VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 16-50
STATE OF VERMONT JUDICIARY DEPARTMENT (RE: USE OF PERSONAL CELL PHONES)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Vermont State Employees' Association ("VSEA") filed a grievance and an unfair labor practice charge on October 19, 2016, contending that the State of Vermont Judiciary Department ("Employer") violated the Judiciary Employees Labor Relations Act ("JELRA") and the collective bargaining agreement by implementing new restrictions on employees' rights to monitor and use personal cell phones in the workplace. Specifically, VSEA alleged in the grievance that the Employer violated the collective bargaining agreement by: 1) imposing a new policy that changes the terms and conditions of employment without notice to VSEA and without providing an opportunity to meet and confer regarding the new policy in violation of Article 2 of the agreement; and 2) eliminating the past practice that permitted employees to monitor and use personal cell phones on an incidental basis during work hours and at their work locations. VSEA further contends that the Employer committed an unfair labor practice in violation of its duty to bargain in good faith set forth in 3 V.S.A. § 1026 (1) and (5) by unilaterally changing the terms and conditions of bargaining unit employees without providing notice to VSEA or the opportunity to bargain.

The Labor Relations Board issued an unfair labor practice complaint on February 15, 2017. The Board, with the concurrence of the parties, consolidated the grievance and the unfair

labor practice complaint for hearing. Hearings were held in the Board hearing room in Montpelier on August 10 and 24, 2017, before Board Members Richard Park, Acting Chairperson; James Kiehle and Alan Willard. Timothy Belcher, VSEA General Counsel, represented VSEA. Assistant Attorney General Jacob Humbert represented the Employer. The parties filed post-hearing briefs on September 7, 2017.

FINDINGS OF FACT

1. VSEA is the collective bargaining representative of all employees of the Judiciary Department who are eligible under the Judiciary Employees Labor Relations Act to be represented by an employee organization. There are approximately 200 employees in the Judiciary Bargaining Unit represented by VSEA.

2. At all times relevant, VSEA and the Judiciary Department have been parties to a collective bargaining agreement ("Contract"). The Contract provides in pertinent part as follows:

> . . .
>
> **ARTICLE 2**
> **MANAGEMENT RIGHTS**
>
> . . . except as specifically set forth herein, as required by law or otherwise specifically agreed to in writing between the parties, the Judiciary possesses the sole right and authority to operate its Department and direct the Judiciary employees in all aspects including, but not limited to, the right:
>
> . . .
>
> > To make, publish and require observance of reasonable rules and regulations, it being understood and agreed that except to the extent specifically modified by this Agreement, the Judicial Personnel Policy which was last revised in March of 1998 all Appendices and subsequent amendments thereto, shall remain in full force and effect and be applicable to employees. However, if a particular subject is covered in both the Agreement and the Personnel Policy, covered employees shall look only to this Agreement and shall not be allowed to rely on the provisions of both documents.
>
> The Judiciary shall give the VSEA at least twenty-one (21) business days advance notice of any proposed amendments to such policy and an opportunity to meet and confer with the Judiciary before implementation of any such amendment. If a proposed amendment involves a mandatory subject of bargaining, the VSEA will be given the opportunity to

collectively bargain with the Judiciary concerning such change before its implementation. In the event of any conflict between this Agreement and such Judicial Personnel Policy, the provisions of this Agreement shall control.

. . .

(VSEA Exhibit 1, Employer Exhibit I)

3. The Vermont Judicial Branch Personnel Policy referenced in Article 2 of the Contract has provided in pertinent part since at least March 1998:

Part VII
Code of Conduct and Employee Discipline

A. Scope

The code of conduct contained in Section B of this part applies to all non-judicial employees of the judiciary . . .

B. Code of Conduct

. . .

2. Responsibilities

a. The Court Administrator

Pursuant to Administrative Order #3 of the Vermont Supreme Court, the Court Administrator shall promulgate the code of conduct and may amend existing rules from time to time.

. . .

3. Code of Conduct

. . .

h. Every Judicial Branch employee shall during their hours of duty and subject to such other laws, rules, and regulations as pertain thereto, devote his or her full time attention and efforts to the responsibilities of his or her position. Specifically, all employees shall:

. . .

4) Behave in a manner that does not disrupt the professional working environment . . .

5) Work consciously to accomplish the goals of the court and refrain from the misuse of work time.

. . .

APPENDIX G
POLICY AND PROCEDURE REGARDING
ELECTRONIC COMMUNICATIONS AND INTERNET USE

I. PURPSOSE

> The Vermont Supreme Court hereby establishes the following policy and procedures for the Judicial Branch regarding electronic communications and internet use. Internet services and e-mail capabilities are a resource to facilitate the work of the Judiciary. This policy provides for use by authorized Judiciary employees.
>
> **II. POLICY**
>
> Employees shall not use, or attempt to use Judicial personnel, property or equipment for their private use or for any use not required for the proper discharge of their official duties. This policy allows a limited degree of personal use of Judiciary telephones for private calls when such use meets certain guidelines. Similar allowances will be applied to internet services and email capabilities where personal use meets all of the following tests. Personal use will be allowed only if <u>all</u> of the following are met:
>
> 1. The user must be authorized to use the equipment by management. . .
> 2. The use must not interfere with an employee's performance of job duties.
> 3. The use must not impose a burden on State resources as a result of frequency or volume of use.
> 4. The use must not otherwise violate this policy, including the prohibition on access of sites that include potentially offensive or disruptive material. . .
>
> . . .

(VSEA Exhibit 3, Employer Exhibit J; emphasis in original)

4. The Vermont Judiciary completed a court system restructuring in 2011 which created a unified court system under the administration of the Vermont Supreme Court. As a result, the Superior Court in each county of the state constitutes a Unit that had four primary divisions: Civil, Criminal, Family and Probate. Each Unit is managed by a Superior Court Clerk. Some Superior Court Clerks manage more than one Unit. Divisions within a Unit are managed by a Court Operations Manager. Management of each Unit generally occurs on a decentralized basis at the Unit level, rather than centralized at the state level.

5. Kathleen Pearl was Superior Court Clerk for the Caledonia and Essex Units from 2010 until her retirement in the summer of 2017. In addition, she was appointed Superior Court Clerk in the Washington Unit in late April or early May 2016. She also served in that position

until her retirement. Pearl supervised two Court Operations Managers in the Washington Unit: Tammy Tyda (Criminal and Family Divisions, Barre) and Donna Waters (Civil and Probate Divisions, Montpelier).

6. Upon appointment as Superior Court Clerk in the Washington Unit, Pearl had a conversation with Tyda regarding personal cell phone use in the Barre office. Tyda informed Pearl that employees in the office had complained in the past about other employees' personal cell phone use to her. She also reported to Pearl that she personally had observed disruptive chirping sounds from one employee's cell phone and employees receiving communications on their personal cell phones during meetings and responding to them. Tyda had relayed these concerns to the Superior Court Clerk at the time. She was not aware of what action, if any, had been taken to address these complaints.

7. There was an instance in the Washington Unit in 2010 in which Marna Murray, the Court Operations Manager, provided written supervisory feedback to an employee due to "(u)se of your personal communication device(s) i.e. cell phone, PDA, laptop, etc." Murray stated: "I understand that on numerous occasions during the regularly scheduled work day, you have been spending time on these devices rather than attending to your duties. . . Starting today, it is my expectation that any and all of your own personal electronic communication devices (i.e. cell phone, PDA, Smart Phone, personal lap top, etc.) will NOT be allowed into the building EXCEPT during your regularly scheduled lunch break." (VSEA Exhibit 6, Employer Exhibit K)

8. Approximately three months later, Murray informed the employee in a memorandum: "Since my earlier communication you have not brought your cell phone into the building. The result has been remarkably good. . . The purpose of this memo is to follow-up on the previous one and provides the same standard to you as to other judicial staff." Murray went

on to state: "(A)ll employees must be attentive to their duties during work hours. In light of this concern and to remind all employees about the appropriate use of cell phones and communication devices, I have prepared the following communication (to) all court staff:

> The purpose of my note is a reminder that use of cell phones and personal communication devices is appropriate before and after work, during lunch breaks and other specific breaks away from your work station. You may chose (sic) to provide your family and friends with the main office line, as well as your direct line, to facilitate necessary communication.
>
> The expectation is that during work hours, your device will be off, silent or on vibrate in your car, at your desk or in your purse. Should your personal situation (on-going family situation or medical crisis) necessitate greater access to your personal communication device, please bring that to my attention and we will find an effective way to accommodate the need.

It is unclear whether Murray disseminated this "communication" to all court staff (VSEA Exhibit 6, Employer Exhibit L).

9. At a staff meeting in the Washington Unit in late May 2016, Pearl informed the staff that personal cell phones were a big issue for her. By this time, the personal cell phones which most employees had were smartphones with capabilities beyond phone communications such as texting, internet access and applications for playing various games. Pearl said at the meeting that she had seen employees misuse cell phones and hide their use, and had staff complain about other staff's misuse of cell phones. She informed them that staff in the Caledonia and Essex Units did not have cell phones out on their desks, and that they put cell phones away in their purse or bag. Pearl told them that their focus needed to be on work during their working hours. She indicated that, if something was going on out of the ordinary during their day, staff could speak to Tyda and Waters about having their cell phone out on their desks. Pearl asked staff to not have their cell phones out, and if this did not work to let Pearl know the reason why it was not working (Employer Exhibit C).

10. On June 15, 2016, Pearl sent an email to employees of the Washington Unit, attaching a cell phone policy. The cell phone policy implemented by Pearl in Washington County provides:

Cell Phone Policy for Caledonia, Essex & Washington Counties

> If you bring a cell phone to work it is to be on silent and put away (not on you or your desk) during work hours (unless COM or clerk have told you differently).
>
> You may use your phone during your lunch break.
>
> You may give out the main line court phone number or your desk line to anyone that needs to reach you. If a call comes in on the main line and you are needed quickly, someone will notify you.
>
> If you have some <u>out of the ordinary</u> personal issue going on, such as a loved one having surgery, you may speak to the COM about having your phone on the desk to receive a text from a loved one to update you.
>
> Your cooperation is appreciated, and assists to enhance a professional work environment. (VSEA Exhibit 4, Employer Exhibits A, B)

11. Pearl expected that if an employee approached the Court Operations Manager to request having a personal cell phone out on the desk, due to an out of the ordinary personal issue, the employee would inform the Manager of the basics of the personal issue. An example would be that the employee tells the manager that there are ongoing concerns with a child.

12. Prior to implementation of the Washington Unit cell phone policy, Elizabeth Aiken, Case Manager with the Family Division in the Barre office since 2000, used her personal cell phone during working hours. There were times that she used the cell phone for personal matters. She also used it for work purposes to communicate by text or cell phone with the magistrate, court security, deputy sheriffs and employees of the Department for Children and Families. No supervisor spoke to Aiken about her use of her personal cell phone prior to the cell phone policy going into effect in 2016. After the policy went into effect, Aiken asked Tyda for

permission to monitor her cell phone to see if her daughter or her daughter's school were trying to reach her. Tyda agreed, but revoked the authorization when the school year ended. The magistrate still calls Aiken on her personal cell phone; Aiken returns the calls on a landline phone.

13. Aiken's workstation arrangements significantly differ from other employees in the office. Unlike other employees, she has two different office desks, one on each floor of the Barre office, and also spends significant work time in a conference room in the office. Further, she is often away from her work desks.

14. Aiken wears an electronic device - a "Fitbit" - on her wrist. If Aiken's cell phone is in close enough proximity to her, she receives notification on her Fitbit if she has received a text message or phone call on her cell phone. The use of Fitbits is not covered by the Washington Unit's cell phone policy.

15. Aiken has served at all times relevant as Vice-Chair of the Judiciary Bargaining Unit represented by VSEA. When the cell phone policy was implemented in the Washington Unit, Aiken contacted VSEA Senior Field Representative Brian Morse. Morse called Pearl to raise objections to the policy. Pearl referred the matter to John McGlynn, Human Resources Manager for the Employer. McGlynn and Morse were unable to resolve the matter. Morse then filed a grievance challenging the implementation of the policy.

16. There were several instances after implementation of the cell phone policy in the Washington Unit where Tyda spoke to employees about violation of the policy and required them to adhere to it in the future. An employee may be disciplined for violating the policy. Employees have made several requests to have personal cell phones out on their desk due to an

out of ordinary personal issue. Tyda has granted the requests in all instances (VSEA Exhibit 7, Employer Exhibits N, O, P, Q, R).

17. The father and son of Barre Docket Clerk Julie Bowen attempted to reach her during work hours after the Washington Unit cell phone policy went into effect to report an incident involving her son. Her son barely escaped a serious accident at work. He was in a dump truck on a steep hill when the truck went out of gear and began to slide backwards toward a drop-off at the end of the road. He managed to stop the truck in time to avert the accident. Bowen's father attempted to reach her on her personal cell phone because that is the only number he had to contact her. Bowen was not aware of her father's and son's calls for several hours since she did not have access to her cell phone pursuant to the cell phone policy.

18. The policy which Pearl implemented in the Washington Unit in 2016 generally was the one which the staff in the Montpelier office of the Washington Unit already had been using to the extent that employees did not have personal cell phones out on their desk. They were allowed to have phones on vibrate. Employees in the Montpelier office have been able to use personal cell phones beyond lunch breaks. Waters has allowed employees to check their personal cell phones without permission when they go to the bathroom, or get coffee or bagel, in the office. Use of personal cell phones in the Montpelier office generally has been very limited. The practices in the Montpelier office have not changed since Pearl issued her policy. Staff have come to Waters on several occasions and requested to have phones out on their desks due to personal reasons such as family members traveling overseas or awaiting a call from a doctor's office. Waters has never denied such a request from an employee and has never asked an employee for more information when they make a request.

19. Pearl had implemented a policy in the Caledonia Unit in 2008 or 2009, when she was Court Manager there, providing that personal cell phones were not to be on during work hours for calls or texting. She informed employees that they could check their cell phones outside the office during their lunch break. She indicated employees could speak to her if they had an out of the ordinary situation and had an urgent need for cell phone use. When she subsequently became Superior Court Clerk for the Caledonia and Essex Units, she implemented a similar policy for both units. She sent a memorandum to staff in December 2013 which contained this "(r)eminder": "Cell phones and other electronics are not to be used during work time for calls, texting or being on the web. If you have an emergency and need to have access to your cell phone please speak to Maggie. Please feel free to use your electronic devices during your noon break." "Maggie" was a reference to Court Operations Manager Margaret Villeneuve. Villeneuve also sent reminders to Caledonia and Essex staff of the cell phone policy in 2012 and 2014 (Employers Exhibits D, E, F, G, H; VSEA Exhibit 8).

20. Neither employees nor VSEA filed a grievance or unfair labor practice charge contesting the cell phone policy in the Caledonia and Essex Units.

21. Villeneuve received various requests from employees to grant exceptions to the cell phone policy due to personal emergencies. Villeneuve granted all the requests. It has been Villeneuve's practice generally to not ask for details of the personal issue. If an employee requests access to a personal cell phone for an extended period of time, Villeneuve would ask for additional information.

22. Michelle Bachand became Probate Register in the Caledonia Unit about a year ago. When she was trained for the position, she was instructed to text the Probate Judge. The Judge was part-time, and maintained a private law practice in addition to serving as judge.

Initially, the Probate Judge communicated with Bachand by text messages, and she responded at times by texting on her cell phone. When Pearl learned that Bachand was texting with the Judge, she told the Judge and Bachand that they needed to use the radio or the Employer's SPARK communication system instead. The Judge is not technologically savvy and does not use the radio. The SPARK system is effective only when the Judge is in the Caledonia Courthouse. When the Judge is not in the courthouse, Bachand attempts to reach him by calling his private law office.

23. The Chittenden Unit has a cell phone policy, effective since June 8, 2009, which provides:

CHITTENDEN UNIT CELL PHONE POLICY

> Cell phones may be used in the courthouse. However, cell phones may not be used in the courtroom or the clerk's office.
>
> All staff must have their cell phones turned off or in vibrate mode. Calls and text messages shall be returned during a scheduled break. (VSEA Exhibit 5, Employer Exhibit S)

24. Neither employees nor VSEA filed a grievance or unfair labor practice charge contesting the cell phone policy in the Chittenden Unit.

25. The practice in the Chittenden Unit is that the cell phone policy is followed less strictly than it is written in certain respects. No one is permitted to use a cell phone in the Chittenden Courtroom. Employees who are not in the courtroom are permitted to keep their cell phones on their desks, on mute or vibrate. They are permitted to return calls they receive on their personal cell phones involving personal emergencies if they return the calls outside of public view. They do not necessarily have to wait for a break to respond to a call or text.

26. Chittenden Superior Court Clerk Christine Brock issued the disciplinary action of an oral warning on an employee in January 2011 for using a personal cell phone while on duty in the courtroom, and opening a text message with an attachment which was a photograph of naked persons involved in sexual activity (VSEA Exhibit 6, Employer Exhibit T).

27. There is no personal cell phone policy in the Grand Isle Unit. The Case Manager there used her personal cell phone at work for texting, contacting the judge, long-distance calls since the cost was covered without additional charge to her, and reporting computer outages.

28. There is no personal cell phone policy in the Brattleboro Unit. Some of the staff there use their personal cell phones and smart phones during work hours, including for work purposes. Supervisors are aware of this use.

29. The Judiciary Department has an emergency notification system – "JENS". The security director of the system encouraged employees to provide work and personal contact information to receive emergency alerts related to significant weather events, court closings, potential threats of violence and other safety issues. Personal contact information provided by employees may include personal cell phone and home phone numbers. It is voluntary for employees to provide information for JENS. JENS is designed to reach employees both during work hours and non-work hours. During work hours, employees typically would receive JENS alerts on their desk phone and work email as well as whatever personal contact information they provided. During non-working hours, employees would receive alerts by whatever means of personal contact the employee designated.

30. Judiciary employees from all the Units throughout the state may volunteer for after-hours work assisting individuals who are seeking relief from abuse orders when the

courthouses are closed. Many Judiciary employees performing such duties have chosen to receive notification routed directly through their personal cell phones.

OPINION

Grievance

We first address the grievance filed by VSEA.VSEA alleges that the Employer violated the collective bargaining agreement by: 1) imposing a new policy that changes the terms and conditions of employment without notice to VSEA and without providing an opportunity to meet and confer regarding the new policy in violation of Article 2 of the agreement; and 2) eliminating the past practice that permitted employees to monitor and use personal cell phones on an incidental basis during work hours and at their work locations.

The Board first needs to decide whether the Employer violated Article 2 of the collective bargaining agreement by implementing the personal cell phone policy in the Washington Unit. Article 2 provides in pertinent part as follows:

> . . . (E)xcept as specifically set forth herein, as required by law or otherwise specifically agreed to in writing between the parties, the Judiciary possesses the sole right and authority to operate its Department and direct the Judiciary employees in all aspects including, but not limited to, the right:
>
> > . . .
> > To make, publish and require observance of reasonable rules and regulations, it being understood and agreed that except to the extent specifically modified by this Agreement, the Judicial Personnel Policy which was last revised in March of 1998 all Appendices and subsequent amendments thereto, shall remain in full force and effect and be applicable to employees. However, if a particular subject is covered in both the Agreement and the Personnel Policy, covered employees shall look only to this Agreement and shall not be allowed to rely on the provisions of both documents.
> >
> > The Judiciary shall give the VSEA at least twenty-one (21) business days advance notice of any proposed amendments to such policy and an opportunity to meet and confer with the Judiciary before implementation of any such amendment. If a proposed amendment involves a mandatory subject of bargaining, the VSEA will

> be given the opportunity to collectively bargain with the Judiciary concerning such change before its implementation. . .

VSEA contends that the Employer violated this provision of the Contract because the Washington Unit cell phone policy is a "policy" because it is titled as such, and clearly relates to "personnel" since it applies to bargaining unit members. VSEA asserts that this personnel policy constituted an amendment to the existing personnel policy because it prohibits the conduct of monitoring incoming messages and calls that was previously permitted. As such, VSEA maintains that the policy amendment is subject to the obligations to notify, and meet and confer, with VSEA prior to implementation.

The Employer contends that a violation of Article 2 of the Contract would occur only if there was an amendment to the Judicial Personnel Policy and notice to, and an opportunity to meet and confer with, VSEA was not provided. The Employer asserts that did not occur here because the Washington Unit cell phone policy is a local operational policy that did not amend the Judicial Personnel Policy.

In determining whether the employer violated Article 2 of the Contract, the Board follows the rules of contract construction developed by the Vermont Supreme Court. The cardinal principle in the construction of any contract is to give effect to the true intention of the parties. Grievance of Cronan, et al, 151 Vt. 576, 579 (1989). A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

A contract will be interpreted by the common meaning of its words where the language is clear. Id. at 71. If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges,

141 Vt. 275 (1982). If this analysis results in a determination that the language is clear and unambiguous, extrinsic evidence under such circumstances should not be considered as it would alter the understanding of the parties embodied in the language they chose to best express their intent. Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).

The Board will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. at 71. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

Ambiguity exists where the disputed language will allow more than one reasonable interpretation. In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005). If the analysis leads to a conclusion that the contract language is ambiguous because the disputed language allows more than one reasonable interpretation, it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988).

In applying these standards here, we conclude that the Contract is clear and unambiguous that the Article 2 obligation of notice to VSEA, and meeting and conferring with VSEA, applies only when there is a proposed amendment to the Judicial Personnel Policy. Article 2 states that the "Judiciary shall give the VSEA at least twenty-one (21) business days advance notice of any proposed amendments to such policy and an opportunity to meet and confer with the Judiciary before implementation of any such amendment." The reference to "such policy" and "such

amendment" refers specifically to the Judicial Personnel Policy in the paragraph which immediately precedes this statement.

It is clear in interpreting the common meaning of these words that the parties have plainly and expressly provided that the notice, meet and confer obligations apply only when there is a proposed amendment to the Judicial Personnel Policy. A contrary ruling would constitute ignoring the contract provisions and result in an inappropriate remaking of the contract.

It is equally clear that the Washington Unit cell phone policy is not an amendment to the Judicial Personnel Policy. The Judicial Personnel Policy, which as referenced in the Contract, was last revised in March 1998. The Washington Unit cell phone policy does not purport to amend this policy and clearly does not do so. The Judicial Personnel Policy was promulgated at a statewide level. Any provisions in the Judicial Personnel Policy's Code of Conduct for employees would be amended by the Court Administrator, a statewide official. The cell phone policy implemented in the Washington Unit applies to the contrary only at a local level.

VSEA further contended in the grievance which it filed, although it has not briefed this issue, that the Employer's implementation of new restrictions on employees' rights to monitor and use personal cell phones in the workplace violates a binding past practice allowing use of personal cell phones in the workplace.

In deciding grievances, the Board has concluded that alleged violations of past practices are encompassed within the statutory definition of a grievance. Grievance of Cronin, 6 VLRB 37, 67-69 (1983). The Board has recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Cronin, supra. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of

Beyor, 5 VLRB 222, 238-239 (1982). If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Cronin, supra.

The evidence presented on use of personal cell phones in the Washington Unit was insufficient to conclude there was a binding past practice mutually accepted by the parties. There were instances in the Barre office where monitoring and use of personal cell phones occurred for personal purposes, sometimes resulting in complaints with an unknown outcome, and for work purposes. The Court Operations Manager issued supervisory feedback to an employee in the Barre office in 2010 for use of personal devices on "numerous occasions", and placed restrictions on such use as a result. The Court Operations Manager then prepared written standards to provide guidance to court staff on use of personal communication devices, but it is unclear whether she ever disseminated this communication to employees.

In the meantime, the historical practice in the Montpelier office of the Washington Unit is that use of personal cell phones generally has been very limited. The Montpelier office has followed a longstanding practice of not having personal cell phones out on their desk, Employees were allowed to have phones on vibrate, and were able to use personal cell phones at times in addition to lunch breaks. Employees have been able to check their personal cell phones without permission when they go to the bathroom, or get coffee or bagel, in the office.

The unclear nature of the standards in the Barre office, and the practices followed in the Montpelier office, make it evident that there was no consistent, longstanding practice in the Washington Unit workplaces. We cannot conclude there was a binding past practice mutually accepted by the parties under these circumstances.

Unfair Labor Practice Charge

VSEA further contends that the Employer's implementations of the restrictions on employees' rights to monitor and use personal cell phones in the workplace constitute an unfair labor practice because it constitutes a unilateral change in working conditions in violation of the employer's duty to bargain in good faith as set forth in 3 V.S.A. Section 1026(1) and (5). 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, it should be noted that the State Employees Labor Relations Act, 3 V.S.A. § 901 *et seq.*, and the Judiciary Employees Labor Relations Act, 3 V.S.A. § 1010 *et seq.*, ("JELRA") contain essentially identical pertinent language and the broadest scope of bargaining of the Vermont labor relations statutes. Section 1013 of JELRA provides in pertinent part:

> All matters relating to the relationship between the employer and employees are subject to collective bargaining to the extent those matters are not prescribed or controlled by law including:
> . . .
> (3) working conditions;
> . . .
> (9) rules for personnel administration . . .

Under these provisions, the employer must bargain over a subject if it is a "matter relating to the relationship between the employer and employees" and is not "prescribed or controlled by statute". 3 V.S.A. §1013. 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". Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. at 457. 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 JELRA which can affect the required scope of bargaining. Section 1014(b) provides: "Subject to rights guaranteed by this chapter and other applicable laws, nothing shall be construed to interfere with the right of the employer to: (1) carry out the statutory mandate and goals and to utilize personnel, methods and means in the most appropriate manner; 2) take necessary action to carry out its mission in an emergency situation."

VSEA acknowledges that the Employer has the right to unilaterally restrict certain personal cell phone use in the workplace. Examples of restrictions which VSEA indicates are not problematic are prohibiting personal cell phone use in courtrooms, when a member of the public needs assistance, when answering the office phone, or when conducting personal business at a time employees should be working. VSEA states in the post-hearing brief: "Put simply, the Judiciary has the undisputed right to ask employees to work when they are working."

This is an appropriate recognition by VSEA that, despite the broad scope of bargaining under JELRA, the Employer has the unilateral right to prohibit cell phone use to ensure employees are attending to the work of the Judiciary. The challenge we have is to determine the appropriate balance between the broad scope of bargaining and management rights when personal cell phone use in the workplace is involved.

In seeking to attain this balance when looking at a change in work rules, policies, and procedures, we need to weigh the nexus between the change and the employer's need to manage

the productivity of the workplace with the union's right to bargain working conditions and rules for personnel administration. In this case, we find that the Employer requiring no use of cell phones in the courtroom, limiting the presence of mobile devises on the desk top, and having personal phones' rings off have a strong nexus to the need to manage work productivity and thus the employer can set such policy.

However, the Employer failed to show that limiting the viewing of personal phones and returning calls or texts only to the lunchbreak has a strong, or even any, impact on work productivity. There was even evidence that stepping out to use a personal phone to call or text might be less disruptive to others than using the Employer's landline and thus increase productivity. Accordingly, the Washington Unit cell phone policy impacts the employer-employee relationship and constitutes a required subject of bargaining in this respect to the extent that limiting the viewing of personal phones and returning calls and texts to the lunchbreak constituted a change for affected employees.

Employees in the Washington Unit have other specific and unscheduled work breaks during the work day in which they are not actively performing work duties. Prior to the implementation of the policy, the Barre office did not enforce restrictions limiting personal cell phone use to scheduled lunch breaks. The evidence indicates instances of employees engaging in such use during non-lunch breaks without management enforcing a prohibition on such usage. Also, the Barre Court Operations Manager in 2010 prepared a communication to court staff permitting personal cell phone use "during lunch breaks and other specific breaks away from your work station". Although it is unclear whether the Court Operations Manager disseminated this communication to staff, it provides evidence that management did not frown upon personal cell phone use during non-lunch breaks.

Further, the practice in the Montpelier office of the Washington Unit prior to implementation of the cell phone policy was that employees were allowed to use personal cell phones beyond lunch breaks. The Court Operations Manager allowed employees to check their personal cell phones without permission when they go to the bathroom, or get coffee or a bagel, in the office. The terms of the cell phone policy differed from this practice.

The unilateral change in the policy prohibiting personal cell phone use during non-lunch breaks thus impacts the employer-employee relationship and constitutes a required subject of bargaining. A contrary ruling would have the strange consequence of the Employer having the ability to implement more restrictions on personal cell phone use than use of state equipment under circumstances where there is no interference with performance of job duties. The Employer's Electronic Communications and Internet Use Policy "allows a limited degree of personal use" of Judiciary telephones, internet services and work emails if the use does "not interfere with an employee's performance of job duties" and the use does "not impose a burden on State resources as a result of frequency or volume of use". Personal cell phone use that does not interfere with performance of duties places no burden on State resources and does not warrant greater restrictions absent negotiations with the employees' collective bargaining representative.

We appreciate that the cell phone policy addresses use of a personal electronic device that an employee brings into the workplace on his or her own accord that has the potential to have adverse impact on productivity and be disruptive to co-workers. The Employer may unilaterally restrict personal cell phone and/or smart phone use to the extent that it has the potential to adversely impact the productivity of the employee with the device or co-workers. However,

unilateral restrictions run afoul of the requirement to bargain when interference with an employees' performance of job duties is not involved.

We next address whether the Washington Unit cell phone policy made an improper unilateral change on a matter affecting the employer-employee relationship by requiring an employee, when making a request to the Court Operations Manager to have a personal cell phone out on their desk due to an out of the ordinary personal issue, to inform the Court Operations Manager of the basics of the personal issue. The broad capabilities of smartphones, which include but go well beyond cell phone use, allow management to generally regulate employee access to them unilaterally during work hours. The distracting and addictive nature of smartphones creates the potential for employee access to them to adversely impact employee productivity. In carrying out its mission, management has the unilateral right to take steps to ensure that employee access to such a device does not interfere with performance of duties.

The refined issue which concerns us is whether the unilateral management right to generally regulate employee access to cell phones, including a smartphone containing a cell phone, extends to the ability to specifically require employees to inform the Court Operations Manager of the basics of an out of the ordinary personal issue before being allowed to have their personal cell phones out on their desk. Prior to the implementation of the cell phone policy, the evidence does not indicate that management in the Barre office so required employees to inform the Court Operations Manager. The practice in the Montpelier office of the Washington Unit prior to implementation of the cell phone policy was for employees to provide general information to the Court Operations Manager when they requested to have personal cell phones out on their desks due to personal information. The Court Operations Manager in the Montpelier

office has never denied such a request and has never asked an employee for more information when they make a request.

The implementation of the cell phone policy has resulted in some employees being required to provide sensitive personal information to management when previously they did not have to do so, and added uncertainty for other employees as to the extent of personal information which they are required to provide to management to conform to the policy. We conclude that this infringes on employees' right to privacy by requiring employees to potentially divulge sensitive personal information to management in order to gain greater access to personal cell phone use outside of lunch breaks. A requirement to provide details as to why on a special occasion an employee needs to have their mobile device in sight on top of their desk is a significant intrusion on the employee's privacy with little or no offsetting gain of productivity for the employer.

This is a unilateral change in a matter affecting the employer-employee relationship and constitutes a required subject of bargaining. The reasonableness of the frequency in which employees may have personal cell phones out on their desks, the degree of access of employees to their personal device, and the required notice employees have to provide to management of the involved personal issue are specific areas of negotiations on this matter. We note that the required scope of bargaining is limited in situations where someone overuses the privilege of having the phone on their desktop to the point where it does affect productivity. Then, the Employer may unilaterally take corrective actions including requiring more details of the need, requiring the use of employer landlines, and even imposing discipline.

Again, a contrary ruling that bargaining is not required in this area would have the consequence of the Employer having the ability to implement greater restrictions on personal cell

phone use compared to the use of state equipment than is warranted. The limited degree of personal use of Judiciary telephones allowed by the Employer's Electronic Communications and Internet Use Policy contemplates that employees may discuss personal matters on Judiciary telephones without having to divulge to management the personal issues discussed. The same is not true under the cell phone policy implemented in the Washington Unit, and this is an appropriate subject of bargaining with the employees' collective bargaining representative.

In sum, we conclude that the Employer has interfered with employee rights and violated its duty to bargain in good faith in issuing a cell phone policy in the Washington Unit to the extent of: 1) limiting personal cell phone use to lunch breaks; and 2) requiring an employee, when making a request to the Court Operations Manager to have a personal cell phone out on their desk due to an out of the ordinary personal issue, to inform the Court Operations Manager of the basics of the personal issue. We determine that the cell phone policy does not otherwise implicate the duty to bargain with VSEA.

VSEA requests as a remedy that the Board order the Employer to: 1) cease and desist from implementing the cell phone policy imposed in the Washington Unit on June 15, 2016; 2) rescind the cell phone policy; and 3) post and deliver a notice to all Washington Unit employees stating that the Employer violated 3 V.S.A. § 1026 by its conduct.

In deciding what remedy to apply as a result of Employer's unfair labor practice, we look to Section 1030(d) of JELRA. This authorizes the Board to require a party committing an unfair labor practice "to cease and desist from the unfair labor practice", and provides that "the Board shall take such affirmative action necessary to carry out the policies" of JELRA. 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 cease and desist from implementing the cell phone policy imposed in the Washington Unit, and rescind the cell phone policy. 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 cell phone policy. This will require the Employer to post this decision on bulletin boards in the Washington Unit normally used for employer-employee communications, and to send all affected employees an e-mail transmission of our Order in this matter. Vermont State Employees' Association v. State of Vermont (Re: Electronic Communications Policy), 30 VLRB at 236-237.

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 informally resolve this matter once the grievance and unfair labor practice charge surfaced.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons in this matter involving both a grievance and an unfair labor practice charge, Labor Relations Board Docket No. 16-50, Vermont State Employees' Association v. State of Vermont Judiciary Department (Re: Personal Use of Cell Phones), the Vermont Labor Relations Board: 1) orders that the grievance is dismissed, and 2) has concluded that the State of Vermont Judiciary Department 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 Judiciary Department ("Employer") refused to bargain in good faith and interfered with employees' exercise of rights, in violation of 3 V.S.A. Section 1026(1) and (5), through unilaterally implementing a cell phone policy in the Washington Unit;
2. The Employer shall rescind this policy 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 policy to the extent it addresses required subjects of bargaining as set forth in the Opinion;
4. The Employer shall forthwith post copies of the Findings of Fact, Opinion and Order in this matter at all places normally used for employer-employee communications in the Washington Unit; and
5. The Employer shall forthwith transmit by e-mail to all employees in the Washington Unit affected by the cell phone policy 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 a grievance and unfair labor practice case involving the Cell Phone Policy for Washington County issued on June 15, 2016."

Dated this 20th day of October 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Acting Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard