure for State employees when using or accessing state government of Vermont (State) owned or provided computers, electronic communication devices/systems. These rules also apply to electronic communications or transactions in which a state employee represents him/herself as a State employee, regardless of whether he or she is using or accessing State equipment.
> . . .
>
> **DEFINITIONS**

"Access" means the ability to enter a system or application or the act of doing so, depending on context.

"Agency systems" or "systems" means all agency software, electronic information devices, interconnections, intranet and technical information related to them. Systems include other systems accessed by or through those devices, such as the Internet, email, or telephone services. Systems include designs, specifications, passwords, access codes and encryption codes.
. . .
"Electronic/wireless communication devices" or "electronic/wireless devices" includes but is not limited to: cellular phones, Blackberries, personal digital assistants (PDAs), and other such mobile devices used to access electronic mail, telephone, and Internet service.
. .

POLICY:
The State purchases computers, electronic/wireless devices, and internet services for use by Agencies to meet the operational and programmatic needs of their units. This policy provides guidelines for acceptable access and use, and prohibits any use of systems, the Internet, or electronic or wireless device, by State employees that violates Federal or State law or regulations.

As defined by this policy, systems and information are State property. Each agency has full control and access as defined above. All systems and information therein are, and shall remain, the property of each agency, subject to its sole control. Each agency owns all legal rights to control, transfer, or use all or any part or product of its systems. All uses must comply with this policy. Nothing in this policy shall be construed to abridge any rights of an agency to control its systems, their uses or information. **This policy does not impair the right and obligation of Agencies to limit access to systems and records that contain information that is subject to any statutory, regulatory, or common law privilege or obligation to limit access, nor does it alter any agency's rights or obligations under the Vermont public records law (1 V.S.A. Section 315, et seq.).**

Authorized Limited Personal Use
Internet, electronic and wireless communication devices and services, and email capabilities are resources to facilitate the work of State government. This policy provides for use by authorized State employees that is consistent with **Personnel Policies and Procedures**, Number 5.6, entitled "Employee Conduct," which states that employees shall not use or attempt to use State personnel, property, or equipment for their private use or for any use not required for the proper discharge of their official duties. That policy has been interpreted to allow a limited degree of personal use of State telephones for private calls when such use meets certain guidelines. Similar allowances will be applied to Internet, electronic and wireless communication devices and services, and email capabilities where

personal use meets all of the following tests. No such use will be allowed where any of the following is not met:

- The user must be authorized to use the equipment by management. Managers will exercise reasonable discretion in determining which employees will be denied personal use of Internet or electronic and wireless communication devices and services, including when such use is denied because of abuse or violation of this policy.
- The use must not interfere with an employee's performance of job duties.
- The use must not impose a burden on State resources as a result of frequency or volume of use.
- The use must not otherwise violate this policy, including the prohibition on visiting sites that include potentially offensive or disruptive material. The fact that the use occurs in a private setting or outside of scheduled work hours does not affect this prohibition.

RULES FOR USE OF SYSTEMS OR INTERNET SERVICES

. . .

2. Passwords, scramblers or various encryption methods may not be used without agency approval, access and control. No user may attempt to access, copy, forward, delete, or alter the messages of any other user without agency authorization. No agency or system may be used to attempt unauthorized access to any information system. No user may use any type of file removal/deletion program on any State computer system without assistance and approval of authorized agency representatives

. . .

4. State employees must conform to reasonable professional standards for use of Internet services as detailed in this guideline. This includes a prohibition against any activity that impairs operation of any state computer resource. . . This . . includes hacking, which means gaining or attempting to gain unauthorized access to any computers, computer networks, databases, data, or electronically stored information, unless acting within the proper scope of official duties.

5. Employees must be mindful that email messages and other electronic data may be considered public records subject to disclosure under the Vermont Public Records Act (1 V.S.A. Section 315, et seq.)

. . .

7. Use of the Internet including email is for State business. The only exception is for personal use that fully complies with the limited personal use described by this policy. Developing or maintaining a personal web page on or from a State device is prohibited, as is the use of peer-to-peer (referred to as P2P) networks such as Napster, Kazaa, Gnutella, Grokster, Limewire, and other similar services. Any use that is not for State business or authorized limited personal use consistent with this policy may result in revocation of Internet access, other appropriate administrative action, or disciplinary or corrective action.

8. Use of agency systems or printers for offensive or disruptive purposes is prohibited. This prohibition includes profanity, vulgarity, sexual content or character slurs. Any inappropriate reference, regardless of whether presented as a

statement, language, image, email signature block, audio file, or in any other way that is reasonably likely to be perceived as offensive or disparaging of others on the basis of race, color, age, gender, sexual orientation, gender identity, religions, national origin or disability is also prohibited.

. . .

10. Agencies have the right to monitor their systems and Internet activities of employees. Monitoring may occur in, but is not limited to, circumstances when there is a reason to suspect that any employee is involved in activities that are prohibited by law, violate State policy or regulations, or jeopardize the integrity and/or performance of the computer systems of State government. Monitoring may also occur in the normal course of network administration and trouble-shooting, or on a random basis using electronic tools designed to monitor Internet usage. Agencies must limit access to reports that may be generated by such programs and ensure that records of Internet usage are disclosed to only their appropriate human resources, management, and investigatory staff unless and until it becomes evidence of employee misconduct in which case it may be used in the same manner and is subject to the same rules of evidence as any other information that is part of a formal investigation into employee conduct. **Agencies must ensure that systems administrators and technicians involved in monitoring, or who otherwise have access to systems and records that contain information that is subject to any statutory, regulatory, or common law privilege or obligation to limit access, are appropriately trained on any requirements to respect such privilege or confidentiality, and directed to comply with such requirements.**

. . .

13. Using or allowing others to use State Internet services or email accounts to conduct transactions or advertising for a personal profit-making business is strictly forbidden. Use of State Internet services for purposes of accessing sites that provide streaming audio or video material for non-work related purposes is prohibited.

14. Use of State computer systems for solicitation for charitable or other causes is prohibited, except for officially-sanctioned activities.

(Exhibit 7, pages 38-41. **Emphasis in original**).

4. The revised Policy 11.7 contained the following revisions from the 1999 policy:

- "These rules also apply to electronic communications or transactions in which a state employee represents him/herself as a State employee, regardless of whether he or she is using or accessing State equipment" **(found under the Purpose section of the policy)**
- "No user may use any type of file removal/deletion program on any state computer system without assistance and approval of authorized agency representatives." **(Rule 2, adding to "Access" definition**

contained in "Purpose and Policy Statement" section of 1999 version of Policy 11.7)

- "This (prohibition) also includes hacking, which means gaining or attempting to gain unauthorized access to any computers, computer networks, databases, data or electronically stored information, unless acting within the proper scope of official duties." **(Rule 4, adding to Guideline No. 7 of 1999 version of Policy 11.7)**
- "Employees must be mindful that e-mail messages and other electronic data may be considered public records subject to disclosure under the Vermont Public Records Act (1 V.S.A. Section 5)" **(Rule 5)**
- "Developing or maintaining a personal web page on or from a State device is prohibited, as is the use of peer-to-peer (referred to as P2P) networks such as Napster, Kazaa, Gnuetella, Grokster, Limewire, and similar services." **(Rule 7)**
- "Any inappropriate reference regardless of whether presented as a statement, language, image, e-mail signature block, audio file, or in any other way that is reasonably likely to be perceived as offensive or disparaging of others on the basis of race, color, age, gender, sexual orientation, gender identity, religions, national origin, or disability is also prohibited." **(Rule 8, replacing Guideline No. 10 of 1999 version of Policy 11.7. The first two sentences of Rule 8 are the same as the first two sentences of Guideline No. 10 cited in Finding of Fact No. 1. This sentence is the third sentence of Rule 8; it contains different language from the third sentence of Guideline No. 10.)**
- "Agencies must limit access to reports that may be generated by such programs and ensure that records of internet usage are disclosed to only their appropriate human resources, management and investigatory staff unless and until it becomes evidence of employee misconduct in which case it may be used in the same manner and is subject to the same rules of evidence as any other information that is part of a formal investigation into employee conduct." **(Rule 10, replacing Guideline No. 11 of 1999 version of Policy 11.7. The first three sentences of Rule 10 are substantially the same as the first three sentences of Guideline No. 11 cited in Finding of Fact No. 1. This sentence is the fourth sentence of Rule 10; it is an additional sentence that is not contained in Guideline No. 11. The fifth sentence of Rule 10 is substantially the same as the fourth sentence of Guideline No. 11.)**
- "Use of State Internet services for purposes of accessing sites that provide streaming audio or video material for non-work related purposes is prohibited." **(Rule 13)**
- "Use of State computer systems for solicitation for charitable or other causes is prohibited, except for officially sanctioned activities." **(Rule 14)**

5. The provision of the revised Policy 11.7 making the policy applicable to electronic communications or transactions in which a state employee represents himself or herself as a State employee, regardless of whether he or she is using or accessing State equipment, was added due to the increased ability of state employees to access their state e-mail from locations such as their homes through equipment not owned by the State.

6. The provision of the revised Policy 11.7 prohibiting computer users from using any type of file removal/deletion program on any state computer system without assistance and approval of authorized agency representatives was added due to a significant recent change in the ability of a user to delete files in a computer system. The ability to delete files was difficult in 1999 and was limited to experienced computer experts. By 2007, the ability to purchase an inexpensive program to delete files in a computer system was available to average computer users and easier to use. The danger exists of an average computer user disrupting mandated core services of a State agency if they delete files improperly.

7. The prohibition against hacking in the revised Policy 11.7 resulted from the ability to hack expanding to more computer users by 2007 than existed in 1999.

8. A peer to peer network is a type of network in which each workstation has equivalent capabilities and responsibilities, compared to situations where some computers are dedicated to serving other computers. Users in peer networks are allowed to share files (including file sharing over the Internet), printers and other resources. Napster, Kazaa, Gnuetell, Grokster and Limewire are services allowing users in peer networks to share and download music and other types of computer files. Personal web pages are World Wide Web pages created by an individual to contain content of a personal nature.

Streaming audio or video refers to multimedia distributed over telecommunications networks that is received by an end-user while it is being delivered by a provider.

9. The prohibitions on developing or maintaining a personal web page (e.g., Facebook, MySpace), using peer to peer networks, or accessing streaming audio or video material for non-work related purposes in the revised Policy 11.7 were instituted by the State due to the greater amount of the State's bandwidth being used through such means than other uses of the Internet from State computers. Bandwidth refers to the physical medium which moves data back and forth between State computers and the Internet. The State purchases bandwidth from a provider. The State has continually expanded the amount of bandwidth it has purchased over the years. The ability of the State computers to function can be compromised if too much of the State's bandwidth is being used at a particular time.

10. Streaming audio or video particularly has the potential of taking a considerable amount of the State's bandwidth. A number of State employees watched the Inauguration of President Obama on the State's system. This took up a large amount of the State's bandwidth, resulting in a considerable slowing of State computers. Any employee who was working on a State computer during this time was not able to process their work at a normal rate, causing a decrease in productivity.

11. Policy 5.6 of the State Personnel Policies and Procedures, entitled "Employee Conduct", issued in 1996, is referenced in both the 1999 and 2007 versions of Policy 11.7. It provides in pertinent part:

> . . .
>
> <u>REQUIRED CONDUCT</u>
>
> . . .

3. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.
. . .

PROHIBITED CONDUCT

1. Employees shall not use, or attempt to use, their positions to obtain special privileges or exemptions for themselves or others.

2. Employees shall not use, or attempt to use, State personnel, property or equipment for their private use or for any use not required for the proper discharge of their official duties.
. . .
5. Employees may not engage in any outside employment, activity, or enterprise during work hours.
. . .
7. Employees shall not discriminate against, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.
(Exhibit 4)

12. The prohibition on solicitation contained in Rule 14 of the revised Policy 11.7 was added to the policy to make clear that the State's non-solicitation policy contained in Policy 11. 6 of the State Personnel Policies and Procedures, entitled "No Solicitation Policy", was specifically applicable to e-mail and other uses of the State's computer systems. Policy 11.6, which has been effective since March 1, 1996, provides:

The soliciting of money, contributions, subscriptions, organizational or group membership, commercial soliciting and vending of all kinds, the display or distribution of commercial advertising, pamphlets, handbills and flyers, or the collection of premiums, payments or private debts, and campaigning in or on State property, both during and after normal working hours, is prohibited, unless or otherwise permitted by law or State building rules.

This policy does not apply to newspaper boys and girls, farmers selling home grown produce, the State Employees' Combined Charitable Appeal ("SECCA"), or personal notices posted on authorized bulletin boards by State employees.
. . .
(Exhibit 6)

13. Policy 11.7 is contained in Section 11 of the State Personnel Policies and Procedures. Section 11 is entitled “Working Conditions”. Other topics addressed in Section 11 are employee workweek-location/shift, lunch and break periods, overtime/compensatory time, emergency closing (including snow days), income from outside sources (moonlighting), and no solicitation policy (Exhibit 2).

14. On September 19, 2007, Labor Relations Specialist Karin Pelletier of the Department of Human Resources sent a copy of the revised Policy 11.7 to all state human resource administrators via e-mail. Her e-mail message stated that the revised policy would “be posted on the (Department of Human Resources) website in about two weeks” and that human resources administrators should “disseminate the revised policy to all of (their) agency/department employees as soon as possible” (Exhibit 9).

15. On September 19, 2007, Pelletier also e-mailed a copy of the revised policy to VSEA Director Anne Noonan. Pelletier stated in her e-mail message to Noonan:

> Attached for your information is a copy of the revised Personnel Policy #11.7 concerning ELECTRONIC COMMUNICATION AND INTERNET USE. This policy has also been sent to the Agency/Department Human Resources Administrators for distribution to employees. Please let me know if you have any further questions regarding this matter.”
> (Exhibit 9)

16. Prior to September 19, 2008, there was no communication from any representative of the Department of Human Resources to VSEA Director Noonan concerning the revised policy or any proposed drafts of the policy.

17. On September 24, 2007, Pelletier sent an e-mail message to the state human resource administrators concerning the changes to Personnel Policy 11.7. She attached a document to her e-mail message “which briefly outlined the changes to

Personnel Policy 11.7 as requested by more than one (Human Resources) partner". The attachment provided as follows:

> Summary of changes to Personnel Policy 11.7:
>
> - The purpose, definitions, and policy statements have been reorganized for better flow.
> - The purpose, definitions, Authorized Limited Use and other applicable policy statements have been expanded to include wireless communication devices (cell phones, blackberries, etc.)
> - Number 2 is new language, the focus of which is to prohibit activity that undermines state control of its systems and to promote the integrity of its systems.
> - Number 4 has been expanded to include other use standards regarding impairing state computer operations and unauthorized access.
> - Number 5 reminds employees about electronic data being subject to Public Records Act requests.
> - Number 7 has been expanded to include prohibitions on the use of peer-to-peer networks (P2P) and developing/maintaining personal web pages.
> - Number 8 was broadened to include language, audio file, e-mail signature block, etc. that may cause disruptions and/or may be perceived to be offensive. Gender identity has been included in the protected characteristics.
> - Number 9 clarifies management's prerogative to "exercise all rights relating to information used in its systems."
> - Number 10 limits access to and use of reports generated from monitoring.
> - Number 13 prohibits use of state systems for profit making and/or using streaming video/audio for non-work related reasons.
> - Number 14 makes explicit prohibitions of use of state systems for solicitation.
>
> (Exhibit 10)

18 On October 9, 2007, the revised Policy 11.7 was posted on the Department of Human Resources website.

19. On October 9, 2007, VSEA Director Noonan sent a letter to Linda McIntire, Department of Human Resources Commissioner. In the letter, Noonan acknowledged receipt of the revised policy and stated:

> . . . Personnel Policies and Procedures are mandatory subjects of bargaining pursuant to 3 V.S.A. Section 904 of the State Employees Labor Relations Act.

> It appears that the changes to this policy have already been implemented, without notification to VSEA and the opportunity to bargain. This letter shall serve as a formal request you (1) immediately rescind the changes to the policy, and (2) bargain with VSEA over the content of the changes.
>
> Please contact me immediately to establish a bargaining schedule." (Exhibit 11)

20. On October 23, 2007, David Herlihy, Acting Commissioner of the Department of Human Resources, responded to this letter, stating:

> In your letter, you indicate that V.S.E.A. wishes to bargain over the revisions to the policy. We do not believe that the rules of use of the State of Vermont computers, electronic devices, and Internet access are subject to bargaining, so we decline your offer to bargain over this matter. In addition, I note that in your letter you wrote that we failed to notify V.S.E.A. of the policy revision. However, you were mailed notice of the changes on September 19, 2007. Consistent with our longstanding practice, we followed the process provided in Article 17 of the Non-Management Bargaining Unit agreement, and waited more than fifteen days before posting the changes, in order to provide you an opportunity to comment. No comments were received, and the changes were posted on October 8, 2007.
>
> Regardless of the failure to respond to the notice, we would be willing to consider your views on why the State's rules for use of its equipment and Internet access are matters that are subject to bargaining, but the revisions to Policy 11.7 will remain in force notwithstanding any further consideration of your position. (Exhibit 12)

OPINION

The issue before us is whether the Employer interfered with employee rights and violated its duty to bargain in good faith, in violation of 3 V.S.A. Section 961(1) and (5), by unilaterally issuing a revision to its electronic communications policy. VSEA contends that issuance of the memorandum constituted an improper unilateral change in working conditions for employees.

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

antithesis of bargaining and is a *per se* violation of the duty to bargain. Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435-36 (1983). In determining whether such an improper unilateral change occurred here, we apply the broad scope of bargaining provisions of the State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* ("SELRA"). Section 904 of SELRA provides in pertinent part:

> (a) All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by statute include but are not limited to:
> . . .
> (3) Working conditions;
> . . .
> (9) Rules and regulations for personnel administration . . .

Under these provisions, the State must bargain over a subject if it is a "matter relating to the relationship between the employer and employees" and is not "prescribed or controlled by statute". 3 V.S.A. Section 904(a). Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980). Collective bargaining is precluded only where "the outcome of any negotiations has been statutorily predetermined or expressly committed exclusively to the discretion of one party". Id. A party asserting that a matter is not a required subject of bargaining has the burden of demonstrating the existence of a specific statutory provision which circumscribes their power to bargain on an issue. Hackel, et al v. Vermont State Colleges, 140 Vt. 446, 449 (1981).

There is a specific statutory provision elsewhere in SELRA which can affect the required scope of bargaining. Section 905(b) provides: "Subject to rights guaranteed by this chapter and subject to all other applicable laws, rules, and regulations, nothing in this

chapter shall be construed to interfere with the right of the employer to: (1) carry out the statutory mandate and goals of the agency, and to utilize personnel, methods and means in the most appropriate manner possible. . .”

In addition to these applicable statutory provisions, the State requests that we apply the precedent established by the Board in International Brotherhood of Police Officers, Local 475 v. City of Burlington, 7 VLRB 356 (1984). There, the Board was presented with the issue of whether the City of Burlington’s unilateral change in the days on which police officers would be paid violated the City’s duty to “bargain in good faith with regard to wages, hours and conditions of employment” under the provisions of the Municipal Employees Relations Act. The Board declined to issue an unfair labor practice complaint because it found that the “actual impact on workers . . . appear(ed) to be de minimis.” The State contends that the de minimis standard should be applied in this case.

We decline to apply the de minimis standard adopted under the Municipal Act. In Vermont State Colleges, supra, the Vermont Supreme Court determined that resort to precedents established under the National Labor Relations Act was not appropriate in determining the scope of bargaining under SELRA where a comparison of the relevant provisions of the two acts indicated that they are more different than they are alike. 138 Vt. at 454. The same logic applies here. Resort to precedent under the Municipal Act is not appropriate in determining the scope of bargaining under SELRA where the relevant provisions of the Municipal Act are similar to those of the National Labor Relations Act, and thus are more different from SELRA than alike.

Nonetheless, the State also requests that the Board adopt the position of the National Labor Relations Board that, in order for a statutory bargaining obligation to

arise with respect to a particular change unilaterally implemented by an employer, such change must be a "material, substantial and significant" one affecting the terms and conditions of employment of bargaining unit employees. Alamo Cement Co., 281 NLRB 737, 738 (1986). Weather Tec Corp., 238 NLRB 1535, 1536 (1978. We decline to adopt this standard. Again, resort to precedents established under the National Labor Relations Act is not appropriate in determining the scope of bargaining under SELRA where the relevant provisions of the two acts are more different than they are alike. Vermont State Colleges, supra

We turn to applying the applicable statutory provisions and precedents under SELRA to each provision of the electronic communications policy which VSEA contends constitutes an improper unilateral change. VSEA first contends that the application of the electronic communications policy has been broadened by making it applicable "to electronic communications or transactions in which a state employee represents him/herself as a State employee, regardless of whether he or she is using or accessing State equipment." VSEA asserts that this represents entirely new language which was not even remotely referenced in the previous policy implemented in 1999, and that the State was required to bargain such a significant expansion of the policy.

This provision concerns the employer-employee relationship since employees may be subject to discipline for electronic communications or transactions, such as email communications, in which they represent themselves as state employees even though they are not using or accessing state equipment. Also, the State has not demonstrated that this matter is prescribed or controlled by statute.

This would mean that the State has committed an unfair labor practice by implementing this provision of the policy if VSEA can demonstrate that it constitutes a unilateral change by the State. A unilateral change by an employer impacting the employer's decision whether to discipline employees clearly concerns the employer-employee relationship, and thus constitutes an improper change on a required subject of bargaining. Vermont State Employees' Association v. State of Vermont (Re: Department of Corrections Disciplinary Guidance Memorandum), 29 VLRB 145, 158 (2007); *Affirmed*, ___ Vt. ___ (Sup.Ct.Doc.No. 2007-213, 2009). VSEA v. State of Vermont (Re: Polygraph Examinations), 7 VLRB 256, 259 (1984).

We conclude that VSEA has not demonstrated that a unilateral change is involved here. In making this determination, our analysis extends beyond just comparing the contents of the revised electronic communications policy issued in 2007 with the 1999 electronic communications policy. VSEA correctly points out that the 1999 policy has no comparable language to the pertinent provision of the revised policy.

However, this does not mean that employees previously were not subject to possible discipline as a result of electronic communications where they represented themselves as state employees even if they were not using or accessing state equipment. Since 1996, Policy 5.6 of State Personnel Policies and Procedures has provided that "(e)mployees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty." At all times relevant, this personnel rule provided an appropriate basis to discipline an employee for improper electronic communications where they represented themselves as state employees even if

they were not using or accessing state equipment. To more specifically articulate conduct already prohibited does not trigger a change obligating the State to bargain.

Also, the Board issued a decision in 1999 upholding the discipline of a state employee for improper email communications even though he was not using or accessing state equipment. The case involved the disciplinary demotion of a correctional officer for sending an offensive and disruptive email message from his home addressed to all Department of Corrections employees that encouraged disrespect of his superiors and defiance of their directives. The employee contended that he did not have fair notice that he could be disciplined for sending e-mail to other employees from his home. The Board disagreed, and ultimately upheld the discipline. Grievance of Paolillo, 22 VLRB 200 (1999). This case demonstrates the appropriate discipline of a state employee prior to 2007 on a matter falling within the coverage of the provision of the 2007 policy contested by VSEA. VSEA has not demonstrated that other state employees also could not have been disciplined in a similar manner.

In sum, VSEA has not demonstrated that a unilateral change is involved here. Further, it is evident that the provision of the revised policy making it applicable to electronic communications or transactions in which a state employee represents himself or herself as a State employee, regardless of whether he or she is using or accessing State equipment, was added due to the increased ability of state employees to access their state e-mail from locations such as their home through equipment not owned by the State. In this light, the provision is most appropriately viewed as constituting an update to personnel rules reflecting technology changes which do not result in a substantive change in employees' conditions of employment.

VSEA next contends that the electronic communications policy has been impermissibly broadened by prohibiting computer users from using any type of file removal/deletion program on any state computer system without assistance and approval of authorized agency representatives. VSEA contends that this clearly represents a change to employee working conditions since file/deletion programs did not exist until the last five years or so, and thus this conduct could not have been prohibited in the 1999 policy.

This new provision of the revised policy concerns the employer-employee relationship since employees may be subject to discipline if they use a file removal/deletion program on a state computer system without assistance and approval of authorized agency representatives. Nonetheless, this does not result in a conclusion that the State violated its bargaining duty by unilaterally enacting this provision.

The provision was added due to a significant recent change in the ability of a user to delete files in a computer system. The ability to delete files was difficult in 1999 and was limited to experienced computer experts. By 2007, the ability to purchase an inexpensive program to delete files in a computer system was available to average computer users and easier to use. The danger exists of an average computer user disrupting mandated core services of a State agency if they delete files improperly. In order to carry out its statutory mandates and goals, the State has the right and the obligation to seek to protect its computer systems from being damaged and its computer files from being destroyed. In so doing, it is permissible for the State to prohibit employees from using a file deletion/removal program without assistance and approval of agency administrators so that potential damage to computers and agency files is avoided.

In sum, we conclude that this matter is controlled by the statutory language of 3 V.S.A. Section 905, which provides the employer with the right to "carry out the statutory mandate and goals of the agency", and that there was no obligation for the State to bargain with VSEA over this provision. In so ruling, we recognize the broad scope of bargaining under SELRA and that the provisions of Section 905(b) are explicitly subject to bargaining rights granted by SELRA. Nonetheless, we presume that the legislature enacted Section 905(b) with the intent that it be given some effect. We conclude that it is a fair interpretation of Section 905(b), when construed together with other provisions of SELRA, that the State has the right to protect its computer systems from damage as covered by the revised policy without bargaining with VSEA. VSEA v. State of Vermont (Re: Involuntary Transfer of Fish and Game Warden Ronald Gonyaw), 7 VLRB 8, 25-26 (1984).

We emphasize that our ruling is limited to the facts of this case where the potential exists for damage to State computer systems and data which directly impact the statutory mandate of the State to complete its mission. Preserving the integrity of its computer systems and data that go to the core of State operations and services is a management right that does not have to be bargained.

Our conclusion on this provision is consistent with the prohibition on hacking contained in the revised policies, which VSEA has not challenged. Hacking can result in damage to state property and data. A state agency has the right to protect unauthorized access to its computers, computer networks, databases, data, or electronically stored information. In order to carry out its statutory mandate and goals, it is permissible for the State to prohibit employees from engaging in such conduct.

VSEA further contends that the electronic communications policy has been improperly expanded by prohibitions on developing or maintaining a personal web page (e.g., Facebook, MySpace) in Rule 7 of the revised policy. VSEA asserts that this represents a substantial change to working conditions. This provision concerns the employer-employee relationship since employees may be subject to discipline for violating it. Also, the State has not demonstrated that this matter is prescribed or controlled by statute. This would mean that the State has committed an unfair labor practice by implementing this provision of the policy if VSEA can demonstrate that it constitutes a unilateral change by the State. The State's rationale for including the prohibition is that it could use a problematic amount of the State's available bandwidth.

We conclude that VSEA has demonstrated a unilateral change concerning this issue. The statement that "developing or maintaining a personal web page on or from a State device is prohibited" is too ambiguous to understand what is being prohibited. For example, posting text to a personal web page takes very little bandwidth. Posting files to a webpage on the other hand can take substantial bandwidth. The revised policy does not distinguish between these significantly different uses. It does not make clear what is meant by developing and maintaining a personal web page, and does not provide sufficiently clear guidance to an employee trying to comply with the policy.

The provisions of the 1999 policy regarding limited personal use, particularly the standard not to impose a burden on State resources, could have served as an appropriate basis for State agencies to prohibit employees from posting large files in developing or maintaining personal web pages on a State computer. However, Rule 7 of the revised

policy goes beyond this prohibition. An employee apparently now would commit a *per se* violation of the revised policy, and be subject to possible discipline, for updating or adding text to a personal web page on his or her own time from a State computer.

This is so even though such actions may result in no greater burden on state resources than other limited personal use of electronic communications systems by employees which is permitted. Under the 1999 policy, it is evident that such conduct would be assessed on a case by case basis to determine whether it was "authorized personal use" of a State computer, rather than constitute a *per se* violation. The State and VSEA could have negotiated reasonable standards to clearly reflect the differences in burden on State resources resulting from developing and maintaining a personal web page. The State committed the unfair labor practice by instead making the unilateral change of implementing Rule 7 of the revised policy.

VSEA also contends that Rule 8 in the revised electronic communications policy significantly broadened the prohibition on the use of agency systems or printers for offensive or disruptive purposes through inappropriate references to a person's characteristics by stating: "Any inappropriate reference, regardless of whether presented as a statement, language, image, email signature block, audio file, or in any other way that is reasonably likely to be perceived as offensive or disparaging of others on the basis of race, color, age, gender, sexual orientation, gender identity, religions, national origin or disability is also prohibited." VSEA contends that an improper unilateral change occurred here because: 1) employees may now be disciplined for conduct for which they previously were not on notice they could receive discipline; 2) the prohibition can also apply to messages sent from any employee's personal email account; and 3) it can even

apply to any electronic communication where an individual makes reference to being a State employee regardless of whether he or she is on a State computer, a State email, or on State time.

We conclude that VSEA has not established that this provision of the revised electronic communications policy changes employees' conditions of employment from the 1999 policy. The addition of the language in the revised policy detailing the various ways inappropriate references can be presented is most appropriately viewed as constituting an update to personnel rules reflecting technology changes which do not result in a substantive change in employees' conditions of employment. Employees were subject to discipline generally under the 1999 policy for "inappropriate reference" to a person's characteristics. This provided sufficient notice to employees of possible discipline regardless of the specific method they used to make the alleged inappropriate reference Again, to more specifically articulate conduct already prohibited does not trigger a change obligating the State to bargain.

VSEA also has not established that the revised policy contains a prohibition on messages sent from an employee's personal email account, messages sent on a non-state computer, or messages sent on an employee's own time that differs from the 1999 policy. The revised policy is no different from the 1999 policy in this regard because under both policies the prohibitions are limited to "(u)se of agency systems or printers" and there are no references under either policy to employees' off-duty activities.

VSEA next contends that Rule 13 of the revised policy contains an obvious example of a new prohibition from what existed in the 1999 policy in providing that "(u)se of State Internet services for purposes of accessing sites that provide streaming

audio or video material for non-work related purposes is prohibited." The State's rationale for including the prohibition on accessing streaming audio or video material for non-work related purposes is that it could use a problematic amount of the State's available bandwidth.

VSEA questions the validity of this rationale because "accessing sites that provide streaming audio or video" is significantly different than actually playing streaming audio or video. We disagree with VSEA's interpretation of this provision. "Access" is defined under the revised policy as "the ability to enter a system or application or the act of doing so, depending on context". Given that the context of the provision being implemented was an effort to limit the amount of the State's bandwidth being used, we conclude that "access" as used in this provision refers to the act of actually playing streaming audio or video.

VSEA further questions the validity of the rationale because streaming audio takes up significantly less bandwidth than streaming video, and some relatively innocuous uses of streaming audio are expressly prohibited even though those uses may not cause any disruption in the State's systems. We disagree that this provision constituted an improper unilateral change.

The functioning of the State computer system can be compromised if too much of the State's bandwidth is being used at a particular time, and streaming audio or video particularly has the potential of taking a considerable amount of the State's bandwidth. The 1999 policy provided that personal use of State computers for Internet services would not be allowed if the use "impose(d) a burden on State resources as a result of frequency or volume of use". This policy could have served as an appropriate basis for

State agencies to prohibit the playing of streaming audio and video for non-work related purposes and to discipline an employee for not complying. The provision in the revised policy is most appropriately viewed as constituting an update to personnel rules reflecting technological changes which do not result in a substantive change in employees' conditions of employment.

The final contention by VSEA is that Rule 14 of the revised policy constitutes an improper unilateral change by banning "use of State computer systems for solicitation for charitable or other causes . . . except for officially-sanctioned activities." We disagree that this involves a unilateral change. The conduct prohibited in Rule 14 already was prohibited in the following provision of Policy 11.6 of the State Personnel Policies and Procedures: "The soliciting of money, contributions, subscriptions, organizational or group membership, commercial soliciting and vending of all kinds, the display or distribution of commercial advertising, pamphlets, handbills and flyers, or the collection of premiums, payments or private debts, and campaigning in or on State property, both during and after normal working hours, is prohibited, unless or otherwise permitted by law or State building rules."

Rule 14 simply makes explicit what is implied in interpreting the provisions of Policy 11.6 – that the State's non-solicitation policy specifically applies to email and other uses of the State's computer systems. Again, the provision in the revised policy is most appropriately viewed as constituting an update to personnel rules reflecting technology changes which do not result in a substantive change in employees' conditions of employment.

In sum, we conclude that the State has interfered with employee rights and violated its duty to bargain in good faith only to the extent of unilaterally implementing the provision in Rule 7 of the revised Policy 11.7 that prohibits employees from "developing or maintaining a personal web page on or from a State device" without negotiating with VSEA. VSEA requests as a remedy that the Board order the State to: 1) rescind the unilaterally promulgated changes to Policy 11.7; 2) cease and desist from engaging in all activities which constitute unfair labor practices with respect to the revised policy; 3) make employees whole for any and all losses or discipline suffered as a result of the revised policy; 4) post, in prominent locations and via email, notice to all State employees of the Board Order in this matter; and 5) pay reasonable attorney fees and costs to VSEA.

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

We will require the Employer to rescind the provision in Rule 7 of the revised Policy 11.7 that prohibits employees from "developing or maintaining a personal web page on or from a State device" without negotiating with VSEA, and give it no further

force and effect, and to cease failing to bargain in good faith with VSEA over this matter. The Employer also needs to ensure that our decision that an unfair labor practice has been committed is communicated broadly to employees affected by the issuance of the revised Policy 11.7. This will require the Employer to post this decision on bulletin boards normally used for employer-employee communications, and to send all affected employees an e-mail transmission of our Order in this matter.

In ruling on VSEA's request that we make employees whole for any and all losses or discipline suffered as a result of the revised policy, VSEA has not presented evidence of any losses or discipline suffered as a result of the invalidated provision of Rule 7 of the revised policy. Thus, there is no applicable "make whole" order for us to issue in this regard.

We deny VSEA's request that we direct the State to reimburse VSEA for reasonable attorney fees and costs incurred as a result of filing this charge. The Board has recognized that such a remedy is an appropriate exercise of our remedial powers in certain unfair labor practice cases. Rutland School Board v. Rutland Education Association, 2 VLRB 250, 286-87 (1978). Cavendish Town Elementary School Teachers Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 393 (1993). Flood Brook Staff Association v. Flood Brook Union Board of School Directors, 19 VLRB 173, 181 (1996). We conclude that such a remedy is not appropriate in this case in which most of the allegations made by VSEA were not established.

In closing, we express our disappointment that it was necessary for the Board to issue this decision. The parties would have been better served to engage in

communication and, where appropriate, good-faith negotiations before the issuance of the revised electronic communications policy.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons in this unfair labor practice case, Labor Relations Board Docket No. 08-11, Vermont State Employees' Association v. State of Vermont (Re: Electronic Communications Policy), the Vermont Labor Relations Board has concluded that the State of Vermont has committed an unfair labor practice in this matter to the extent set forth in the Opinion, and it is ordered:

1. The State of Vermont refused to bargain in good faith and interfered with employees' exercise of rights, in violation of 3 V.S.A. Section 961(1) and (5), through unilaterally implementing the provision in Rule 7 of the revised Policy 11.7, "Electronic Communications and Internet Use", that prohibits employees from "developing or maintaining a personal web page on or from a State device" without negotiating with VSEA;
2. The Employer shall rescind this provision of Rule 7 of Policy 11.7 and give it no further force or effect;
3. The Employer shall cease and desist from failing to bargain in good faith with the Vermont State Employees' Association over this required subject of bargaining;
4. The Employer shall forthwith post copies of this Order page at all places normally used for employer-employee communications; and
5. The Employer shall forthwith transmit by e-mail to all employees affected by the revised Policy 11.7 this order page in PDF format (provided by the Vermont Labor Relations Board), accompanied by an e-mail message that states in its entirety as follows: "Attached is the Order issued by the Vermont Labor Relations Board in an unfair labor practice case involving Policy 11.7, 'Electronic Communications and Internet Use', issued by the State of Vermont in September 2007.

Dated this 15th day of July, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ Leonard J. Berliner

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Leonard J. Berliner

/s/ James J. Dunn

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James J. Dunn