

VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES'  
ASSOCIATION

V.

STATE OF VERMONT AGENCY  
OF HUMAN SERVICES (RE:  
HIRING STANDARDS POLICY)

DOCKET NO. 08-17

## FINDINGS OF FACT, OPINION AND ORDER

## Statement of Case

On April 28, 2008, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge, alleging that the State of Vermont Agency of Human Services ("AHS") interfered with employee rights and violated its duty to bargain in good faith by unilaterally issuing a hiring standards policy which requires employees to sign background check authorizations and/or submit to fingerprint testing. The AHS filed a response to the charge on June 3, 2008. Following investigation of the charge and attempts to informally resolve it, the Labor Relations Board issued an unfair labor practice complaint on January 23, 2009.

The Labor Relations Board held hearings on the complaint on June 11 and July 14, 2009, in the Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; John Zampieri and James Kiehle. VSEA General Counsel Michael Casey represented VSEA. Michael Seibert, AHS Legal Counsel and Special Assistant Attorney General, represented AHS. The parties filed post-hearing briefs on July 28, 2009.

## FINDINGS OF FACT

1. The AHS employs approximately 3,365 employees. Most of them are represented for exclusive bargaining purposes by VSEA in the Non-Management, Supervisory or Corrections Bargaining Units. The employees work in the Department of Health; the Department for Children and Families; the Department of Corrections; the Office of Vermont Health Access; the Department of Disabilities, Aging, and Independent Living; and the Department of Mental Health, including the Vermont State Hospital.

2. VSEA and the State have negotiated collective bargaining agreements covering employees in the Non-Management, Supervisory and Corrections bargaining units. These agreements address matters pertaining to transfer and promotion of employees, and provide rights for employees who have been laid off to exercise reemployment rights to vacant bargaining unit positions which are being filled. Laid-off employees must meet minimum qualifications for the vacant position, and the vacant position must be of the same or lower pay grade of the position the employee left. The laid-off employee with the most seniority who meets these requirements is entitled to be moved into the vacant position.

3. Gail Rushford, AHS Human Resources Chief, sent a letter dated August 20, 2007, to Anne Noonan, VSEA Director. The letter provided in pertinent part:

The Agency of Human Services is preparing to implement a background check requirement for newly hired employees within the Agency. I am forwarding the draft hiring standards to you as a courtesy, in recognition that you may receive inquiries from your members and also to provide the opportunity for you to ask questions and comment before we finalize the language.

To summarize the new hiring standards, all Agency hires will be subject to a Vermont criminal record check. Driver records and abuse registry checks will be

conducted when applicable. The pre-hire background checks will be conducted prior to a final offer of employment. As a newly established minimum qualification, the checks will apply only to future hiring decisions, including transfers, and will not affect the current employment status of incumbent state employees.

...

(State's Exhibit 1)

4. Noonan sent Rushford a letter dated September 19, 2007, in response. The letter provided in pertinent part:

... In your correspondence you advise that the Agency of Human Services is preparing to implement criminal and other background checks on prospective employees, and existing employees who seek to transfer and/or promote within the state classified service.

State employees are currently able to transfer, promote and move within the classified service. This ability is not conditioned on their having to sign authorizations allowing the employer to conduct criminal and other background checks on them. Under your proposed policy, existing state employees will no longer enjoy the freedom to transfer and promote within the classified service unless they sign such authorizations. In other words, they must either agree to sign such an authorization, or forego any prospect of career advancement within the State. In VSEA's view, conditioning the ability of bargaining unit employees to transfer, promote, or otherwise move within the classified service, as your proposed policy does, broadly encompasses "matters relating to the relationship" between AHS and its union-represented employees, which must be bargained pursuant to 3 V.S.A. §904 of the State Employees Labor Relations Act . . .

If you intend to implement this policy, please consider this letter a formal request that you bargain with VSEA over its substance prior to its implementation. . .

(State's Exhibit 2)

5. Thomas Ball, Director of Employee Relations for the Department of Human Resources, responded to this letter from Noonan by a letter to her dated October 29, 2007. Ball indicated that the State did not believe that it had a duty to engage in collective bargaining with VSEA over the AHS Hiring Standards policy (State's Exhibit 3).

6. The Agency of Human Services implemented a Hiring Standards Policy effective March 3, 2008, which provided as follows:

PURPOSE: To protect client safety and the public interest by establishing a consistent framework for considering the background of prospective AHS employees prior to final hire.

BACKGROUND AND RATIONALE: Changes in Vermont State Law in 2006 broaden employers' ability to conduct criminal record checks on prospective employees. Previously, departments in AHS have established background check policies or practices for specific job roles either as "criminal justice agencies" (Department of Corrections) or "qualified entities" providing care to vulnerable populations. This policy establishes the Agency's general expectations with respect to background checks by requiring general background checks for all prospective employees and more particularized checks for employees in certain positions, as described below.

DEFINITIONS:

Background Check: A background check is the process of collecting any one or a combination of reports about individuals for employment purposes. The scope of a background check can include a range of activities, including but not limited to:

- verification of education/work history
- checking references provided by the applicant
- checking references not provided by the applicant
- checking licensing, suspension, disbarment and "excluded" databases
- checking abuse registries
- reviewing driving records
- reviewing criminal records

SCOPE: This policy applies to all hiring, including exempt, classified, temporary and contractual (on the state payroll) employees, by the Agency of Human Services and all of its departments and offices. "Hiring" includes transfers and promotions as well as new hires.

STANDARDS:

**General Background Check Requirements:**

1. Hiring managers will not extend any offer of employment unless they have, at a minimum, checked references furnished by the applicant. Reference checks and verification of work history should also include follow up with prior supervisors of the applicant. As educational

credentials are not confirmed during the application process, they may also be verified, particularly when directly germane to the requirements of the position. Certain positions may require additional checks, as described below. Outcomes of all reference check activity should be reduced to writing and placed in the hiring folder.

2. If an applicant chosen as a finalist for a position listed a criminal conviction on the employment application, the hiring manager should follow up with the applicant during the interview and reference checking process for the applicant's explanation of the nature and dates of the conviction.
3. All finalists for positions with federal funding must be checked against the "Excluded Parties List System" maintained on-line by the General Services Administration. An additional check of the exclusions database maintained by the federal Health and Human Services Office of the Inspector General is advised when hiring health care professionals. Hiring managers must consult with their Personnel Administrator if a finalist for hire is on an exclusion list to assess the impact the exclusion has on the hiring decision.
4. The credentials of all finalists for positions requiring a professional license must be verified against the database maintained by the Vermont Secretary of State or other appropriate licensing agency prior to a final or conditional offer of employment.

#### **Motor Vehicle, Registry & Criminal Background Check Requirements:**

To further protect the public interest, as well as to ensure that the employees hired by the Agency do not pose a risk to those served, the Agency of Human Services will conduct a record check of prospective employees. The record checks outlined below require written consent of the applicant and are appropriate only after a conditional offer of employment has been made. The forms to initiate the record check(s) must be signed by the prospective employee and submitted by the hiring manager to the AHS HR Unit. The AHS HR Unit will process the record check and communicate the results to the hiring manager. If the record check results reveal a potential concern about the applicant, the AHS HR Unit will consult with the hiring manager regarding the impact on the job offer. If the HR staff and hiring manager are unable to reach a mutual conclusion about withdrawing a job offer on the basis of the candidate's record check, the matter will be reviewed with the department commissioner for final determination as appointing authority.

##### **1) Motor Vehicle Driver Check**

This record check is required for any position being filled where client transport (in either state or personal vehicles) is expected as part of the regular job duties.

Assessment of possible disqualification for the position due to the results of the record check will be made on a case-by-case basis and will include consideration of the seriousness of the offense(s), time elapsed since the offense(s) and whether or not there were multiple or repeated offenses.

## 2) Vermont Abuse Registry Checks

The registries described below must be checked when applicable to any position being filled where the duties involve providing care, custody, treatment, transportation or supervision of children or vulnerable adults as defined by statute (33 V.S.A. Sec. 6902).

- a) Child Abuse Registry –database maintained by the Department for Children and Families to provide information about people who have been substantiated for abuse, neglect, and/or exploitation of children.
- b) Adult Abuse Registry – database maintained by the Department of Disabilities, Aging and Independent Living to provide information about people who have been substantiated for the abuse, neglect and/or exploitation of vulnerable adults.

A diligent effort will be made to query similar out-of-state records pertaining to candidates who are from out-of-state or have been residents of Vermont for less than five years. If such records are available, the candidates will be checked against the registries from the state(s) where they have lived in the preceding ten years.

Candidates for a position subject to the abuse registry checks described above will generally be disqualified on the basis of any history of abuse, neglect, or exploitation. Exceptions may be deemed appropriate based on an assessment of mitigating factors. Such factors will minimally include (but not be limited to):

- the position type and the nature of direct and/or unsupervised services provided;
- age of the individual at the time of the substantiation;
- nature and seriousness of the substantiation;
- the person's involvement with the criminal justice system and/or human services system since the substantiation;
- the amount of time that has passed since the substantiation; and
- the candidate's overall record including current references and recommendations of past employers.

## 3) Criminal Record Checks

- a) A criminal record check may be conducted on two levels:
  - 1. Vermont, which is obtained from the Vermont Criminal Information Center (VCIC) and is available to any employer. A state record check includes the sex offender registry.

2. National, which is obtained from the Federal Bureau of Investigation (FBI) through VCIC and is available only in certain employment situations, including criminal justice agencies and qualified entities under the National Child Protection Act. These are fingerprint-supported record checks which require the candidate to be fingerprinted at an Identification Center, which is generally a local law enforcement agency. A national record check includes information on federal offenses and state offenses reported to the national database, as well as a check of Vermont criminal records and sex offender registry.

- b) The Agency of Human Services requires a Vermont criminal record check for any position being filled.
- c) A National record check will also be required, to the extent permitted by law, in those situations where a candidate has been a Vermont resident for less than 5 years.
- d) Departments in AHS may opt to implement a general requirement for National record checks based on the particular needs of the department. Due to the administrative and legal issues affecting background checks and employment practices, such department procedures must be reviewed and approved by the HR Unit prior to implementation.
- e) Disqualification based on criminal history  
In those cases where the chosen applicant has a criminal record, the AHS HR Unit will consult with the hiring manager to determine the candidate's fitness for the job in question in light of the conviction. Many factors will enter into this assessment, including the philosophies underlying the AHS 4 Key Practices and the guiding principle of Corrections that people can change. Accordingly, this policy does not define disqualifying criminal offenses. Rather, AHS adopts the directives of the federal Equal Employment Opportunity Commission (EEOC) in setting general standards for consideration of background checks and determining whether or not an individual candidate will be disqualified for employment on the basis of conviction or arrest records. As specified in EEOC Directive #915.003 dated 4/19/06, the criteria for disqualification shall be job related and consistent with business necessity:

“... [W]ith respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the

sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.”

Departments may establish disqualification criteria based on job roles and business necessity, provided that a waiver process is also established.

**Applicability:**

- 1) This policy applies to prospective employees for positions under recruitment, including external and internal applicants.
- 2) When permitted by department policy or authorized by the appointing authority, a hiring manager may rely on the results of a previous motor vehicle, registry and/or criminal record check when hiring an internal applicant for another position in the same department.
- 3) Any department seeking to conduct background checks on incumbent employees who are not changing positions must consult with the HR Unit to determine if this is permitted within law and the collective bargaining agreements.

**Implementation and Responsibilities:**

The AHS HR Unit will consult with each department regarding the process for screening background checks and to specify the internal procedures for: 1) obtaining and documenting the background check data; 2) maintaining confidentiality; and 3) ensuring that the background check standards are applied consistently. These internal procedures will provide a process for hiring managers to: a) document completion of general background requirements; b) initiate appropriate motor vehicle, registry, and criminal record checks; and c) receive confirmation from the HR Unit that the record check process is completed.

Hiring managers must ensure that the offer of employment is strictly conditional until the required background checks have been completed. Therefore, departments may not hire candidates while the process for a motor vehicle, abuse registry or criminal background check is pending unless both of the following conditions are met:

1. The candidate will start work in original probation and is informed in writing that the background check is pending and that s/he will be subject to termination if the



background check results are found to be disqualifying or of a nature that causes management to lose confidence that the applicant should continue to work in the probationary position.

2. The candidate will start work in a capacity that does not place the public or vulnerable populations at risk.

The AHS HR Unit will ensure that job postings specify that candidates must pass any level of background investigation applicable to the position, including a criminal record check. The AHS HR Unit will coordinate with hiring managers and the Department of Human Resources to include similar language regarding the background check requirement in revisions of AHS job class specifications.

#### COMPLIANCE:

Adherence to this policy and related protocols is a shared responsibility of the AHS HR Unit, Appointing Authorities, and hiring managers. The AHS HR Unit will develop the form(s) to use in documenting compliance.

#### ENFORCEMENT

The AHS HR Unit will administer this policy through its internal processes. A personnel action to hire a new employee will not be processed until appropriate documentation is received.

(State's Exhibit 5)

7. In enacting Policy 4.02, AHS relied in part on 20 V.S.A. §2056c to perform a Vermont Criminal Record Check for any position being filled by a new person, including transfers and promotions as well as new hires (State's Exhibit 6). Subsequent to the enactment of Policy 4.02, 20 V.S.A. §2056c was amended effective July 1, 2008, to provide in pertinent part:

(a) As used in this section:

- (1) "The center" means the Vermont criminal information center.
- (2) (A) "Criminal conviction record" means the record of convictions in a Vermont district court.

...

(b) A person may obtain from the center a criminal conviction record for any purpose provided that the requestor has completed a user's agreement with the center. The user's agreement shall prohibit the alteration of criminal records and shall require the requestor to comply with all statutes, rules, and policies

regulating the release of criminal conviction records and the protection of individual privacy.

(c) Criminal conviction records shall be disseminated to the public by the center under the following conditions:

- (1) Public access to criminal conviction records shall be provided by a secure Internet site or other alternatives approved by the center.
- (2) A requestor who wishes to receive criminal conviction records from the center shall accept the terms of a user agreement with the center. The user agreement shall specify the conditions under which record information is being released and specifies guidelines for the proper interpretation and use of the information.
- (3) Prior to receiving criminal conviction records using the center's Internet site, a requestor shall establish a secure, online account with the center. Issuance of the account is conditioned upon the requestor's willingness to accept the terms of a user agreement with the center which specifies the conditions under which record information is being released and specifies guidelines for the proper interpretation and use of the information.
- (4) All queries shall be by name and date of birth of the subject.
- (5) Only "no record" responses and record responses which constitute an exact match to the query data shall be returned automatically online. In the event that query criteria suggest a possible match, center staff will determine whether the query criteria match a record in the repository and shall return the result to the requestor.

...

8. Due to the change in 20 V.S.A. §2056(c) effective July 1, 2008, employers and members of the public may obtain from the Vermont Criminal Information Center ("VCIC") a criminal conviction record for any purpose provided the requestor has filed a user agreement with VCIC. Prior to July 1, 2008, requestors of criminal conviction records were required to submit a release form signed by the subject of the search authorizing the search. The changes to the law apply only to Vermont criminal record checks and not to national record checks sought from the Federal Bureau of Investigation (State's Exhibits 14, 15, 16).

9. In enacting Policy 4.02, AHS relied in part on 33 V.S.A. §6911 to perform an Adult Abuse Registry Check for any position being filled by a new incumbent, where

the duties involve providing care, custody, treatment, supervision, or transportation of children or vulnerable adults (State's Exhibit 6). 33 V.S.A. §6911; which concerns records of abuse, neglect and exploitation of vulnerable adults; provides in pertinent part:

(a) Information obtained through reports and investigations, including the identity of the reporter, shall remain confidential and shall not be released absent a court order, except as follows:

(1) The investigative report shall be disclosed only to: the commissioner (of the department for children and families) or person designated to receive such records; persons assigned by the commissioner to investigate reports; the person reported to have abused, neglected or exploited a vulnerable adult; the vulnerable adult or his or her representative; the office of professional regulation when deemed appropriate by the commissioner; a law enforcement agency, the state's attorney, or the office of the attorney general, when the department believes there may be grounds for criminal prosecution, or in the course of a criminal investigation. When disclosing information pursuant to this subdivision, reasonable efforts shall be made to limit the information to the minimum necessary to accomplish the intended purpose of the disclosure, and no other information, including the identity of the reporter, shall be released absent a court order.

(2) Relevant information may be disclosed to the secretary of the agency of human services, or the secretary's designee, for the purpose of remediating or preventing abuse, neglect or exploitation, to assist the agency in its monitoring and oversight responsibilities, and in the course of a relief from abuse proceeding, guardianship proceeding, or any other court proceeding when the commissioner deems it necessary to protect the victim, and the victim or his or her representative consents to the disclosure. When disclosing information pursuant to this subdivision, reasonable efforts shall be made to limit the information to the extent necessary to accomplish the intended purpose of the disclosure, and no other information, including the identity of the reporter, shall be released absent a court order.

(b) The commissioner shall maintain a registry which shall contain the following information: the names of all individuals found on the basis of a substantiated report to have abused, neglected or exploited a vulnerable adult; the date of the finding; and the nature of the finding. . .

(c) The commissioner or the commissioner's designee may disclose registry information only to:

. . .

(3) an employer if such information is used to determine whether to hire or retain a specific individual providing care, custody, treatment, transportation or supervision of children or vulnerable adults. "Employer", as used in this section, means a person or organization who employs or contracts with one or more individuals to care for or provide transportation services to children or vulnerable adults, on either a paid or volunteer basis. The employer may submit

a request concerning a current employee, volunteer, grantee, or contractor or an individual to whom the employer has given a conditional offer of a contract, volunteer position, or employment. The request shall be accompanied by a release signed by the current or prospective employee, volunteer, grantee, or contractor. If that individual has a record of a substantiated report, the commissioner shall provide the registry information to the employer;

...

(d) An employer providing transportation services to children or vulnerable adults may disclose registry records obtained pursuant to subdivision (c)(3) of this section to the agency of human services or its designee for the sole purpose of auditing the records to ensure compliance with this chapter. An employer shall provide such records at the request of the agency or its designee. Only registry records regarding individuals who provide direct transportation services or otherwise have direct contact with children or vulnerable adults may be disclosed.

...

10. In enacting Policy 4.02, AHS relied in part on 33 V.S.A. §4919 to perform a Child Abuse Registry Check for any position being filled by a new incumbent, where the duties involve providing care, custody, treatment, supervision, or transportation of children or vulnerable adults (State's Exhibit 6). The Department for Children and Families maintains a child protection registry which contains a record of all investigations that have resulted in a substantiated report of child abuse. 33 V.S.A. §4919 relates to disclosure of the records of the registry, and provides in pertinent part:

(a) The commissioner (of the Department for Children and Families) may disclose a registry record only as follows:

...

(3) To an employer if such information is used to determine whether to hire or retain a specific individual providing care, custody, treatment, transportation, or supervision of children or vulnerable adults. The employer may submit a request concerning a current employee, volunteer, grantee, or contractor or an individual to whom the employer has given a conditional offer of a contract, volunteer position, or employment. The request shall be accompanied by a release signed by the current or prospective employee, volunteer, grantee, or contractor. If that individual has a record of a substantiated report, the commissioner shall provide the registry information to the employer. The employer shall not disclose the information contained in the registry report.

...

(b) An employer providing transportation services to children or vulnerable adults may disclose registry records obtained pursuant to subdivision (a)(3) of this section to the agency of human services or its designee for the sole purpose of auditing the records to ensure compliance with this subchapter. An employer shall provide such records at the request of the agency or its designee. Only registry records regarding individuals who provide direct transportation services or otherwise have direct contact with children or vulnerable adults may be disclosed.

...

(e) “Employer”, as used in this section, means a person or organization who employs or contracts with one or more individuals to care for or provide transportation services to children or vulnerable adults, on either a paid or volunteer basis.

11. 42 U.S.C. §5119 provides in pertinent part:

(a) In general

In each State, an authorized criminal justice agency of the State shall report child abuse crime information to, or index child abuse crime information in, the national criminal history background check system. A criminal justice agency may satisfy the requirement of this subsection by reporting or indexing all felony and serious misdemeanor arrests and dispositions.

...

(c) Liaison

An authorized agency of a State shall maintain close liaison with the National Center on Child Abuse and Neglect, the National Center for Missing and Exploited Children, and the National Center for the Prosecution of Child Abuse for the exchange of technical assistance in cases of child abuse.

...

12. In enacting Policy 4.02, AHS relied in part on 18 U.S.C. §2723 to perform a Motor Vehicle Driver Check for any position where client transport is part of the regular job duties (State’s Exhibit 6). 18 U.S.C. §2723 provides for criminal fines on a person who knowingly violates federal law prohibiting the release and use of certain personal information from state motor vehicle records, and civil penalties for state departments of motor vehicles that do not substantially comply with such law.

13. AHS Policy 4.02 resulted in a change for existing state employees, both inside and outside AHS, when they sought a transfer or promotion to a position in AHS.

Prior to implementation of the policy, AHS did not require all existing state employees applying for transfers or promotions to AHS positions to submit to criminal record background checks. Upon implementation of the policy on March 3, 2008, AHS began requiring all existing state employees applying for transfers or promotions to AHS positions to submit to Vermont criminal record checks if they were made a conditional offer of employment. Subsequent to implementation of the policy and prior to July 1, 2008, AHS was required to submit a release form signed by the subject of the criminal conviction record search to obtain criminal conviction records. Due to the statutory change in 20 V.S.A. §2056c effective July 1, 2008, discussed in Findings of Fact Nos. 7 and 8, employers and members of the public may obtain from the Vermont Criminal Information Center a criminal conviction record for any purpose provided the requestor has filed a user agreement with VCIC. As a result of the statutory change, AHS no longer requires job applicants to sign a form authorizing VCIC to provide Vermont criminal conviction records to AHS.

14. There are other background checks that remain in effect for employees seeking transfer or promotion to AHS positions that were initiated by implementation of the hiring standards policy. Employees seeking promotion or a transfer have to undergo: 1) a Motor Vehicle Driver check if client transport is expected as part of regular duties; 2) Child Abuse Registry and Adult Abuse Registry checks if the duties involve providing care, custody, treatment, transportation or supervision of children or vulnerable adults; and 3) a National criminal record check through the Federal Bureau of Investigation for any position being filled where the person has been a Vermont resident for less than five

years. Further, the hiring standards policy requires state employee applicants to submit to fingerprint testing if they are required to undergo a National criminal record check.

15. The Consent For Release of Information form for information in the Adult Abuse Registry referenced in Policy 4.02 requires the job applicant by his or her signature on the form to authorize the Commissioner of Disabilities, Aging and Independent Living to release to AHS any information on reports of abuse, neglect or exploitation substantiated against the applicant contained in the Adult Abuse Registry (State's Exhibit 10).

16. The form requesting information from the Vermont Child Abuse and Neglect Registry referenced in Policy 4.02 requires the job applicant by his or her signature on the form to authorize the Department for Children and Families to disclose to AHS whether the applicant has a Child Abuse and Neglect Registry record and, if so, the details of that record (State's Exhibit 11).

17. The Vermont DMV Record Request form referenced in Policy 4.02 requires the job applicant by his or her signature to authorize AHS to perform a one-time search of Vermont Department of Motor Vehicles files pertaining to the applicant and any resulting reports (State's Exhibit 12).

18. The FBI National Record Check Release Form for a national criminal record check referenced in Policy 4.02 requires the job applicant by his or her signature on the form to agree to a check of any criminal record of convictions which may be obtained by the FBI, and to understand that the results of that check will be made available to AHS for use in reviewing the applicant's suitability for employment. The

applicant also is required to submit to a fingerprinting test as part of the national criminal record check (State's Exhibit 9).

19. Dave Clark currently is a Systems Developer III with the Department for Children and Families within AHS. Clark has worked for AHS for 31 years and has held various positions, including positions that involve contact with vulnerable populations. He has been promoted several times. When Clark first began working for AHS as a WIC ("Women, Infants and Children") Program Clerk, he was not required to undergo a criminal background check. He was not required to sign consent forms authorizing AHS to obtain his Department of Motor Vehicles ("DMV") records, Adult or Child Abuse Registry information, or criminal history at any time during his employment with AHS. In January 2009, when Clark was promoted to his current position, Clark underwent a criminal background check. At this time, he was not required to sign consent forms for release of VCIC records, DMV records, or Adult or Child Abuse Registry information as a condition of his promotion. The position to which he was promoted involved no contact with vulnerable populations.

20. Terry Lefebvre currently is an employee with the Department of Health within AHS. She has worked for AHS for 36 years. She has had regular contact with children and other vulnerable populations. When Lefebvre was first hired by AHS, she was not required to undergo a criminal background check or to sign consent forms authorizing AHS to obtain her DMV records, or Adult or Child Abuse Registry information. Lefebvre was not required to sign consent forms or authorize a criminal background check as a condition of any of her transfers or promotions within the Department of Health prior to March 3, 2008.



21. Rozalynn Lavallee has worked for the Department of Health within AHS for 23 years. Her work has involved contact with children and other vulnerable populations. In 1981, when she began working for the Department of Health as a Public Health Nurse, she was not required to undergo a criminal background check or to sign consent forms authorizing her employer to obtain her DMV records, or Adult or Child Abuse Registry information. She later left state service to work for another employer. She returned to the Department of Health in 1994, and was not required at that time to undergo a criminal background check or sign any consent forms. She was promoted within the Department twice between 1994 and March 3, 2008. Each time she applied for positions within AHS during her years of employment, she did not have to undergo a criminal background check or sign any consent forms. She has not applied for a transfer or promotion within AHS since March 3, 2008.

22. The Department of Corrections (“DOC”) has had a practice for more than 15 years of conducting criminal record checks on applicants for Correctional Officer positions whom were not currently employed by DOC or elsewhere in state government. An existing DOC employee was not required to undergo a new criminal record check if they were transferred within the department.

23. DOC implemented Policy #122.01, “New Employee Selection”, effective October 2, 2006. It provides that “(a)ny job applicant convicted of a felony is ineligible for employment with the Department without an approved waiver”, and that “(a)n applicant with a misdemeanor conviction must remain crime-free for a period of five (5) years beyond the date of conviction or release from correctional supervision, whichever is later, or have received an approved waiver.” Policy 122.01 requires DOC to “conduct

criminal record checks of the applicant before a job offer is made”. Applicants are required to complete a Court Involvement Form and list “all convictions including driving offenses”. Policy 122.01 does not require current employees to sign authorizations to release adult or child abuse registry information (State’s Exhibit 26).

24. DOC employees are required under a DOC work rule to disclose to DOC any criminal arrest, investigation or conviction.

25. Prior to 2007, the Vermont State Hospital (“VSH”) did not perform background checks on its employees when they sought a transfer or promotion within VSH. VSH required applicants for VSH positions who were outside of state government, and applicants who were employed in state government in agencies outside of VSH, to sign authorizations for a criminal background check and Adult Abuse Registry information beginning in 2002 (State’s Exhibit 27, pages 2 – 7).

26. In 2007, VSH required all its employees who had not already been required to sign authorizations for criminal background and adult abuse registry checks to authorize such checks. VSEA filed an unfair labor practice charge against VSH as a result of this action. The parties resolved the charge. As a part of the settlement agreement, VSH agreed that it would not require background checks for current employees in the future unless a court ordered it, it was agreed to by VSEA, or the Labor Relations Board authorized it.

27. Pamela Shover was hired at VSH as a Psychiatric Technician in 2002. As a new hire from outside state employment, she was required to sign authorizations for a criminal background check and Adult Abuse Registry information. She transferred or was promoted to three VSH positions involving admissions or scheduling during the next

three years. She was not required to sign authorizations or release forms as a condition of the transfers and promotion. Shover left state employment in late 2006. She returned to VSH as a temporary Psychiatric Technician in December 2007. She was required at this time to sign authorizations for a criminal background check and Adult Abuse Registry information. She became a permanent Psychiatric Technician in June 2008. She then moved to a Scheduling Coordinator position in April of 2009. VSH required her to again sign authorizations for a criminal background check and release of Adult Abuse Registry information.

28. The Division of Vocational Rehabilitation is within the Department of Disabilities, Aging and Independent Living (“DAIL”), a department in AHS. Prior to implementation of AHS Policy 4.02, the Division did not require current Division employees to submit to background checks in order to move to another Division position. At some time prior to February 2006, the Division implemented a policy requiring all “new hires” to authorize a criminal record check and release of Adult Protective Services registry information. There is one example of an existing state employee from outside the Vocational Rehabilitation Division who was required to undergo a criminal record check, and to consent to release of criminal record information, upon applying for a position in the Division. The policy also provided that the Division would perform a Department of Motor Vehicles record check on new hires who would be transporting clients. There is no evidence that VSEA was notified of this policy (State’s Exhibit 25).

29. 20 V.S.A. §2056e, which was amended effective June 27, 2002, provides in pertinent part:

- (a) The department of buildings and general services shall obtain from the Vermont criminal information center a Vermont criminal record, an out-of-state

criminal record, and a record from the Federal Bureau of Investigation for any applicant for a state security personnel position who has given written authorization, on a release form prescribed under section 2056c of this chapter, pursuant to the provisions of this subchapter and the user's agreement filed by the commissioner of buildings and general services with the center. The user's agreement shall require the department to comply with all federal and state statutes, rules, regulations and policies regulating the release of criminal history records and the protection of individual privacy. The user's agreement shall be signed and kept current by the commissioner. Release of interstate and Federal Bureau of Investigation criminal history records is subject to the rules and regulations of the Federal Bureau of Investigation's National Crime Information Center.

...

(c) The commissioner of buildings and general services shall obtain from the Vermont criminal information center the record of Vermont convictions and pending criminal charges for any security personnel applicant after the applicant has received an offer of employment conditioned on the record check. Nothing herein shall automatically bar a person who has a criminal record from applying or being selected for a security position.

...

30. 20 V.S. A. §2056h, which was added effective in 2007, provides in pertinent part:

(a) The department of banking, insurance, securities, and health care administration shall obtain from the Vermont criminal information center a Vermont criminal record, an out-of-state criminal record, and a record from the Federal Bureau of Investigation for any applicant for a banking division examiner position who has given written authorization, on a release form prescribed under section 2056c of this chapter, pursuant to the provisions of this subchapter and the user's agreement filed by the commissioner of banking, insurance, securities, and health care administration with the center. The user's agreement shall require the department to comply with all federal and state statutes, rules, regulations and policies regulating the release of criminal history records and the protection of individual privacy. The user's agreement shall be signed and kept current by the commissioner. Release of interstate and F.B.I. criminal history records is subject to the rules and regulations of the F.B.I.'s National Crime Information Center.

...

(c) The commissioner of banking, insurance, securities, and health care administration shall obtain from the Vermont criminal information center the record of Vermont convictions and pending criminal charges for any banking division examiner applicant after the applicant has received an offer of employment conditioned on the record check. Nothing herein shall automatically bar a person who has a criminal record from applying or being selected for a banking division examiner position.

...

31. The Department of Motor Vehicles is within the Agency of Transportation. 23 V.S.A. §102(d), relating to the Department of Motor Vehicles, has provided the following since 2007:

...

(d) The commissioner (of motor vehicles) may authorize background investigations for potential employees that may include criminal, traffic, and financial records checks; provided, however, that the potential employee is notified and has the right to withdraw his or her name from application. Additionally, employees who are authorized to manufacture or produce operators' licenses and identification cards, including enhanced licenses, may be subject to appropriate security clearance if required by federal law, including background investigations that may include criminal and traffic, records checks, and providing proof of United States citizenship. The commissioner may, in connection with a formal disciplinary investigation, authorize a criminal or traffic record background investigation of a current employee; provided, however, that the background review is relevant to the issue under disciplinary investigation. Information acquired through the investigation shall be provided to the commissioner or designated division director, and must be maintained in a secure manner. If the information acquired is used as a basis for any disciplinary action, it must be given to the employee during any pretermination hearing or contractual grievance hearing to allow the employee an opportunity to respond to or dispute the information. If no disciplinary action is taken against the employee, the information acquired through the background check shall be destroyed.

32. The Federal REAL ID Act provides that "States must subject all persons authorized to manufacture or produce drivers' licenses and ID cards to appropriate security clearance requirements." (State's Exhibit 24).

33. The Department of Motor Vehicles has conducted criminal and traffic records checks since March 2006 on all newly hired employees, rehired employees, state employees transferred from other state departments, and employees hired who were in a reduction in force status. Prior to conducting the records checks, Department of Motor Vehicles Commissioner Bonnie Rutledge approached VSEA Director Anne Noonan about the need to do the checks to comply with federal law. Rutledge and Noonan

worked together on this and agreed to the statutory language providing for the criminal records check process (State's Exhibit 24).

34. The Vermont Veterans Home has conducted Vermont Criminal Information Center checks, and Adult Abuse Registry checks, on any new employee of the Home since 2002. The Home also has required all Home employees to undergo fingerprinting testing since 2002. The Home is subject to Vermont State Nursing Home regulations that disqualify employees from working at the Home due to certain criminal convictions. An existing employee of the Home who applies for another position at the Home does not have to undergo another criminal record check. An AHS employee applying for a position at the Home would have to undergo a criminal record check.

35. The State of Vermont Employment Application for the past several years has contained the following question for applicants for state government positions to answer:

In the past five years have you been convicted, imprisoned, placed on probation or under supervision, or fined for any violation of any law including motor vehicle violations? In the past fifteen years have you been convicted of a felony? If "YES" to either question, give dates, details and penalties for each occurrence on a separate sheet of paper (8.5" x 11"), which must accompany your application.

The application also requires job applicants to make the following certification:

I certify that all information I have entered is correct and complete to the best of my knowledge. I understand that the State may verify information, and that untruthful or misleading answers are cause for rejection of this application, removal of my name from a register, or dismissal if employed.

The application does not require job applicants to sign any authorizations for the release of any background information. A question similar to the "five years" question on the Employment Application has been part of the application since at least 1980. The "fifteen

years” question on the application has been part of the application since approximately 2003. The section requiring the employee to certify the accuracy and completeness of the application has been part of the application since at least 1980 (State’s Exhibit 17).

36. The Personnel Policies and Procedures implemented by the Vermont Department of Human Resources covering state employees has provided in pertinent part at all times relevant as follows:

...

Personnel Policy No. 2.3

**Chapter 7 – RECRUITMENT AND EXAMINATION**

...

7.06 Disqualification of Applicant: The Commissioner may disqualify from admission to the examination or appointment any person if:

...

7.064 He has been convicted of a felony or other crime involving moral turpitude.

7.065 He has made a false statement of material fact in his application.

...

Personnel Policy No. 4.11

Subject: **INTERVIEWING AND REFERENCE CHECKING**

...

PURPOSE AND POLICY

To establish policy for interviewing and reference checking of applicants for positions in classified service.

...

REFERENCE CHECKING

Before any offer of employment is extended, the hiring manager or personnel officer is strongly encouraged to conduct a reference check on the final candidate(s). Candidates should be notified that a reference check will be done and that the information will be used in making the final hiring decision. . .

...

Personnel Policy No. 4.5

Subject: **MINIMUM QUALIFICATIONS/ELIGIBILITY  
DETERMINATION**

...

## PURPOSE AND POLICY STATEMENT

The purpose of this policy is to describe the use of minimum qualifications in the determination of eligibility for employment in the classified service.

## DEFINITIONS

**MINIMUM QUALIFICATIONS** – Minimum qualifications (MQs) are the criteria established for the initial screening of job applicants. MQs are usually expressed in terms of the nature and amount of formal education, training, work experience, as well as any special requirements such as licenses, certifications or physical standards. Minimum qualifications are set at a level that provides a reasonable likelihood that a candidate for the job possesses the most important required knowledge, skills, and abilities for adequately performing entrance level work in the job.

## ESTABLISHMENT OF MQS

MQs are based on a job analysis and developed in conjunction with subject matter experts most familiar with the job. MQs are written to assure that applicants who meet the requirements have some reasonable likelihood of being able to perform the job. MQs provide assurance that a candidate for the job possesses the most important minimum required knowledge, skills and abilities for adequately performing entrance level work in the job. Applicants who do not possess the MQs are those who have little likelihood of being able to do the job or who would require training beyond what it would be reasonable for the State to provide.

## REVIEWING APPLICATIONS

An eligibility determination is made by comparing an applicant's qualifications with the MQs of a particular job class. The source of information for the determination is the individual's job application, as well as other supporting documentation such as a resume or educational transcript. An applicant who does not meet the education, experience or necessary special requirements of the job class will be determined ineligible for further consideration for the particular position.

## NOTIFICATION OF ELIGIBILITY

Applicants must be notified by mail whether or not they are eligible. If found ineligible, the notice must include the reason(s) for the determination (i.e., lack of required education or experience, or both). . .

. . .

Personnel Policy No. 4.6



Subject: **TRANSFER/PROMOTION**

...

**PURPOSE AND POLICY STATEMENT**

When a vacancy in the classified service occurs, the appointing authority shall make a diligent effort to recruit employees from within the classified service to fill the vacancy. This policy establishes and clarifies the procedure for the transfer, demotion and promotion of State employees.

**TRANSFER**

... The applicant must meet the minimum qualifications of the job class. . .

(State's Exhibits 18, 20, 22, 23)

37. The collective bargaining agreements between the State and VSEA at all times relevant have contained the following definition of "Minimum Qualifications" in the Definition section of the agreements: "the lowest level of skills, experience and educational qualifications necessary for admittance to the examination process."

38. Article 18, Section 1, of the 2008-2010 Non-Management Unit agreement; Article 19, Section 1, of the 2008-2010 Supervisory Unit Agreement; and Article 19, Section 1, of the 2008-2010 Corrections Unit Agreement provide:

When management decides to fill a permanent, vacant bargaining unit position through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline, statewide in the case of state promotional or open competitive procedure, agency-wide when only an agency promotional procedure is being utilized. If a change is made in the minimum qualifications after the announcement is posted, the new vacancy notice shall be posted for a period of five (5) workdays.

39. Subsequent to the implementation of AHS Policy 4.02, AHS added the following provision to its Job Specifications describing positions under the section "Minimum Qualifications":

Special Requirements

Candidates must pass any level of background investigation applicable to the position.

AHS Policy 4.02 Hiring Standards, pursuant to 20 V.S.A. 2056c or other applicable statutory authority, requires criminal record checks for all AHS positions, including motor vehicle driving record checks and national record checks where appropriate.

(State's Exhibit 28)

OPINION

The issue before us is whether the Agency of Human Services 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 hiring standards policy which requires employees to sign background check authorizations and/or submit to fingerprint testing. VSEA contends that application of the policy to current state employees seeking to transfer, promote or exercise recall rights to AHS positions constitutes an improper unilateral change with respect to the employer-employee relationship.

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:

- (1) wages, salaries . . . ;
- ...
- (3) working conditions;
- ...
- (6) Reduction-in-force procedures;
- ...
- (9) Rules and regulations for personnel administration, except . . . rules and regulations relating to applicants for employment in state service . . .

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. . .”

We apply these applicable statutory provisions and precedents under SELRA to the provisions of the AHS hiring standards policy to determine whether they resulted in

improper unilateral changes. The hiring standards policy affects the transfer, promotion and re-employment of state employees. Promotion is related to the employer-employee relationship, and thus is subject to collective bargaining unless a statute provides otherwise. Hackel v. Vermont State Colleges, 140 Vt. at 449 (1981). Similarly, the process by which employees are selected for transfer is a matter relating to the relationship between the State and its employees, and is a required subject of bargaining unless it is prescribed or controlled by statute. VSEA v. State of Vermont (Re: Involuntary Transfer of Fish and Game Warden Gonyaw), 7 VLRB 8, 25-26 (1984). Further, re-employment rights of laid-off state employees has been subject to detailed negotiations between the State and VSEA, evident by extensive provisions on such rights in the parties' collective bargaining agreements, and is clearly a matter affecting the employer-employee relationship.

The AHS hiring standards policy resulted in a change for existing state employees, both inside and outside AHS, when they sought a transfer or promotion to a position in AHS. Prior to implementation of the policy, AHS did not require all existing state employees applying for transfers or promotions to AHS positions to submit to background checks. Upon implementation of the policy on March 3, 2008, AHS began requiring all existing state employees applying for transfers or promotions to AHS positions to sign a release form authorizing AHS to obtain Vermont criminal conviction records on them if they are made a conditional offer of employment. Due to a statutory change effective July 1, 2008, employers and members of the public may obtain from the Vermont Criminal Information Center ("VCIC") a criminal conviction record for any purpose provided the requestor has filed a user agreement with VCIC. As a result of the

statutory change, AHS no longer requires job applicants to sign a form authorizing VCIC to provide Vermont criminal conviction records to AHS.

However, there are other background checks that remain in effect for employees seeking transfer or promotion to AHS positions that were initiated by implementation of the hiring standards policy. Employees seeking promotion or a transfer have to undergo: 1) a Motor Vehicle Driver check if client transport is expected as part of regular duties; 2) Child Abuse Registry and Adult Abuse Registry checks if the duties involve providing care, custody, treatment, transportation or supervision of children or vulnerable adults; and 3) a National criminal record check through the Federal Bureau of Investigation for any position being filled where the person has been a Vermont resident for less than five years. The hiring standards policy requires applicants to sign release forms authorizing AHS access to the records resulting from each of these background checks. Further, the policy requires state employee applicants to submit to fingerprint testing if they are required to undergo a National criminal record check.

In enacting the hiring standards policy, AHS relied on various state and federal statutes set forth in the Findings of Fact as authority for the provisions of the policy requiring applicants to sign release forms authorizing these various background checks. Although the state statutes relied on by AHS require the release forms to be signed by applicants in order to release the records resulting from the background checks to employers, they do not statutorily predetermine that the records shall be released. Instead, they permit employers to perform checks, rather than mandate them. Further, the conducting of checks is not committed exclusively to the discretion of employers under the state statutes as they are contingent on obtaining a release from the subject of the

background checks. The state statutes allow access to information about individuals who consent to it, and do not contain any requirement for these checks to be performed on any type of employee by any type of employer.

Also, AHS has not demonstrated that the federal statutes relied on by AHS statutorily predetermine that criminal background records shall be released or that the conducting of checks is committed exclusively to the discretion of employers. AHS also has not demonstrated that the federal statutes statutorily predetermine that employees shall submit to fingerprint testing or that such testing is committed exclusively to the discretion of employers.

In sum, AHS must bargain over the hiring standards policy as a matter relating to the relationship between the employer and employees if it is not prescribed or controlled by statute. AHS has not met the burden of demonstrating the existence of specific statutory provisions which circumscribes its power to bargain on an issue through its reliance on the various state and federal statutes discussed above.

The statutes relied on by AHS are in contrast to the state statutes set forth in the Findings of Fact relating to hiring of state security personnel, banking division examiners, and Department of Motor Vehicles employees. The statutes addressing the hiring of state security personnel and banking division examiners require the employers to obtain from the Vermont Criminal Information Center the records of Vermont convictions and pending criminal charges for any applicants for such positions after the applicant has received an offer of employment conditioned on the record check. As such, these statutes statutorily predetermine that the records shall be released. Collective bargaining thus is precluded in this area.

The statute concerning the hiring of Department of Motor Vehicles employees provides the Commissioner of Motor Vehicles with the discretion, among other things, to authorize background investigations for potential employees that may include criminal, traffic, and financial records checks; provided that the potential employee is notified and has the right to withdraw his or her name from application. The conducting of checks is committed exclusively to the discretion of the employer, and thus collective bargaining is precluded in this area.

Nonetheless, AHS justifies implementation of the hiring standards policy on various other grounds. AHS contends that it implemented the policy consistent with its management rights contained in the collective bargaining agreement. The Management Rights article of the collective bargaining agreements between the State and VSEA provides that “(s)ubject to law, rules and regulations . . . 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. . .”

AHS maintains that the State has exercised these management rights for many years to require job applicants to answer specific questions on employment applications relating to their criminal record. The employment application also has informed employees that the State may verify information, and that untruthful or misleading answers will result in rejection of the application, or dismissal if employed. AHS contends that, by signing the application, state employees consent to whatever the State deems to be appropriate steps to verify the information on the application and to

investigate their background further as the employer deems appropriate. AHS asserts that it is a proper exercise of management rights in this regard to implement background check policies, including criminal record and abuse registry checks, to carry out the statutory mandates and goals of the agency.

We disagree that either contractual or statutory management rights extend as far as AHS contends. Management rights are subject by contract and Section 905(b) of SELRA to statutory collective bargaining rights, including required subjects of bargaining. AHS has not met its required burden of demonstrating the existence of a specific statutory provision which circumscribes its power to bargain on the issues of requiring employees to sign background check authorizations and/or submit to fingerprint testing. It is a long leap from inquiries on the employment application relating to an applicant's criminal record, and the possible consequences of providing untruthful information, to requiring employees to sign background check authorizations and/or submit to fingerprint testing. We cannot presume the legislature precluded collective bargaining on such an expanded requirement absent specific statutory language so providing.

AHS also justifies implementation of the hiring standards policy based on background check policies implemented by entities within AHS and outside the agency. AHS contends that it implemented its hiring standards policy consistent with the State's authorized and accepted practice of implementing such policies which, through its actions and inactions, VSEA has regarded as a management right until this matter arose.



In so contending, AHS is asserting in essence that VSEA has waived its right to bargain over the issues of requiring employees to sign background check authorizations and/or submit to fingerprint testing.

Absent a waiver by either the terms of the collective bargaining contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a contract if contract negotiations are ongoing or not ongoing. VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). The unilateral imposition of terms of employment during a contract term when the employer is under the legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. Burlington Firefighters, *supra*. Mt. Abraham, *supra*. VSEA v. State, 5 VLRB 303, 324-329 (1982).

In determining whether a party has waived its bargaining rights, the VLRB has required that it be demonstrated a party consciously and explicitly waived its rights. Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231. In such matters, the Board is further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981). A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217 (1983).

In applying these standards, we conclude that VSEA has not waived its bargaining rights. The background check policies relied on by AHS cover different

applicants and employees, under different statutory and regulatory requirements, than covered by the AHS hiring standards policy. We cannot conclude that there was a conscious and explicit waiver of bargaining rights by VSEA under such circumstances.

AHS further relies on Section 904(a)(9) of SELRA to support its unilateral implementation of the hiring standards policy without bargaining with VSEA. Section 904(a)(9) provides:

. . . (M)atters appropriate for collective bargaining to the extent they are not prescribed or controlled by statute include but are not limited to:

. . .

(9) Rules and regulations for personnel administration, except the following: rules and regulations relating to persons exempt from the classified service under section 311 of this title and rules and regulations relating to applicants for employment in state service and employees in an initial probationary status including any extension or extensions thereof provided such rules and regulations are not discriminatory by reason of an applicant's race, color, creed, sex or national origin;

AHS contends that Section 904(a)(9) makes it clear that the State is not obligated to engage in bargaining over subjects such as establishing job qualifications and deciding what form of reference checking, including criminal record and abuse registry checks, is appropriate in investigating whether applicants, both those who are state employees and those who are not, meet the minimum qualifications for a position and are otherwise suitable for employment. We conclude that AHS is giving too broad a reading to Section 904(a)(9). This section exempts from collective bargaining rules and regulations relating to applicants for employment in state service who are not currently state employees, but does not extend to existing state employees who are seeking a transfer or promotion within state government or to laid-off employees who are seeking to exercise re-employment rights.

Section 904 specifies that matters appropriate for collective bargaining covering existing state employees include, but are not limited to, wages, salaries, working conditions and reduction in force procedures. Each of these areas is involved in establishing rules and regulations relating to promotion, transfer and re-employment of state employees. We construe Section 904 in its entirety to provide that existing state employees do not lose collective bargaining rights in each of these areas when promotion, transfer and re-employment are involved. It is evident that the legislature limited its exemption from bargaining rights to rules and regulations to applicants for state employment who were not state employees. This is consistent with their status as individuals who do not possess collective bargaining rights, unlike existing state employees.

Nonetheless, AHS contends that its ability to unilaterally issue the hiring standards policy derives from its exclusive authority to create job descriptions, including establishing minimum qualifications for positions. AHS asserts that it properly exercised this authority in this case by making a minimum qualification for AHS positions the requirement of “criminal record checks for all AHS positions, including motor vehicle driving record checks and national record checks where appropriate.”

We agree that AHS has the exclusive authority to create job descriptions, including establishing minimum qualifications for positions. 3 V.S.A. §310(b) states that “(i)t shall be the responsibility of the head of each department to provide current job descriptions for all positions within (the) department”. The Vermont Supreme Court has cited this section to hold that “(t)he responsibility for creating job descriptions clearly is given to department heads”, and that “job descriptions become valid for purposes of

determining requisite employment qualifications when a department head communicates the descriptions to the Department of Personnel.”. In re Robert D’Orazio, 139 Vt. 423, 426-427 (1981).

However, the driving issue in this respect is not the ability of AHS to establish minimum qualifications for positions. Instead, it is whether the requirement of criminal record checks for all AHS positions is properly included within the meaning of “minimum qualifications” for a position. The collective bargaining agreements between the State and VSEA at all times relevant have contained the following definition of “Minimum Qualifications” in the Definition section of the agreements: “the lowest level of skills, experience and educational qualifications necessary for admittance to the examination process.” Similarly, Personnel Policy No. 4.5 implemented by the Department of Human Resources defines “Minimum Qualifications” as follows:

Minimum qualifications (MQs) are the criteria established for the initial screening of job applicants. MQs are usually expressed in terms of the nature and amount of formal education, training, work experience, as well as any special requirements such as licenses, certifications or physical standards. Minimum qualifications are set at a level that provides a reasonable likelihood that a candidate for the job possesses the most important required knowledge, skills, and abilities for adequately performing entrance level work in the job.

Thus, minimum qualifications are limited to the education, experience and skills required for entry into a position. Any special requirements included within the minimum qualifications for a position relate to these areas. The requirement of criminal record checks is not included within the education, experience or skills of a position; and thus is not properly included within a description of minimum qualifications for a position. By including such a requirement as a minimum qualification for a position, AHS in effect has done an improper end-run around its obligation to bargain over this issue.

AHS also justifies implementation of the hiring standards policy on the basis that it constitutes a *de minimis* immaterial, unsubstantial and insignificant impact on state employee working conditions, and therefore does not rise to the level of change that would require bargaining. We have recently declined to adopt this standard advanced by the State; Vermont State Employees' Association v. State of Vermont (Re: Electronic Communications Policy), 30 VLRB 210, 225-226 (2009); and adhere to such holding in this decision.

In sum, AHS has not been able to meet its burden of demonstrating the existence of a specific statutory provision which circumscribes its power to bargain on the issues of requiring state employees seeking to transfer, promote or exercise recall rights to AHS positions to sign background check authorizations and/or submit to fingerprint testing. 3 V.S.A. §310(e) provides that “(s)ubject to bargaining rights as set forth in (SELRA), the commissioner of human resources . . . shall prescribe rules governing appointments, . . . promotions, transfers . . . applicable to persons in the classified service”. AHS is required to bargain on the matters at issue herein consistent with this provision unless it can point to a specific statutory provision prescribing or controlling these matters. AHS has been unable to make such a demonstration.

We thus conclude that AHS 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 hiring standards policy which requires state employees seeking to transfer, promote or exercise recall rights to AHS positions to sign background check authorizations and/or submit to fingerprint testing. Specifically, AHS committed an unfair labor practice upon implementation of the policy on March 3, 2008, until July 1,

2008, by requiring all existing state employees applying for transfers or promotions to AHS positions to sign a form authorizing release to AHS of their Vermont criminal records if they were made a conditional offer of employment.

Also, AHS has committed unfair labor practices from the March 3, 2008, implementation of the policy until the present by requiring state employee applicants to sign release forms authorizing AHS access to records resulting from each of the following background checks: 1) Motor Vehicle Driver check if client transport is expected as part of regular duties; 2) Child Abuse Registry and Adult Abuse Registry checks if the duties involve providing care, custody, treatment, transportation or supervision of children or vulnerable adults; and 3) a national criminal record check through the Federal Bureau of Investigation for any position being filled where the person has been a Vermont resident for less than five years. Further, AHS has committed an unfair labor practice by requiring state employee applicants to submit to fingerprint testing if they are required to undergo a national criminal record check.

In deciding what remedy to apply as a result of AHS's unfair labor practices, 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 AHS to rescind the hiring standards policy as it applies to state employees, and give it no further force and effect with respect to these employees, and to cease failing to bargain in good faith with VSEA over this matter. We also will require AHS to remove from all job descriptions any reference to the hiring standards policy requiring that candidates who are current state employees seeking to transfer, promote or exercise re-employment rights to AHS positions need to submit to a criminal record check as a condition of employment. AHS further 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 hiring standards policy. 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.

We deny VSEA's request that we direct AHS 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, which presented significant issues of first impression. Caledonia North Education Association v. Burke Board of School Directors, 18 VLRB 45, 75 (1995).

## ORDER

Based on the foregoing findings of fact and for the foregoing reasons in this unfair labor practice case, Labor Relations Board Docket No. 08-17, Vermont State Employees' Association v. State of Vermont Agency of Human Services (Re: Hiring Standards Policy), the Vermont Labor Relations Board has concluded that the State of Vermont Agency of Human Services ("AHS") has committed unfair labor practices in this matter as forth in the Opinion, and it is ordered:

1. AHS has 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 Policy 4.2, "Hiring Standards Policy", as it applies to current state employees seeking to transfer, promote or exercise re-employment rights to Agency of Human Services positions, without negotiating with the Vermont State Employees' Association;
2. AHS shall rescind Policy 4.2 as it applies to current state employees and state employees in reduction in force status, and give it no further force or effect with respect to these employees;
3. AHS forthwith shall remove and immediately destroy any and all references and documents contained in any employment and personnel files which relate to background checks which were performed on current or reduction in force status employees pursuant to Policy 4.2;
4. AHS shall forthwith remove from all job descriptions any reference to AHS Policy 4.2 requiring that candidates who are current state employees seeking to transfer, promote or exercise re-employment rights to Agency of Human Services positions submit to criminal record checks as a condition of appointment;
5. AHS shall cease and desist from failing to bargain in good faith with the Vermont State Employees' Association over the required subjects of bargaining of requiring employees to sign background check authorizations and/or submit to fingerprint testing;
6. AHS shall forthwith post copies of these two Order pages at all places normally used for employer-employee communications; and



7. AHS shall forthwith transmit by e-mail to all employees affected by Policy 4.2 these order pages 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 Agency of Human Services Policy 4.2, ‘Hiring Standards Policy’, issued by the State of Vermont Agency of Human Services on March 3, 2008.

Dated this 13th day of November, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ John J. Zampieri

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John J. Zampieri

/s/ James C. Kiehle

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James C. Kiehle