State Employees Labor Relations Act.

The State Employees Labor Relations Act ("SELRA") was enacted in 1969.[1] SELRA has many unique provisions compared to other labor relations statutes in Vermont and the United States. For instance, it vests the Vermont Labor Relations Board with much broader responsibilities under the Act than the Board has under the other labor relations statutes which it administers. This includes empowering the Board to make "final determination" on employee grievances, a responsibility which is without parallel for labor relations boards administering other labor relations statutes in the United States.

When SELRA was enacted in 1969, the State Employees Labor Relations Board was created to administer the Act. The Board was composed of three members, "of whom not more than two shall be of the same political party".[2] Board members were to be appointed to six-year terms "in such a manner that not more than one term shall expire" every two years.[3] Board members were empowered to elect a chairperson from its members.[4] During the period from 1969 and 1976, there were two labor relations boards in Vermont – the State Employees Labor Relations Board which administered SELRA, and the State Labor Relations Board which administered the other Vermont labor relations statutes. In 1976, the Legislature created the three-member Vermont Labor Relations Board ("VLRB") to replace the two boards.[5] Since that time, the VLRB has administered all labor relations statutes in Vermont.

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[1] Act No. 113; 3 V.S.A. §§901-1005.
[2] Act No. 113; 3 V.S.A. §921.
[3] Id.
[4] Id.
[5] Act No. 152 (1975 Adj. Sess.).

The VLRB was expanded from three to five members in 1986 with the proviso that not more than three members shall be of the same political party. A panel system was set up to hear and decide cases. The revised statute provided:

> Each case that comes before the board for a hearing shall be heard and decided by a panel of three members appointed by the board chairman. Not more than two members of a panel shall be of the same political party. Two members of a panel shall constitute a quorum with authority to act provided that the board may, it its discretion, review a proposed decision by a panel prior to its issuance for the sole purpose of insuring that questions of law are being decided in a consistent manner.[6]

The composition of the Board was changed again in 2006. The Board expanded to six members serving six-year staggered terms. The composition of the Board changed from selection based on political party to a tripartite structure with two members with neutral backgrounds, two members with labor backgrounds and two members with management backgrounds. A review panel was set up to "submit to the governor a list of nominees whom the panel determined to be qualified for membership on the board". The panel system of three members hearing cases was maintained. The Board continues to elect a chairperson from its members.[7]

SELRA is the governing statute for the VLRB. In addition to the provisions concerning Board composition, there are other sections of the Act relating to its employees, legal counsel, office space, general powers, and procedures. It gives the Board explicit authority to adopt rules and regulations consistent with the Act which may be necessary to carry out the provisions of the Act.[8] The Act specifically provides that the Vermont Administrative Procedures Act and other laws of the state relating to administrative procedure are not applicable to the Board.[9]

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[6] Act No. 133 (1985 Adj. Sess.); 3 V.S.A. §921(a).
[7] Act No. 187 (2005 Adj. Sess.).
[8] 3 V.S.A. §928(a).
[9] 3 V.S.A. §1005.

SELRA provides that "(a)ll findings, conclusions and determinations of the board and the records of all hearings and other proceedings, unless otherwise provided by law, shall be public records."[10] The VLRB has stated: "It necessarily leads from this provision that hearings of the Board shall be public also, unless otherwise provided by law, for private hearings would be meaningless if the records of those hearings were public."[11]

SELRA applies to the State of Vermont, the Defender General, the Vermont State Colleges, the University of Vermont, the State's Attorneys offices, and the employees of these entities. When enacted, SELRA covered any "individual employed on a permanent status basis by the State of Vermont and the Vermont State Colleges" except for specified categories of individuals excluded from the definition of "employee" under the Act.[12] The coverage of employees was broadened in 1977 to include "limited status" employees.[13] More significantly, SELRA was amended in 1988 to cover employees of the University of Vermont.[14] Employees of the defender general, excluding attorneys, were added to SELRA's coverage in 1998.[15] Deputy State's Attorneys and other employees of the State's Attorneys' offices were granted collective bargaining rights under a 2017 amendment to the Act.[16]

When originally enacted in 1969, SELRA did not define "managerial" or "supervisory" employees. Shortly after SELRA's enactment, the Board certified the Vermont State Employees' Association as the bargaining representative of state employees. Non-supervisory employees and employees who had supervisory responsibilities were included in one bargaining unit. The Legislature then amended

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[10] 3 V.S.A. §929.
[11] Appeal of Goderre, 4 VLRB 344, 345 (1981).
[12] 3 V.S.A. §902(5).
[13] Act No. 109.
[14] Act No. 177 (1987 Adj. Sess.).
[15] Act No. 92 (1997 Adj. Sess.).
[16] Act No. 81 (2017 Sess.).

SELRA in 1972 to define "managers" and to designate four levels of management positions. Two levels were excluded from collective bargaining rights and the other two levels were granted such rights with the proviso that they were to be in a separate bargaining unit from non-management employees.[17] Subsequent to this 1972 amendment of SELRA, VSEA continued to represent the managers who were granted collective bargaining rights.

In 1977, the Legislature rescinded its designation of four management levels, and replaced them with definitions of "managerial employee", "supervisory employee", and "confidential employee". Managerial employees and confidential employees were excluded from the definition of "employee" entitled to collective bargaining rights and thus were not entitled to be included in a bargaining unit or represented by an employee organization. Supervisory employees were granted such rights and placed in a separate supervisory bargaining unit by a specific statutory provision. Another 1977 amendment to SELRA provided that the human resources commissioner shall determine those positions he or she believes should be designated as managerial, confidential or supervisory; and the VLRB shall finally resolve any disputes arising from such designations.[18]

SELRA provides employees with "the right to self-organization; to form, join or assist employee organizations; to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities".[19] The Act prohibits employees from striking, and

[17] Act No. 193 (1971 Adj. Sess.).
[18] Act No. 109.
[19] 3 V.S.A. §903(a).

employees may not "recognize a picket line of an employee or labor organization while in the performance of . . official duties."[20]

Employees or an employee organization acting in their behalf may file a petition with the VLRB asserting that the employees wish to be represented by a particular employee organization. If the petition is supported by a sufficient showing of interest, the Board resolves any issues that arise concerning the appropriate grouping of employees in the bargaining unit to be represented by the employee organization. Once the unit issues are resolved, the Board conducts an election in which employees vote on whether they wish to be organized into the unit and whether they wish to be represented by the petitioning employee organization or organizations.[21]

If a majority of employees do not vote to be organized into a bargaining unit or do not vote to be represented by the employee organization, the employee organization does not become the representative of employees. If a majority of employees vote to be organized into a bargaining unit and to be represented by the employee organization, the organization becomes the exclusive representative of all employees in the bargaining unit for a minimum of one year.[22] There is no provision in SELRA for employers to voluntarily recognize employee organizations as representatives of employees; an election must be conducted among employees for an employee organization to become the representative of employees.[23]

SELRA as enacted in 1969 allowed the Board, in lieu of an election, to certify an employee organization as initial bargaining representative of employees under

[20] 3 V.S.A. §903(b).
[21] 3 V.S.A. §§927 and 941.
[22] 3 V.S.A. §941(h).
[23] 3 V.S.A. §941.

the Act based on a petition signed by at least a majority of employees in a bargaining unit.[24] However, this provision was repealed in 1977.[25]

SELRA allows employees to file a petition to decertify an employee organization as their bargaining representative, or replace one employee organization with another employee organization as their representative.[26] However, such an election may not be held in any bargaining unit if an election has been held in the previous 12 months.[27] Also, as discussed in Chapter 3, collective bargaining agreements bar such petitions for much of the term of the agreement.

Once an employee organization becomes the representative of employees, the employer and employee organization are required to engage in collective bargaining with the intent to arrive at a collective bargaining agreement.[28] SELRA provides that "to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter; but the failure or refusal of either party to agree to a proposal, or to change or withdraw a lawful proposal, or to make a concession shall not constitute or be evidence, direct or indirect, of a breach of this obligation."[29]

As discussed in Chapter 5, the required scope of bargaining under SELRA is broad.[30] Required subjects of bargaining have been expanded since SELRA's enactment. One notable addition occurred in 1994 when employers and unions were allowed for the first time to negotiate provisions requiring employees covered by a collective bargaining agreement, who have elected not to become union members,

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[24] Act No. 113; 3 V.S.A. §941(l).
[25] Act No. 109.
[26] 3 V.S.A. §941(c).
[27] 3 V.S.A. §941(h).
[28] 3 V.S.A. §902(2).
[29] 3 V.S.A. §981.
[30] 3 V.S.A. §904(a).

to pay a "collective bargaining service fee" which cannot exceed 85 percent of union dues.[31]

SELRA was further amended in 2013 to remove collective bargaining service fees as a required subject of bargaining, and instead to provide that employees in a bargaining unit represented by an employee organization as exclusive bargaining representative are required to pay collective bargaining service fees to the representative.[32] The statutory change provided that the fee may not exceed 85 percent of the amount of union dues, and that the fee was to be deducted in the same manner as dues are deducted from the wages of members of the employee organization, and "shall be used to defray the costs of chargeable activities."[33] However, in 2018, the U.S. Supreme Court ruled that public employers and public sector unions are prohibited from collecting agency fees or any other payment to a union from nonconsenting employees.[34]

If the employee organization and employer are unable to arrive at a collective bargaining agreement without outside assistance, SELRA provides for the dispute resolution mechanisms of mediation, fact-finding, and selection of last best offer by the VLRB to resolve negotiations impasses.[35] These dispute resolution procedures are discussed in detail in Chapter 5. When originally enacted in 1969, SELRA did not include mediation and selection of last best offers by the Board as dispute resolution mechanisms. Instead, it provided for fact-finding. It also allowed for the recommendations of the fact-finding panel to be binding, but only if both parties so agreed at the commencement of proceedings before the panel.[36] SELRA was

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[31] 3 V.S.A. §§902(19), 904(a)(10), 962(10), 1001(c).
[32] 3 V.S.A. §903 (c).
[33] 3 V.S.A. §902(19).
[34] Janus v. AFSCME, et al, ___ U.S. ___ (June 27, 2018).
[35] 3 V.S.A. §925.
[36] Act No. 113; Section 925.

amended in 1972 and 1977 to establish its present scheme of mediation, fact-finding and selection of last best offer by the Board.[37]

The "selection of last best offer" provision of the Act was amended in 2006. It continues to provide that "the Board shall select between the last best offers of the parties, considered in their entirety without amendment". Notwithstanding this provision, the statute was amended to provide that "should the board find the last best offers of the parties unreasonable and likely to produce undesirable results, or likely to result in a long-standing negative impact upon the parties' collective bargaining relationship, then the board may select the recommendation of the fact finder . . . as to those disputed issues submitted to the board in the last best offers."[38]

SELRA provides that collective bargaining agreements, except those affecting Vermont State Colleges and the University of Vermont, shall be for a maximum term of two years. Agreements "are not subject to cancellation or renegotiation during the term except with the mutual consent in writing of both parties".[39]

SELRA sets forth unfair labor practices of employers and employee organizations. Included among employer unfair labor practices since SELRA was enacted in 1969 are: 1) interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by law, rule or regulation; 2) dominating or interfering with the formation or administration of an employee organization; 3) discriminating against employees to encourage or discourage membership in a labor organization; and 4) refusing to bargain collectively with the representative of employees.[40]

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[37] Act Nos. 185 (1971 Adj. Sess.), 109 (1977).
[38] Act No. 194 (1995 Adj. Sess.), 3 V.S.A. §925(j).
[39] 3 V.S.A. §982(a).
[40] 3 V.S.A. §961.

Among the unfair labor practices of employee organizations set forth in SELRA since its enactment are: 1) restraining or coercing employees in the exercise of their rights guaranteed by law, rule or regulation; 2) restraining or coercing employers in the selection of representatives for collective bargaining or adjustment of grievances, and 3) refusing to bargain collectively with an employer.[41]

Significant amendments to the unfair labor practice provisions of SELRA have concerned categories of employees protected against discrimination. When enacted, SELRA made it an unfair labor practice for an employer to discriminate against an employee on account of race, color, creed, sex or national origin. Similarly, employee organizations were prohibited from discriminating against persons seeking or holding membership in the labor organization on account of race, color, creed, sex or national origin.[42] In 1992, 1999 and 2007, the Act was amended to add discrimination based on religion, disability, sexual orientation, gender identity or age as prohibited acts of employers and labor organizations.[43] SELRA also was amended in 1988 to make it an unfair labor practice for an employer to request or require an applicant or employee to have an HIV-related blood test as a condition of employment, or to discriminate against them for having such a positive test result.[44]

Whenever an unfair labor practice charge is filed against an employer or an employee organization alleging violation of the unfair labor practice provisions of SELRA, the Board investigates the charge and determines whether to issue a complaint. If the Board issues a complaint, a hearing is held before the Board. If the Board determines subsequent to the hearing that an unfair labor practice has been committed, the Board issues an order requiring the offending party "to cease and

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[41] 3 V.S.A. §962.
[42] 3 V.S.A. §§961, 963.
[43] Act Nos. 135 (1991 Adj. Sess.), 19(1999), 41(2007).
[44] Act No. 176 (1987 Adj. Sess.).

desist from such unfair labor practice, and to carry out such affirmative action as will carry out the policies" of SELRA.[45] The practices and procedures in unfair labor practice cases are discussed in detail in Chapter 4.

As indicated above, the Board "shall hear and make final determination on the grievances of all employees eligible to appeal grievances to the board". The right to file grievances extends to individual employees, groups of employees and employee organizations representing employees.[46] When SELRA was enacted in 1969, it did not define "grievance". This omission was corrected in 1972.[47] Hearings of the VLRB on grievances are informal and are not subject to the rules of evidence.[48] SELRA was amended in 2008 to provide that the Board shall hear and make final determination on the grievances of retired employees of the University of Vermont "limited to those relating to compensation and benefits that were accrued during active employment but are received after retirement."[49]

SELRA also was amended in 2008 to provide whistleblower protection to state employees. The intent of the provision is that a state employee "shall be free to report, in good faith and with candor, waste, fraud, abuse of authority, violations of law, or a threat to the health of employees, the public, or persons under the care of the state without fear of reprisal, intimidation, or retaliation."[50] An employee may file a claim of retaliation for such protected activity either with the VLRB or superior court, but not both.[51]

SELRA was amended in 2016 to require the Board to enact rules providing for the redaction of the name of a grievant, whom the Board exonerates of

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[45] 3 V.S.A. §965.
[46] 3 V.S.A. §926.
[47] Act No. 193 (1971 Adj. Sess.), 3 V.S.A. §902(14).
[48] 3 V.S.A. §928(a)(3).
[49] Act No. 107 (2007 Adj. Sess.); 3 V.S.A. §926(b).
[50] Act No. 128 (2007 Adj. Sess.); 3 V.S.A. §§ 971-978.
[51] Id.

misconduct for which he or she was disciplined, from the version of the Board decision that is posted on its website.[52] The Board subsequently enacted such rules.[53]

Some individuals that are not considered "employees" under SELRA nonetheless have limited rights to appeal to the Board to contest actions taken by employers. Persons that are applicants for state employment in the classified service and classified employees in their initial probationary period may appeal to the Board if they believe they have been discriminated against based on race, color, creed, religion, disability, sex, sexual orientation, gender identity, age or national origin.[54] Also, permanent classified employees excluded from bargaining units "have the right of appeal in the same manner and to the same extent as those employees represented by a bargaining representative except that they may not be represented by a bargaining representative".[55]

SELRA provides that the VLRB or any party may file a petition with a superior court for the enforcement of Board orders.[56] The Act provides that a party may appeal an order or decision of the Board to the Supreme Court "on questions of law".[57] When enacted, SELRA made no provision for the stay of Board orders. However, the Act was amended in 1988 to provide that an "order of the Board shall not automatically be stayed pending appeal." A stay is first requested from the Board. If the Board denies a stay, the Vermont Supreme Court or a justice of the Court may stay the order or any part of it.[58]

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[52] Act No. 101 (2015 Adj. Sess.), 3 V.S.A. §928(b)(7).
[53] Section 19.3, Labor Relations Board *Rules of Practice*.
[54] 3 V.S.A. §1001(a).
[55] 3. V.S.A. §1001(b).
[56] 3 V.S.A. §1002(a).
[57] 3 V.S.A. §1003(a).
[58] 3 V.S.A. §1003(b).