

## Scope of Bargaining

Issues concerning whether particular subjects are mandatory subjects of bargaining come before the VLRB as unfair labor practice charges alleging a refusal to bargain over the subject and/or making unilateral changes in conditions of employment. 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.<sup>1</sup> The mandated scope of bargaining varies substantially under the labor relations statutes in Vermont.

### A. State Employees Labor Relations Act / Judiciary Employees Labor Relations Act

The State Employees Labor Relations Act and the Judiciary Employees Labor Relations Act contain the broadest scope of bargaining. They contain the following provisions relating to the scope of bargaining: "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".<sup>2</sup>

In a 1980 decision interpreting this language under the State Employees Act,<sup>3</sup> the Vermont Supreme Court declined to adopt the distinction between mandatory and permissive bargaining subjects developed in the private sector. The Court determined the statutory bargaining obligation applied if the subject was a matter

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<sup>1</sup> Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Teachers' Association, Cabot Teachers' Association and Twinfield Teachers' Association v. Washington Northeast Supervisory Union, 34 VLRB 4, 31 (2017). Burlington Firefighters Association v. City of Burlington, 142 Vt. 434, 435-436 (1983). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). VSEA v. State, 5 VLRB 303, 324-329 (1982).

<sup>2</sup> 3 V.S.A. §904(a); 3 V.S.A. §1013.

<sup>3</sup> Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980).

"relating to the relationship between the employer and employees" and was not "prescribed or controlled by statute".

Collective bargaining was precluded only where "the outcome of any negotiations has been statutorily predetermined or expressly committed exclusively to the discretion of one party". 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.<sup>4</sup>

In scope of bargaining decisions under the State Employees Act, the VLRB and/or the Vermont Supreme Court have determined that the following are mandatory subjects of bargaining:

- wages, hours, working conditions, overtime, leave compensation, reduction in force, grievances and insurance coverage for probationary employees.<sup>5</sup>
- mandatory polygraph examination for non-State Police employees.<sup>6</sup>
- disciplinary guidance memorandum issued by the employer which lists specific instances of misconduct that "likely will lead to severe discipline up to and including immediate dismissal".<sup>7</sup>
- the process by which employees will be selected for involuntary transfer and the process by which an employee's geographic responsibilities may be expanded.<sup>8</sup>
- work schedules.<sup>9</sup>

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<sup>4</sup> Hackel, et al v. Vermont State Colleges, 140 Vt. 446, 449 (1981).

<sup>5</sup> VSEA v. State of Vermont, 151 Vt. 492 (1989).

<sup>6</sup> VSEA v. State of Vermont, 7 VLRB 256, 259-261 (1984).

<sup>7</sup> VSEA v. State of Vermont (re: Department of Corrections Disciplinary Guidance Memorandum), 29 VLRB 145 (2007); *Affirmed*, 185 Vt. 363 (2009).

<sup>8</sup> VSEA v. State of Vermont (re: Involuntary Transfer of Gonyaw), 7 VLRB 8, 25-26 (1984).

<sup>9</sup> VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vt. State Hospital), 5 VLRB 303, 312-313 (1982). VSEA v. State of Vermont, 2 VLRB 26, 30-33 (1979).

- contracting out work and partial closing of State liquor stores.<sup>10</sup>
- the criteria for appointment, reappointment, promotion and tenure of State Colleges faculty.<sup>11</sup>
- faculty governance.<sup>12</sup> Specifically, this includes the creation and composition of faculty assemblies; the role of the faculty assemblies in areas of academic concern such as selection of department chairpersons and instructional/academic unit coordinators; curricular policy and curricular structure; library policies and acquisitions policies; requirements for degrees and granting of degrees; policies for recruitment, admission and retention of students; development, curtailment or re-organization of academic programs; and course assignments and faculty scheduling.<sup>13</sup>
- a hiring standards policy which requires state employees seeking to transfer, promote or exercise recall rights to Agency of Human Services positions to sign background check authorizations and/or submit to fingerprint testing.<sup>14</sup>

The following areas have been determined not to be required subjects of bargaining under the State Employees Act:

- use of polygraph examinations as an investigatory tool with respect to discipline of State Police officers.<sup>15</sup>
- authority to determine the need to transfer an employee and the size of the area employees must cover.<sup>16</sup>

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<sup>10</sup> VSEA v. State of Vermont, 1 VLRB 85 (1977).

<sup>11</sup> VSCFF, VFT, AFT, Local 3180, AFL-CIO v. Vermont State Colleges, 4 VLRB 1 (1981); *Affirmed*, 141 Vt. 138 (1982).

<sup>12</sup> VSCFF, AFT Local 3180, AFL-CIO v. Vermont State Colleges, 138 Vt. 451, 457 (1980).

<sup>13</sup> Vermont State Colleges Faculty Federation, AFT Local 3180 AFL-CIO v. Vermont State Colleges, 3 VLRB 350 (1980).

<sup>14</sup> Vermont State Employees' Association v. State of Vermont Agency of Human Services (Re: Hiring Standards Policy), 30 VLRB 296 (2009).

<sup>15</sup> VSEA v. State of Vermont, 7 VLRB 256, 262-264 (1984).

<sup>16</sup> VSEA v. State of Vermont (re: Involuntary Transfer of Gonyaw), *supra*.

- changes in performance evaluation forms and criteria.<sup>17</sup>
- a revised electronic communications policy to the extent it constituted updates to personnel rules reflecting technological changes which do not result in a substantive change in employees' conditions of employment.<sup>18</sup>
- removal of 13 of 31 Department of Finance and Management positions from the Non-Management and Supervisory Bargaining Units where the appropriate designations of the positions can be determined by the Labor Relations Board after a hearing on designation disputes involving the positions which were pending before the Board.<sup>19</sup>

The Board has issued only one scope of bargaining decision under the Judiciary Employees Act. The Board held that the employer violated the required duty to bargain under the Act with respect to a cell phone policy issued by the employer to the extent that it: 1) limited personal cell phone use to lunch breaks; and 2) required an employee, when making a request to the manager to have a personal cell phone out on his or her desk due to an out of the ordinary personal issue, to inform the manager of the basics of the personal issue.<sup>20</sup>

## B. Municipal Employee Relations Act

Under the Municipal Employee Relations Act, "wages, hours and other conditions of employment" are mandatory bargaining subjects.<sup>21</sup> "Wages, hours and other conditions of employment" means "any condition of employment directly

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<sup>17</sup> Grievance of Sophrin and Sophrin, 1 VLRB 360 (1978).

<sup>18</sup> Vermont State Employees' Association v. State of Vermont (Re: Electronic Communications Policy), 30 VLRB 210 (2009).

<sup>19</sup> Vermont State Employees' Association v. State of Vermont (Re: Department of Finance and Management Positions), 33 VLRB 32 (2014).

<sup>20</sup> VSEA v. State of Vermont Judiciary Department (Re: Use of Personal Cell Phones), 34 VLRB 155 (2017).

<sup>21</sup> 21 V.S.A. §§1722(4), 1725(a).

affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative."<sup>22</sup>

The VLRB looks to experience under the National Labor Relations Act ("NLRA")<sup>23</sup> for guidance in determining whether particular areas are mandatory subjects of bargaining. Resort to Federal precedent is a practice that has been approved by the Vermont Supreme Court in construing the Municipal Act's provisions that reflect similar provisions in the NLRA.<sup>24</sup> Both the Municipal Act and the NLRA<sup>25</sup> mandate bargaining over "wages, hours and other conditions of employment". Also, the Supreme Court has indicated that it is appropriate to adopt the same distinction between mandatory and permissive subjects of bargaining as has been developed under the NLRA.<sup>26</sup>

The VLRB and/or the Supreme Court have determined that the following subjects constitute mandatory subjects of bargaining under the Municipal Act:

- a requirement that employees wear uniforms.<sup>27</sup>
- union activities by employees while on duty such as engaging in negotiations and discussing pending grievances with the union representative.<sup>28</sup>
- restriction on secondary employment during employees' off-duty time.<sup>29</sup>
- continued use of marked police cruisers with blue lights on extra duty jobs for police officers.<sup>30</sup>

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<sup>22</sup> 21 V.S.A. §1722(17).

<sup>23</sup> 29 U.S.C. §§141-187.

<sup>24</sup> Burlington Firefighters Association, 142 Vt. 434, 435 (1983).

<sup>25</sup> 29 U.S.C. 158(d).

<sup>26</sup> VSCFF v. Vermont State Colleges, 138 Vt. 451, 455-456 (1980).

<sup>27</sup> Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 436-437 (1983).

<sup>28</sup> St. Johnsbury Police Chapter, AFSCME Local 2413 v. Town of St. Johnsbury, 13 VLRB 1, 6-7 (1990).

<sup>29</sup> Local 2413, AFSCME v. Town of St. Johnsbury, 13 VLRB 75, 85-87 (1990).

<sup>30</sup> Burlington Police Officers' Association v. City of Burlington, 22 VLRB 5 (1999).

- paid lunch breaks, and the time to take a lunch break.<sup>31</sup>
- procedure employed during grievance meetings on an employee's dismissal.<sup>32</sup>
- day on which an employee is paid.<sup>33</sup>
- entering into an agreement with an individual before employing him as a full-time police officer which required him to reimburse the employer for training costs should he leave employment within three years of completing training, and then enforcing the agreement when the officer left employment.<sup>34</sup>
- new duties for firefighters relating to an airport crash rescue service which were substantially different from normal firefighting duties.<sup>35</sup>
- drug-free workplace policy in which discipline of employees is addressed.<sup>36</sup>

The Board also has issued decisions in four unfair labor cases under the Municipal Act where unions have alleged that employers committed unfair labor practices by unilaterally contracting out the work of bargaining unit employees.

The Board ruled in a 1992 decision that contracting out custodial work previously performed by bargaining unit employees of a school constituted a mandatory subject of bargaining, and that a school board committed an unfair labor practice by acting unilaterally to subcontract work without negotiating with the

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<sup>31</sup> Castleton Education Association Paraprofessional Unit v. Castleton-Hubbardton Board of School Directors, 13 VLRB 140 (1990). Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363, 372 (1984).

<sup>32</sup> Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 10 VLRB 252, 257-258 (1987).

<sup>33</sup> Local 2787, AFSCME v. City of Montpelier, 15 VLRB 188 (1992). IBPO, Local 474 v. City of Burlington, 7 VLRB 356 (1984).

<sup>34</sup> AFSCME Council 93, Local 1201, AFL-CIO v. Town of Castleton, 32 VLRB 98 (2012).

<sup>35</sup> Local 881, IAFF, AFL-CIO v. City of Barre, 2 VLRB 81, 86-88 (1979).

<sup>36</sup> AFSCME Local 1201, Council 93 v. City of Rutland, 18 VLRB 189 (1995).

union. The independent contractors did the same work previously done by bargaining unit employees, and the contracting out decision related primarily to conditions of employment rather than formulation or management of public policy.<sup>37</sup> As a remedy for the unfair labor practice, the Board ordered the employer to: 1) cease and desist from implementing its contracting out decision, 2) negotiate in good faith on this issue with the union; and 3) reinstate the terminated custodians with back pay and benefits.<sup>38</sup>

The second case involving contracting out resulted in two Board decisions and two Supreme Court decisions. The Board ultimately determined, and the Supreme Court affirmed, that the unilateral action by the School Board of contracting out custodial work during the time it was under a legal duty to bargain in good faith violated its duty to bargain, and the Union did not waive its right to bargain over this issue. The Board ordered the employer to cease and desist from implementing its contracting out decision, negotiate in good faith with the Association on the issue, and reinstate the affected custodians with back pay and benefits.<sup>39</sup>

In the third contracting out case, the issue decided by the Board was whether school boards committed unfair labor practices by imposing terms providing for contracting out of driver education work, and paying for that work at an hourly rate instead of at the salary rate. The Board determined that the employers acted lawfully under circumstances where: 1) contracting out driver education work, and compensating certain driver education work by an hourly rate of pay instead of

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<sup>37</sup> Middlebury Union High School Educational Support Personnel Unit v. Middlebury Union High School Board of Directors, 15 VLRB 397 (1992).

<sup>38</sup> 15 VLRB at 416.

<sup>39</sup> Milton Education and Support Association v. Milton Board of School Trustees, 20 VLRB 114 (1997; *Affirmed in part, Reversed in part*, 171 Vt. 64, (2000). 23 Vt. 301 (2000); *Affirmed*, 175 Vt. 531 (2003).

salary, were matters in dispute during collective bargaining negotiations for a successor collective bargaining agreement; 2) there was no contention by the union that the employers did not bargain in good faith over these matters prior to the unilateral imposition; and 3) the timing of the employers' unilateral imposition was appropriate as it occurred more than 30 days after issuance of the fact finder's report.<sup>40</sup>

In the fourth case, the Board determined that the collective bargaining agreement did not entitle the school board to subcontract the bargaining unit work of food service employees, the school board did not meet its burden to negotiate in a timely manner, and the Association did not waive its right to contest the subcontracting of food service work. There being no waiver of bargaining rights by the association, the Board concluded that the unilateral action by the school board of contracting out food services work during a time it was under a legal duty to bargain in good faith was a violation of the duty to bargain. As a remedy for the unfair labor practice, the Board ordered the employer to cease and desist from implementing the subcontracting decision, and reinstate the laid off food service workers with back pay and benefits.<sup>41</sup>

The VLRB has determined under the Municipal Act that the composition of a bargaining unit is not a mandatory subject of bargaining.<sup>42</sup> The VLRB has ultimate control of the bargaining unit, and to insist on a change in the composition of the bargaining unit improperly disrupts the bargaining process.<sup>43</sup>

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<sup>40</sup> Barre Town Education Association v. Board of School Commissioners of the City of Barre and the Spaulding High School Union District Board of School Directors, 31 VLRB 323 (2011).

<sup>41</sup> Arlington Staff Association/Vermont-NEA v. Arlington Board of School Directors, 33 VLRB 471 (2016).

<sup>42</sup> AFSCME Local 490 v. Town of Bennington, 6 VLRB 88, 95-98 (1983). Rutland School Chapter, AFSCME Local 1201, Council 93 v. Board of Education of the City of Rutland, 17 VLRB 348 (1994). Hyde Park Elementary School Board v. Lamoille North Education Association, 22 VLRB 78, 81-82 (1999).

<sup>43</sup> Hyde Park, 22 VLRB at 82. Rutland, 17 VLRB at 351.



### C. State Labor Relations Act

The State Labor Relations Act has a similar scope of bargaining as the Municipal Act, obligating bargaining with respect to wages, hours and other terms and conditions of employment.<sup>44</sup> Although there have been no scope of bargaining decisions issued under this private sector act, the Vermont Supreme Court has indicated that it is appropriate under this Act to adopt the same distinction between mandatory and permissive subjects of bargaining as has been developed under the National Labor Relations Act.<sup>45</sup>

### D. Labor Relations for Teachers Act

The Labor Relations for Teachers Act has a more restrictive scope of required bargaining, although a broad scope of permissive bargaining exists. The Teachers Act provides for negotiations "on matters of salary, related economic conditions of employment, procedures for processing complaints and grievances relating to employment, and any mutually agreed upon matters not in conflict with the statutes and laws of the State of Vermont".<sup>46</sup>

The VLRB has issued scope of bargaining decisions in several areas under the Teachers Act. The Board has held that freezing wages, altering the grievance procedure and changing the procedure for taking personal leave all are required subjects of bargaining.<sup>47</sup> The Board has determined that the length of teachers' workday is a required subject of bargaining.<sup>48</sup>

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<sup>44</sup> 21 V.S.A. §1621(e).

<sup>45</sup> VSCFF v. Vermont State Colleges, 138 Vt. 451, 455-456 (1980).

<sup>46</sup> 16 V.S.A. §2004.

<sup>47</sup> Castleton Education Association v. Chester-Andover School Board of Directors, 1 VLRB 426, 439 (1978).

<sup>48</sup> Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors, 13 VLRB 60, 65 (1990). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 107-108 (1990).

The Board also has concluded that the transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining.<sup>49</sup> The test for whether work has been transferred away from a bargaining unit is whether, as a result of decisions by the employer, the bargaining unit in question has suffered an adverse impact.<sup>50</sup> The proper question is whether work was allocated in such a way so as to have caused the bargaining unit to lose work which, in light of past practices, the bargaining unit otherwise would have been expected to perform.<sup>51</sup> Also, the employer may not shift work away from the bargaining unit without bargaining simply because it is to the employer's economic advantage.<sup>52</sup>

In a decision reflective of the restrictive scope of required bargaining under the Teachers Act, the VLRB determined in a 1981 decision that implementation of a no smoking policy was not a required subject under the Act, while noting that such a policy had been found to be a required subject of bargaining under statutes with broader scopes of bargaining.<sup>53</sup> The Board also has concluded that the ratification of contracts by teacher organizations does not fall within the mandated bargaining subjects under the Teachers Act. Instead, contract ratification falls within the permissive area of bargaining under the Teachers Act of “mutually agreed upon matters”.<sup>54</sup>

Any treatment of scope of bargaining in Vermont would be inadequate if it did not mention that the VLRB has determined that the "impact" of a decision

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<sup>49</sup> Burlington Education Association v. Burlington School District, 16 VLRB 398, 406-407 (1993).

<sup>50</sup> Id. Road Sprinkler Fitters Union v. NLRB, 676 F.2d 826, 831-32 (D.C. Cir. 1982).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 233-234 (1981).

<sup>54</sup> Middlebury Union High School Teachers Association-Hannaford Regional Technical Unit/Vermont-NEA/NEA v. Patricia Hannaford Regional Technical School District Board of Directors, 29 VLRB 40, 50-52 (2007).

expressly committed to management's discretion is a mandatory subject of bargaining if it affects employees' conditions of employment.<sup>55</sup>

#### E. Independent Direct Support Providers Labor Relations Act

Mandatory subjects of bargaining under the Independent Direct Support Providers Labor Relations Act are limited to: 1) compensation rates, workforce benefits, and payment methods and procedures; 2) professional development and training; 3) the collection and disbursement of dues or fees to the exclusive bargaining representative, 4) procedures for resolving grievances against the State; and 5) access to job referral opportunities within covered programs.<sup>56</sup>

#### F. Early Care and Education Providers Labor Relations Act

Mandatory subjects of bargaining under the Early Care and Education Providers Labor Relations Act are limited to: 1) child care subsidy reimbursement rates and payment procedures, excluding quality standards and payment schedules associated with the Step Ahead Recognition System (STARS); 2) professional development; 3) the collection of dues and disbursement to the exclusive representative; 4) agency fees and disbursement to the exclusive representative; and 5) procedures for resolving grievances.<sup>57</sup> The parties also may negotiate on any mutually agreeable matters that are not in conflict with state or federal law.<sup>58</sup>

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<sup>55</sup> VSEA v. State of Vermont (re: "Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303 (1982).

<sup>56</sup> 21 V.S.A. §1634(b).

<sup>57</sup> 33 V.S.A. §3603(b)(1).

<sup>58</sup> 33 V.S.A. §3603(b)(2).