**STATE OF VERMONT**
**VERMONT LABOR RELATIONS BOARD**

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| VERMONT STATE EMPLOYEES' ASSOCIATION, | ) | |
| v. | ) | Docket No. 25-50 |
| STATE OF VERMONT, DEPARTMENT OF HUMAN RESOURCES | ) | |

**POST-HEARING BRIEF OF THE**
**VERMONT STATE EMPLOYEES' ASSOCIATION**

## I. INTRODUCTION

Now comes the Charging Party, the Vermont State Employees' Association ("VSEA" or the "Union"), pursuant to Section 12.16 of the Rules of Practice of the Vermont Labor Relations Board ("VLRB" or the "Board"), and hereby submits this post-hearing brief in the above-captioned matter.

The case arises from a unilateral change in conditions of employment perpetrated by the State of Vermont (the "State") to the negotiated telework policy impacting all three Executive Branch bargaining units represented by VSEA. The original policy – Policy 11.9 – which was negotiated by the State and VSEA in 2011 and 2012, provided employees the opportunity to apply for remote work for up to five days per week if they have a positive recommendation from their local supervisors and approval by their appointing authorities, so long as such telework was not inconsistent with the agency's business operations. The policy was strengthened by the passage of the Flexible Working Arrangements Act, 21 V.S.A. § 309, which required the State to give good-faith case-by-case consideration to such requests.

Upon return from the COVID-19 pandemic, a very large percentage of eligible employees were engaged in some level of telework, with more than 80 percent of teleworking employees spending three or more days per week working from home. However, in August 2025, the Governor announced that all Executive Branch employees would have to return to commuting to their official duty stations. Over the next few months, the Agency of Administration played catch-up, trying to find justifications for the Governor's arbitrary order and trying to establish some parameters to apply to satisfy the Governor's whim. In the end, the State created the so-called Hybrid Work Standard, which upended the existing negotiated telework protocols by creating an arbitrary two-day per week telework limit and requiring employees to justify even short-term exceptions to that limit based on "compelling reasons."

On December 1, 2025, the State implemented these significant changes to the negotiated telework protocols over the VSEA's objection and in the face of the Union's demand to negotiate over the change. For the reasons described at hearing and further explicated herein, the VLRB must find that the State violated section 961(5) and (1) of the State Employees Labor Relations Act when it made this unilateral change in conditions of employment and must order the State to return to the status quo ante and make all employees whole for their losses occasioned by the State's unfair labor practice.

## II. PROPOSED FINDINGS OF FACT

### A. Background Regarding the Parties and Their Original Negotiated Telework Agreement.

1. The Vermont State Employees' Association ("VSEA") is the certified collective bargaining representative of three units of employees of the Executive Branch of the State of

Vermont (the "State") – a Non-Management Unit ("NMU"), a Supervisory Unit, and a unit of employees of the Department of Corrections ("DOC"). [Tr. I: 198.][1]

2. At all times relevant, VSEA has been a signatory to collective bargaining agreements ("CBAs") covering the terms and conditions of employment of employees in the three Executive Branch units. [Ex. BB, CC & DD.]

3. Although the CBAs contain general language regarding employees' work locations and also contain provisions for employees whose official duty station is their home, [Ex. BB, Art. 20 & 55; Ex. CC, Art. 20 & 60; Ex. DD, Art. 20 & 61], the agreements contain no provision regarding remote work opportunities for employees who have an official duty station at an owned or leased State facility.

4. In or around August 2011, Tropical Storm Irene displaced well over one thousand employees from the Waterbury State Office Complex, which led the State to seek some protocols around the ability of employees to engage in telework, [Tr. I: 31-32], ultimately leading the State to negotiate with VSEA over what would become Policy 11.9 – Telework, [Tr. III: 34; Ex. F].

5. When the Administration asked its Department of Human Resources (DHR) to create a telework policy, the Labor Relations staff determined that the policy needed to be negotiated with the VSEA.[2] [Tr. III: 35.]

[1] References to the three volumes of non-consecutively paginated transcripts will be made to the volume and page number. VSEA exhibits will be referred to by the Exhibit number, and State Exhibits will be referred to by the Exhibit letter.

[2] Director of Labor Relations John Berard testified that he believed the policy needed to be negotiated and he consistently referred to the parties' discussions in 2011 and 2012 over the new policy as "negotiations."

6. Director of Labor Relations John Berard, who at the time was a Labor Relations Specialist, spoke with VSEA General Counsel Michael Casey and then sent him a draft proposal on October 13, 2011.[3] [Tr. III: 35; Ex. A.]

7. After reviewing the original draft with his principals, Casey responded to Berard with a red-line counterproposal on October 26, 2011, indicating that the proposal was only for the NMU but that Casey believed he could get the Supervisory and Corrections Units to agree to similar language. [Ex. B at 0004.][4]

8. On October 28, 2011, Berard responded with a revised draft of the policy incorporating some but not all of the VSEA's proposed changes. [Ex. B at 0003.] Although VSEA had proposed making the policy a side letter to the NMU CBA, the State wanted telework "to be open to *all* Executive Branch employees" – including employees outside of the bargaining units – such that the State needed telework to be incorporated into a state-wide policy instead of just a side letter in the CBA. [*Id.* (emphasis added).]

9. The negotiations stretched into January and then into early February, at which time the Supervisory Unit also agreed to be included under the Policy, and the VSEA ultimately agreed that the State could implement the final iteration of the policy, as had been modified during negotiations. [Tr. II: 29; Ex. D, E & G.]

10. On February 3, 2012, the State implemented Policy 11.9. [Ex. F.]

11. Policy 11.9 contained the following statement of purpose and policy:

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[3] Director Berard testified that he reached out to Conor Casey, whom Berard believed to have been the VSEA Executive Director at the time. [Tr. III: 34-35.] However, the letter Berard sent to Michael Casey was addressed to Michael Casey as "Interim Director." [Ex. A.]

[4] Page references within State (lettered) exhibits will be made to the Bates stamped numbers on the top of the page regardless of any internal pagination.

**PURPOSE AND POLICY STATEMENT**

The purpose of this policy is to establish the basic principles and conditions regarding an employee's voluntary request to work remotely from an alternate worksite, including an employee's home, on a regularly scheduled basis. *Ad hoc*, non-recurring or occasional telecommuting is not covered by this Policy.

[*Id.* at 0012.]

12. Policy 11.9 further contained the following eligibility provisions:

**ELIGIBILITY**

Telework is only feasible for those tasks, within a job, which are suitable – in whole or in part – to being performed away from the official duty station.

In general, positions involving the direct supervision of employees, direct in-person client contact, and/or significant administrative support may not be amenable to telework. Under no circumstances shall an employee's home be used to hold meetings or provide direct face-to-face service to clients.

The Appointing Authority or designee has the sole discretion to approve an employee's request for telework, and will only permit telework when consistent with the operating needs of the Agency or Department.

Employees who desire to perform telework shall complete and submit the attached Telework Request Form to his/her Appointing Authority. A copy of each approved Telework Request shall be provided to VSEA, Inc., when applicable.

[*Id.*]

13. Part of the negotiations centered on who would have the authority to approve an employee's telework request, and the State was insistent that the final approval be at the level of the appointing authority, which is reflected in the final document. [Tr. III: 36-37; Ex. F at 0012.] Under the negotiated policy, determinations as to whether and how much an employee would be permitted to telework were made at the agency or department level, with initial approval by a supervisor and ultimate approval by the appointing authority or their designee. [Ex. F; Tr. I: 35.]

14. As relates to the meaning of the term "appointing authority," all three Executive Branch CBAs include an Appendix A containing definitions used between the parties, and all three appendices identically define the term "appointing authority" as follows:

> **APPOINTING AUTHORITY** - the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees. For purposes of reduction in force: within an agency, the Secretary shall be the appointing authority except as such authority may be delegated to a Commissioner; within a department not a component of an agency, the Commissioner or executive head shall be the appointing authority.

[Ex. BB at 0185; Ex. CC at 0306; Ex. DD at 0426.] The State adduced no evidence that the parties (or even the State itself) ever refers to the Governor as the "appointing authority."

15. Although the State Employees Labor Relations Act ("SELRA") does not specifically define the term "appointing authority," the term is used in the statutory definition of "Department head" to refer to a person "in charge of an *agency* of State government." 3 V.S.A. § 972(1) (emphasis added).

16. Policy 11.9 also contains provisions relating to the termination of an individual employee's telework, as follows:

> **TERMINATION OF TELEWORK**
>
> Telework is a voluntary program, provided at the sole discretion of the Appointing Authority, and may be terminated by the employee or employer at any time, with or without cause. Whenever feasible, either party will provide a minimum of two (2) weeks' notice of the decision to terminate telework participation. The decision to terminate telework is not disciplinary, and any disciplinary action will be addressed separately.

[Ex. F at 0015.]

17. The policy does not contain any waiver of rights allowing the State to change or eliminate the availability of telework without first giving the VSEA notice and an opportunity to bargain to the extent required by law, nor did the State adduce any evidence that VSEA ever waived such rights. [*See* Ex. F.]

18. As relates to the process for requesting telework, an employee would fill out the Telework Request Form that is attached to the policy itself, which is then reviewed and signed off on by the employee's Division Manager or Director, and then further signed off on by the employee's "Appointing Authority or Designee." [Tr. I: 40; Ex. F at 0016-0018.]

19. Notably, there is no limitation in the policy or on the Telework Request Form as to the number of days an employee can request to telework. [Ex. F; Tr. I: 82-83; Tr. III: 59.] In this regard, a database of approved telework requests submitted between August 9, 2021, and September 25, 2025, shows 2,758 separate approvals for 40-hour telework arrangements.[5] [Ex. YY.]

20. Nor does the policy or the form require the employee to provide a reason for seeking telework (let alone a compelling reason). [Tr. III: 59-60.] Rather, the policy focuses solely on whether telework may be permitted as "consistent with the operating needs of the Agency or Department." [Ex. F at 0012.]

**B. The Passage of the Flexible Working Arrangements Act.**

21. On May 14, 2013, the Governor signed a new statutory provision, codified at 21 V.S.A. § 309, entitled "Flexible Working Arrangements." 2013 Acts & Resolves, No. 31, § 6. [Ex. 2 at 7-10, 16.]

22. The so-called Flexible Working Arrangements Act ("FWAA") requires all Vermont employers (including the State) to give good-faith consideration to employee requests

[5] Many of these approvals are duplicate approvals for the same employee at different points in time. For example, James Nadeau, who testified in this proceeding, was twice approved for a 40-hour telework protocol – once on September 21, 2021, and then again on December 9, 2021. [*See* Ex. YY at 497, 588.] Similarly, State's witness Jaron Foster was twice approved for a 24-hour telework protocol – once on October 13, 2021, and then again on March 31, 2022. [*See id.* at 0514, 0602.]

for flexible working arrangements, including "work from home" arrangements. 21 V.S.A. § 309(a)(1) and (2). [Ex. 2 at 7-8.]

23. In this regard, the FWAA requires employers to "consider . . . whether the request could be granted in a manner that is not inconsistent with business operations or its legal or contractual obligations." 21 V.S.A. § 309(b)(2). [Ex. 2 at 8.]

24. The FWAA defines the phrase "inconsistent with business operations" as including:

> (A) the burden on an employer of additional costs;
>
> (B) a detrimental effect on aggregate employee morale unrelated to discrimination or other unlawful employment practices;
>
> (C) a detrimental effect on the ability of an employer to meet consumer demand;
>
> (D) an inability to reorganize work among existing staff;
>
> (E) an inability to recruit additional staff;
>
> (F) a detrimental impact on business quality or business performance;
>
> (G) an insufficiency of work during the periods the employee proposes to work; and
>
> (H) planned structural changes to the business.

21 V.S.A. §309(b)(3). [Ex. 2 at 8-9.]

25. The FWAA took effect on January 1, 2014. 2013 Acts & Resolves, No. 31, § 14. [Ex. 2 at 16.]

26. Upon its passage, the Administration reviewed Policy 11.9 and believed that it was meeting the requirements of the FWAA for State employees through that existing policy (as well as the alternative work schedule provisions of the CBAs). [Tr. III: 38-39.]

27. Deputy Secretary of Administration Sean Brown testified that he did not recall any discussions between and among management officials about the impact of the FWAA on the telework policy at any time prior to the events in question in this case. [Tr I: 81-82.]

### C. The Experience of Remote Work Among State Employees Prior to the COVID Pandemic.

28. Despite the existence of a broad telework policy supported by an enforceable statutory right to good-faith consideration of flexible working arrangement requests, there were relatively few State employees who sought regular telework arrangements in the time prior to the COVID-19 pandemic. [Ex. Z at 0080.]

29. The results of a December 2020 survey of State employees indicated that two-thirds of respondents had never worked remotely prior to the pandemic, with 19.5 percent of respondents regularly teleworking one day or more each week while only 9 percent of respondents reported teleworking two or more days per week. [Ex. Z at 0080.]

30. These survey results comport with the experience of VSEA Executive Director Steve Howard, who explained that the "generational expectations" at the time were focused on in-person work and that it was rare and infrequent for VSEA members to seek consistent telework opportunities. [Tr. I: 205.]

31. Nevertheless, Commissioner Fastiggi testified before the House Committee on Corrections and Institutions that, even in the time prior to the pandemic, her team of administrative staffers were "very adept" at using remote work tools to communicate and thus were ready to transition to fully remote work with the onset of the pandemic. [Ex. 64 at 70-71.] Indeed, Fastiggi testified that her employees "were actually more productive when they were working remotely." [*Id.* at 71.]

## D. The Onset of the COVID Pandemic and the Implementation of Telework Arrangements for All Employees Capable of Remote Work.

32. On March 13, 2020, the Governor issued Executive Order 01-20, declaring a state of emergency in Vermont relating to the burgeoning COVID-19 pandemic. [Ex. I].

33. Consistent with that order, on March 13, 2020, Secretary of Administration Suzanne Young issued a memo to all Appointing Authorities recommending that they consider telework options for State employees to help slow and reduce the spread of COVID-19. [Ex. J.]

34. Despite calls from the VSEA to immediately close state government offices, [Ex. K], on March 15, 2020, Secretary Young issued a memo to all State employees directing them to continue reporting to their worksites as scheduled but also attaching newly created Telework Guidelines relating to the COVID-19 pandemic. [Ex. L & M.]

35. Ten days later, on March 25, 2020, the State finally heeded the VSEA's call, and Secretary Young ordered all State employees who could work from home to begin doing so no later than that day. [Ex. O.] Thereafter, the State pivoted very quickly to remote work for all those employees whose positions could be performed remotely. [Tr. I: 47-48.]

36. The work-from-home order for State employees was extended several times, [Ex. P & Q], until April 1, 2021, at which time employees were permitted to continue remote work through May 31, 2021, but would also be permitted to return to their official duty stations with the approval of their Appointing Authorities, [Ex. R].

37. On May 14, 2021, Secretary Young announced that State employees would be permitted to remain working from home with the approval of their Appointing Authorities until September 1, 2021, at which time they would be required to submit a request for telework pursuant to Policy 11.9 if they wished to continue their work-at-home arrangements. [Ex. S.]

38. On August 24, 2021, Secretary Young sent a further memo to all State employees about the return to in-office work and the continued availability of telework opportunities, writing:

> Beginning September 1, 2021 those employees who are certain they want to continue some level of remote work may submit a request under existing Policy 11.9 Telework. No employee is required to submit a request to telework if their preference is to return to the worksite full-time before November 1, 2021, or if you are just unsure at this time. Those who request to remote work should be patient and not expect an immediate response. Agencies and departments will likely be reviewing a larger volume of requests than were normal pre-pandemic. It will take time to evaluate the requests against programmatic needs and Policy 11.9.
>
> While these requests for approval to telework are being prepared and evaluated, continued telework will be permitted until a determination is made. Employees should expect to be working under an approved telework agreement or working on-site by November 1, 2021.
>
> An employee is not precluded from requesting approval to telework at any time in the future beyond November 1st as ***the telework policy is intended to provide flexibility for state employees throughout their careers with the State and for use as individual circumstances and preferences change***. Policy 11.9 was in effect pre-pandemic and remote work will remain an option for those who can telework in the future.

[Ex. T at 0057 (emphasis added).]

39. Secretary Young also linked to her August 24, 2021, memo a copy of DHR's Model Telework Guidelines template for those agencies and departments that had not created their own guidelines. [Ex. T & U.] The Model Telework Guidelines were consistent with the precepts of Policy 11.9 in that each employee's request would be considered on a case-by-case basis based on whether the employee's position is susceptible to remote work, that approval would be recommended by the employee's supervisor with final approval by the appointing authority or their designee, and that there were no restrictions on the number of days that an employee could apply for or be approved to telework. [Ex. U.]

40. VSEA did not object to the reopening of the offices and to the re-implementation of the requirements of Policy 11.9 together with the protections inherent in the FWAA. [Tr. I: 208-209, 210-211.]

41. The State also published a set of Telework FAQs (i.e., frequently asked questions) on July 27, 2021, which explained that employees would be permitted to live and telework from outside of the State of Vermont with approval of their Commissioner and Secretary. [Ex. V at 4; Tr. I: 52-53.]

42. VSEA Executive Director Howard testified that there were, in fact, VSEA members who lived out of state and worked completely remotely consistent with the existing policy. [Tr. I: 211-212.]

**E. Remote Work Patterns In and After November 2021.**

43. On May 4, 2023, the House Committee on Corrections and Institutions held a hearing to discuss the impact of telecommuting on State buildings at which the Committee heard from Commissioner of Buildings and General Services Jennifer Fitch and Commissioner of Human Resources Beth Fastiggi. [*See* Ex. Y (meeting agenda) and Ex. 64 (hearing transcript).]

44. At the hearing, Commissioner Fastiggi presented statistics relating to the approximately 3,100 approved telework agreements that had been submitted to the Department of Human Resources. Fastiggi testified that

- 31 percent of teleworking employees (approximately 961 employees) worked remotely more than 32 hours per week – i.e., more than four days per week;
- 19 percent of teleworking employees (approximately 589 employees) worked remotely more than 24 and up to 32 per week – i.e., more than three and up to four days per week; and
- 32 percent of teleworking employees (approximately 992 employees) worked remotely more than 16 and up to 24 hours per week – i.e., more than two and up to three days per week.

[Ex. Z at 0081; Ex. 64 at 78-79.] Thus, 82 percent of teleworking employees tracked by DHR – i.e., more than 2,500 State workers – were working from home more than two days per week as of May 2023.

45. Fastiggi reported that 44 percent of employees across all agencies/departments were engaging in telework, [*id.* at 0081], but this percentage is based on the total Executive workforce of approximately 7,500 employees, which number also includes the many hundreds of employees (such as corrections officers, law enforcement personnel, front-line hospital workers, buildings and grounds crews, and many others) who are unable to telework because they must have physical interaction in the workplace. [Tr. I: 89.] Fastiggi estimated that as many as 50 percent of State employees might be ineligible to telework, meaning that the far majority of eligible employees were actually teleworking in some capacity. [Ex. 64 at 79-80.] For example, the employees working in the central office for Environmental Conservation and Natural Resources had nearly 100 percent telework participation. [*Id.* at 83.]

46. Fastiggi also noted that the data was drawn from employees who actually uploaded their telework agreements that the numbers of employees engaged in telework was most likely under-reported. [Ex. 64 at 77.]

47. Moreover, the documents on file did not necessarily represent the extent to which employees actually engaged in telework. For example,

- Michelle Salvador's telework agreement, which expired on its face on January 13, 2024, indicated that she was teleworking four days per week, [Ex. 44; Ex. YY at 0636], when in fact she was teleworking five days per week up through the day she testified, [Tr. II: 58-59];

- Lisa (Adukonis) Trimboli's telework agreement, which expired on its face on November 11, 2022, indicated that she was teleworking one day per week, [Ex. PPP; Ex. YY at 0584], when in fact she had relocated out of State with the knowledge and permission of her supervisors and was a full-time remote worker until she resigned from State employment as of January 23, 2026, due to the events of this case, [Tr. II: 148, 156, 159]; and

- Bethany Ledoux had filed a telework agreement with DHR indicating that she was teleworking three days per week, [Ex. YY at 0524], but her remote work was later increased to four days per week and later increased further until she was only in office one day per month, [Tr. II: 180].

48. At the time of the Committee hearing, while the State was not actively reducing existing square footage of State workplaces to account for the large number of teleworking employees, the State was taking telework into account whenever it renovated or built new space. [Ex. 64 at 37-38.]

49. As noted above, *supra* ¶ 31, Commissioner Fastiggi testified that her team of administrative staffers were "very adept" at using remote work tools to communicate and indicated that, in the time since the pandemic, she found that her team was "very productive" and had "embraced telework." [*Id.* at 72.]

50. Fastiggi also noted that, "now that employees . . . have really been enjoying the benefits of telework, it's really hard to hire somebody for an administrative job anywhere who doesn't have the opportunity to do some type of telework." [*Id.* at 87-88.] And even within the State, Fastiggi noted that some employees would move between departments to work somewhere where telework was more readily available. [*Id.*]

51. Some candidates would indicate that they wouldn't even apply if they couldn't telework, which created difficulties in recruitment at a time when the unemployment rate was so low. [*Id.* at 88-89.] For that reason, DHR encouraged hiring managers to note the availability of telework in job announcements. [*Id.* at 88-89, 120-121.]

52. Fastiggi also explained that telework could be an incentive to potential job candidates outside of Vermont for especially hard-to-fill jobs, such as in the information technology sector, [*Id*. at 101], and Commissioner Jennifer Fitch recounted a story of a stellar employee whom BGS was able to keep employed through telework despite his need to move out of State with his family, [Tr. 103-104].

53. In her testimony, Fastiggi also reported the results of the annual survey of State employees for 2022 in which 35.1 percent of respondents indicated that the availability of telework was a reason for remaining employed by the State. [Ex. Z at 0083.] Interestingly, 28 percent of respondents indicated that the availability (or lack thereof) of teleworking would be a primary reason for them to leave State employment. [*Id.* at 0086.]

54. In summarizing the findings of the survey, Fastiggi wrote:

> - Telework/hybrid schedule was a major theme found throughout the survey. It is cited as a top five reason for staying AND for potentially leaving
>
> - Desire to continue full-time or hybrid work schedule post pandemic
>
> - Reasons in favor of teleworking include:
>   - work life balance
>   - better work environment
>   - greater productivity
>   - reduction of commuting barriers
>   - allowing the state to remain more competitive in job market

[*Id.* at 0089.]

55. VSEA Executive Director Steve Howard testified in the same hearing that, in choosing to telework, employees had expressed concern about long commutes, about the availability of housing near large State office complexes, and about childcare at the beginning and end of the day when employees would be commuting. [Ex. 64 at 123-124.] He also highlighted the issue of limited parking in Montpelier and other regions with a high density of State workers, [*id.* at 133-134], which is an issue Howard encountered in his own time as a State Legislator serving on this same House Committee, [Tr. I: 195].

56. In July 2023, only two months after Fastiggi testified about the then-existing status of telework, the State experienced a significant rain event in the Montpelier area that rendered many of the State office buildings uninhabitable and pushed even more employees into routine telework. [Tr. I: 55.]

57. In a survey of State employees undertaken September 2025, one month after the State announced the unilateral change in the telework policy discussed *infra*, Part II.G., 3,663 survey respondents indicated that they teleworked at least one day per week, with 3,027 indicating that they teleworked three or more days per week. [Ex. 61 at 2.] Of those respondents, 2,523 (83.35 percent) indicated having some kind of obstacle to more in-office days – including concerns about increased commuting time (including the cost of transportation and unavailability of public transportation), office space limitations, and the disruption to work/life balance. [*Id.* at 2, 8.]

### F. The November 2024 Curtailment of Remote Work for Certain Employees of the Department for Children and Families Within the Strictures of the Telework Policy and the Flexible Working Arrangements Act.

58. On October 18, 2024, Miranda Gray, Deputy Commissioner for the Economic Services Division (ESD) of the Department for Children and Families (DCF), sent an email to

ESD District Office Staff notifying them that telework would be suspended for that group of employees beginning Monday, November 4, 2024. [Ex. EE.]

59. Deputy Commissioner Gray indicated that the decision was based on various specified concerns, including concerns that telework was significantly impacting the service the District Office staff was providing to constituents. [*Id.*] Gray wrote:

> We have heard directly from our clients, partners, advocates and concerned citizens, who feel that our current service model is falling short. Vermonters engage with us to help meet their basic needs and the amount of time they spend waiting to connect in person or on the phones is not acceptable. Concerns have also been raised about not knowing that in-person meetings are available through case management.

[*Id.* at 0437.]

60. The decision to suspend telework solely for this subgroup of employees originated with the Deputy Commissioner and was implemented with the approval of the Commissioner – i.e., the appointing authority – and was not mandated from the Governor or anyone else outside the Department. [Tr. I: 96.]

61. On October 25, 2024, the VSEA wrote to DCF Commissioner Chris Winters complaining about the change and the lack of communication with the Union and expressing skepticism about the assertions Gray made in her email about service to constituents. [Ex. FF.] The Union asked that the Department cease and desist from implementation of the telework restriction unless and until the parties could discuss the matter and the impact on the affected employees. [*Id.* at 0440-0441.]

62. In order to inform the parties discussions, and in order to determine "any actions VSEA may take to challenge the change," the Union requested that the Department provide information to confirm the assertions made by Deputy Commissioner Gray in her email, including but not limited to copies of

> All concerns from Vermonters, including clients, partners, advocates, and concerned citizens received by ESD, regarding deficiencies in the current service model, including but not limited to:
>
> a. Complaints received about wait time to connect with staff in person or by telephone.
>
> b. Complaints received about wait times and not being informed of in-person meetings.

[Ex. FF at 0441; Tr. I: 213.]

63. On November 17, 2024, the State, through Director of Labor Relations John Berard, agreed to meet with VSEA while also indicating the State's position that it had no obligation to engage in "further bargaining" over the telework restriction for ESD employees because of the negotiations the partes had about the implementation of Policy 11.9. [Ex. GG.]

64. As is common in such communication from Director Berard to the Union, the State offered to meet "with the understanding that neither party is waiving any legal positions it has regarding the matter," [*id*], which the Union understood to mean that the State was willing to meet and discuss the matter without agreeing that it had any obligation to bargain and without requiring the VSEA to agree that there was no such obligation, [Tr. I: 216-217].

65. Thereafter, State representatives from Labor Relations and ESD met with VSEA Director of Labor Relations Gary Hoadley and various VSEA member-leaders about the restriction of telework for ESD workers. [Tr. III: 44-45.]

66. In February 2025, the State finally responded to the Union's October 25, 2024, request for information. [Tr. I: 214; Tr. III: 44; *see* Ex. 10A-10L.]

67. In response to the Union's request that DCF share any and all concerns it had received regarding deficiencies in ESD's current service model, the State provided a trove of communications from constituents and legislators and other data about the service being provided by ESD, [Tr. III: 61], including but not limited to the following:

- 102 pages of complaints received either directly from constituents or through the offices of various elected officials, including Governor Scott, State Senator Allison Clarkson, and U.S. Senator Bernie Sanders, [Ex. 10A-10C & 10G-10K];

- three voice messages left by constituents who were dissatisfied with the service they had received, [Ex. 10D-10F];

- a document unfavorably comparing the number and wait times for walk-ins to the service center in October 2019 versus October 2024 as well as the average wait times in the telephone queue from July through October 2024, [Ex. 10H]; and

- a document summarizing management's concerns distilled from these and other documents, [Ex. 10L].

68. After receiving and reviewing this information from DCF, the VSEA did not file any charges or grievances relating to the restriction in telework for employees in the ESD District Offices because the Union believed that the Department was acting in compliance with Policy 11.9 when the local appointing authority made the decision to restrict telework opportunities for a single subgroup of employees based on documented evidence informing the appointing authority's determination that remote work by this subgroup of employees was inconsistent with the operation of the Department. [Tr. I: 224-226; Tr. II: 27.]

### G. The Governor's Surprise Announcement Curtailing Remote Work that Ultimately Led to a Unilateral Change in the Negotiated Telework Policy Despite the Union's Demand to Bargain.

69. On August 7, 2025, the Governor announced at a press conference that State employees would be required to report to a worksite five days per week. [Tr. I: 226.] The State's Director of Labor Relations, John Berard, was not contacted in advance of the Governor's announcement. [Tr. III: 86.]

70. The next day, a Friday, Secretary of Administration Sarah Clark, sounding uncharacteristically "frazzled," called VSEA Executive Director Howard around 4 p.m. and said she would be issuing a communication regarding the Governor's announcement from the

previous day. Despite Howard's urging Clark to wait, at 4:13 p.m., Clark emailed all Executive Branch employees that the Administration was in the early stages of developing parameters for a statewide hybrid work strategy. [Tr. I: 229; Ex. 11.]

71. In that August 8 communication, Secretary Clark stated the process would include input from a focused group of employees and be based on data and lessons from the pandemic and flooding events, emphasizing that the State would "take the time to get it right" given the known impacts of this change on employees. [Ex. 11.]

72. On August 28, 2025, Secretary Clark advised employees that "Governor Scott is setting the hybrid work standard at a minimum of three days in the office," with appointing authorities retaining discretion to require *more* than three days, and that the new parameters would take effect on December 1, 2025. [Ex. 12.] The Union received no prior notice of these parameters or the implementation date before the announcement. [Tr. I: 231–232.]

73. Employees were not told the significance of the December 1 deadline [Tr. II: 64]

74. At the hearing in this matter, Deputy Secretary Brown testified they "settled on December 1" as a deadline in order to "make sure it was before January, because in January, things get very, very busy where we are finalizing the Governor's budget" and they "didn't want to make this transition during the legislative session." [Tr. II: 105-106.] The State did not adduce evidence of any exigency that required implementation prior to the Legislative session instead of after the session was over.

75. On September 5, 2025, Secretary Clark disclosed that an Advisory Group had met in the prior week in order to make recommendations for a plan to implement the new "Hybrid Work Standard" and would prioritize: (1) office space and capacity planning; (2) impact on employees with extended commutes; and (3) impact on employees located out-of-state. [Ex. 13.]

These were priorities because, prior to announcing the new Hybrid Work Standard, the State did not have sufficient space set up for all of its workers to come back to their in-office locations and because there was no plan to address employees with extended commutes or who lived out-of-state. [Tr. I: 111-113.]

76. On September 8, 2025, the Governor distributed a video message and transcript to Executive Branch employees describing the shift to a hybrid schedule and asserting goals of "comradery [*sic.*] and collaboration" and a need "to be good stewards of (Vermonters) tax dollars," explaining that the change in remote work protocols was "not about any individual employee's or team's performance." [Ex. 14.]

77. At least some employees subject to the Hybrid Work Standard work primarily with people and organizations outside their Agency and who, even if performing work at their official workstation, would continue to connect remotely. [Tr. I: 174-175, Tr. II: 49, 60-61, 106-108, 112, 120, 124-125, 151-152, 155-156, 176-179.]

78. At least some employees were hired by the State despite their respective appointing authorities' knowledge that the employees lived a long distance from their official duty stations. [Tr.1: 176-177, Tr. II: 46-50, 100, 104, 123, 152-153.]

79. On September 12, 2025 – more than a month after the Governor's initial announcement – Director of Labor Relations John Berard gave VSEA official notification that all Executive Branch employees working remotely would be required to return to the office for a minimum of three days per week beginning December 1, 2025. [Ex. 15.]

80. The State took the position that this requirement fell within the existing negotiated Telework Policy and therefore did not need to be further bargained, although Berard stated a

preference to discuss the change with VSEA, "with the understanding that neither party is waiving any legal positions it has regarding the matter." [Ex. 15; *see supra* ¶¶ 63-64.]

81. On September 18, 2025, while the Union was considering next steps in response to Director Berard's letter, Secretary Clark sent a further communication directing employees to an Information and Resources page, encouraging completion of a survey, and noting formation of a cross-agency advisory group to make recommendations to minimize operational disruptions. [Ex. 17.]

82. On September 26, 2025, the Union responded to Director Berard's letter agreeing to meet to discuss the evolving situation even though the Governor and his team had "as of yet, failed to provide any details as to how they intend[ed] to accomplish this monumental undertaking in the very short time frame the Governor has mandated." [Ex. 19.] As VSEA Executive Director Howard explained, the Union was "sort of grasping for information, watching the emails that were coming from the Secretary of Administration, trying to figure out from those emails what the policy was supposed to be. And then we reached a point where we felt we couldn't wait anymore." [Tr. I: 234.]

83. In her October 3, 2025, email, Secretary Clark distributed the Administration's "Hybrid Work Standard: Out-of-State Employee Guidance and Procedures." [Ex. 20.] The document directed out-of-state employees to consult with their supervisors by October 17 to determine if they could meet the Hybrid Work Standard and, if not, to commit in writing by November 21 to relocate; otherwise, their positions would be posted for recruitment no later than December 1. [Ex. 22.] The Union was not notified by the State of these procedures or directives. [Tr. I: 238.]

84. Per these announced procedures, appointing authorities would be permitted to request continuation of an out-of-state telework arrangement only after an "unsuccessful robust recruitment" and only with approval through DHR and the Secretary of Administration, subject to annual renewal. [Ex. 22.]

85. For out-of-state employees committing to relocate, the procedures required that they meet the Hybrid Work Standard – i.e., that they report to their in-office duty station three days per week – by June 30, 2026, and indicated that those employees should expect DHR to seek periodic confirmation of relocation efforts during the intervening time. [*Id*.]

86. These procedures also contemplated "limited exceptions" for out-of-state employees who could perform "all job duties remotely" and who also had "compelling reasons" – such as military or court-ordered relocation or for personal safety – to seek such an exception from the Hybrid Work Standard. [*Id*.] In order to apply for such an exception, out-of-state employees would need to complete a new DHR Exception Request Form and would be subject to approval from their appointing authority, from DHR, and ultimately from the Secretary of Administration's office. [Ex. 22, 26.]

87. In an October 10, 2025, email, Secretary Clark acknowledged that there existed significant space constraints at certain worksites. [Ex. 21.] In this regard, at the time the Hybrid Work Standard was announced, the State did not have enough or adequate space to accommodate all the employees' in-office day requirements. [Tr. II: 53-57, 135-136, 141, 187, 193.] For example, in at least one agency, about 50 desks were shared among 400 employees. [Tr. II: 56-57.] Secretary Clark indicated that the Hybrid Work Standard intentionally allowed two remote days per week to allow for staggered schedules, [Ex. 21], which ironically would undercut the camaraderie that the Governor was purportedly seeking.

88. In her October 10 email, Secretary Clark also shared survey results indicating that approximately 83 percent of employees who were not already working three in-office days per week reported specific challenges to meet the standard, including commute times, medical conditions, and childcare needs. [*Id.*; *see supra* ¶ 57.]

89. Also on October 10, 2025, VSEA and the State held the meeting that had been offered by the State to discuss the pending change in telework protocols. In response to questions from the VSEA, the State representatives at this meeting – including Director Berard, Chief Recovery Officer Doug Farnham, and other DHR staff – could not identify any research or data relied upon by the Governor to support his announced policy change and had no implementation plan to share with the Union. [Tr. I: 235–238; Tr. III: 48, 61-67.]

90. On October 14, 2025, the State expanded its "limited exceptions" to in-state employees who also could not meet the in-office requirement by December 1 but who would be permitted to request an exception due to "compelling reasons" such as military or court-ordered relocation or for personal safety. [Ex. 23, 25.] The State added the possibility of short-term, time-limited extensions to address temporary obstacles such as relocation, childcare, or transportation issues. Like the out-of-state procedures, requests had to be submitted via the DHR Exception Request Form by no later than November 21, 2025, and would be reviewed by the Appointing Authority, DHR, and the Secretary of Administration. [Ex. 25.] As of the October 14 memo, if an employee's exception was not "granted," they would be required to meet the minimum three in-person days by December 1. [Ex. 23, 25, 26.]

91. At this juncture, not only had the State unilaterally announced a new restriction to the telework policy in reducing remote work opportunities to two days per week, but it had also created out of whole cloth a policy for "exceptions" to that unilaterally changed policy focusing

not on business operations – as anticipated under the original negotiated policy and as required by the FWAA – but rather on whether the employee had some compelling need to continue teleworking.

92. Employees were understandably confused about the State's guidance, implementation of the Hybrid Work Policy, and about the procedures they would have to follow to seek exceptions. [Ex. 46, 47; Tr. I: 189, Tr. II: 62-64, 68, 70, 110, 117,131-132.] In her October 24, 2025, weekly memo, Secretary Clark acknowledged that uncertainty regarding schedules added to employee stress but stated that the State would communicate in-person plans in the coming weeks with support from the Hybrid Work Standard Advisory Group, DHR, and BGS. [Ex. 28.]

93. On October 24, 2025, recognizing the fundamental changes to the originally negotiated Telework Policy as had been modified by the FWAA and by the parties' practice over time, VSEA demanded bargaining over the State's proposed return-to-commute initiative. [Ex. 29; Tr. 238-239.]

94. On November 10, 2025, the State rejected VSEA's demand, reiterating its position that any bargaining obligation had been satisfied when Policy 11.9 was negotiated in 2012 and therefore refusing to engage in "further bargaining." [Ex. 33.]

95. Based on the State's refusal to bargain, on November 10, 2025, the Union filed the unfair labor practice charge in this case. [Tr. II: 33.]

### H. Ongoing Changes to the Announced Protocols After the Filing of the Unfair Labor Practice Charge.

96. Between the time of the Union's demand to bargain and the State's rejection of that demand, the Administration issued additional implementation guidance. On October 31, Secretary Clark announced that all prior and current telework agreements would be rescinded as

of December 1 and instructed employees who wished to continue any amount of remote work to submit new online Telework Request Forms by November 21 for approval. [Ex. 27, 30.]

97. In her November 14, 2025, memo, Secretary Clark acknowledged that many employees were experiencing "concerns, uncertainty, and logistical obstacles" and even "stress, frustration, and for some, anger" as the State pushed toward the change in remote-work protocols. The memo directed employees seeking any reoccurring telework after December 1 to submit a new online telework request by November 21. Those employees with questions were directed to speak with their agency management or to provide feedback with the Governor's Constituent Service Office. [Ex. 27, 34.]

98. On November 20, 2025, Secretary Clark reminded employees that the State's Hybrid Work Standard would take effect on December 1 and reiterated that employees seeking any fewer than three days per week in the office would need to have "an approved exception or authorized Reasonable Accommodation" submitted by the next day. For the first time – the day before such exception requests were due – Clark stated that exception requests would be accepted after November 21 but that employees who had not submitted a request by November 21 would "be expected in the office five days a week." [Ex. 35.]

99. Around this time, at least one appointing authority told an employee that her "ongoing" (i.e., non-time-limited) exception request would not be approved and said that, in order to receive the appointing authority's approval, the employee needed to also provide a rationale for her exception request "other than successful remote work and issues of space." [Ex. 50.]

100. Other supervisors told employees that their exception requests were unlikely to be approved if the reason did not fall within the bulleted list of "compelling reasons" in the State's published guidance. [Tr. I: 183, Tr. II: 77, 84, 111.]

101. Secretary Clark's November 25, 2025, memo explained that employees who had submitted *exception* requests by November 21 would be permitted to continue working their previous telework arrangements but that employees who had merely submitted *telework* requests that had not yet been approved, regardless of the date of submission, would be "expected to report to their assigned location five days a week until an authorized telework agreement is in place." [Ex. 36.]

102. On November 24, 2025, the Vermont Human Rights Commission ("HRC") raised significant legal concerns regarding the State's implementation of the Governor's mandate and requested that the State respond to their concerns. HRC asserted that credible information indicated the mandate was violating the FWAA and the Vermont Fair Employment Practices Act ("FEPA"). The HRC warned that the State's requirement that employees submit "exception" requests – particularly with "compelling reasons" on State-specified forms – conflicted with the cited laws, both of which require individualized, good-faith discussions and prohibit the imposition of new burdens on employees seeking flexible arrangements. Any denials of a flexible working arrangement, the HRC explained, must be written and set out the State's position on how the employee's request would, if allowed, be inconsistent with the States' business operations." [Ex. 40.]

103. In a November 26, 2026, hearing in Superior Court relating to the impending December 1 implementation, Deputy Secretary Brown perpetrated a feat of linguistic jujitsu, suggesting for the first time that the phrase "compelling reasons" in the exception guidance

would also include circumstances that an *employee* believed to be compelling and was not restricted to circumstances of the kind described in the State's published guidance. [Ex. 42 at page 51.] Nevertheless, on cross-examination, Brown was forced to admit that "the word 'compelling' means more than just something that might be convenient. It actually requires some compelling circumstance that is really exceedingly detrimental, something heightened." [*Id.*; *see also* Tr. I: 120-121.]

104. On December 3, 2025, HRC sent a follow-up letter acknowledging that the testimony provided by Deputy Secretary Brown in Superior Court clarified the State's intent to implement the mandate in a manner compliant with FWAA and FEPA and asked the State to confirm the accuracy of Brown's testimony. HRC also emphasized that the clarifications arrived too late to assist employees whose requests were due by November 21 and urged the State to reopen the request period and issue a fresh notice consistent with the testimony. [Ex. 42.] The State adduced no evidence that it ever issued a fresh notice as HRC requested.

## I. Implementation of the Unilateral Change in the Negotiated Telework Policy and the Ramifications of Such Unilateral Change.

105. In an email on December 1, 2025, Secretary Clark confirmed that the State's Hybrid Work Standard was now in full effect – i.e., that employees were no longer permitted to telework more than two days per week except for compelling reasons having nothing to do with the impact on state business operations and based on decisions made not by the appointing authority but rather by the highest levels of the Administration. [Ex. 37.]

106. In an email a few days later, on December 5, 2025, Secretary Clark reported that approximately 500 exception requests were currently under review. For the first time in her weekly memos, Clark asserted that, though employees continue to need a "compelling reason" to make an exception request, those reasons are not limited to the examples provided in the prior

guidance and that the appointing authorities, DHR, and the Secretary of Administration's office would be reviewing the requests "based on individual facts." [Ex. 38; Tr. II: 89-91.]

107. On December 8, 2025, the Attorney General's Office responded to the HRC on behalf of the State, asserting that the State was implementing the mandate consistently with applicable law and reiterating that telework and exception requests were reviewed on an individualized, case-by-case basis. The State acknowledged the HRC's concerns regarding the "compelling reasons" language but stated that updated employee communications – particularly the December 5 statewide email – clarified that examples of compelling reasons were non-exclusive and that employees could detail any circumstances they believed warranted an exception. [Ex. 43.]

108. Some exemplary State employees have left State employment, or are contemplating leaving State employment, because of the Governor's mandate. [Tr. I: 191, Tr. II: 98, 113, 159.] At least one exemplary State employee is committed to relocating at great financial and personal expense. [Tr. II: 135.]

## III. ARGUMENT

### A. The Subject of Telework Is a Mandatory Subject of Bargaining That the State Admits It Is Required to Negotiated Over with the VSEA.

The State has admitted throughout this case – both by its conduct and through the testimony of its own Director of Labor Relations – that telework is a proper subject of negotiation. That conclusion is buttressed by the relevant provisions of SELRA and by persuasive precedent from other jurisdictions.

Section 904 of SELRA provides, in pertinent part, that "[a]ll 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." 3 V.S.A. § 904(a)(3).

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 Employees' Association v. State of Vermont, AHS (Re: Hiring Standards Policy),* 30 VLRB 296, 321 (2009), citing *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 138 Vt. 451, 456 (1980). The 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. *Id.*, citing *Hackel v. Vermont State Colleges*, 140 Vt. 446, 449 (1981).

In the post-pandemic world, there can be no more pertinent a matter relating to the relationship between the State and its employees than where the employees will be permitted to perform their work, and in that regard, the subject of teleworking is neither prescribed nor controlled by statute. Rather, the opposite is true. The relevant statute – i.e., the FWAA – provides that all employers, including the State, *must* consider work-from-home arrangements. The statute further provides that employers may institute policies that are "more generous" than the statutory requirements and states that the provisions of the FWAA "shall not diminish any rights . . . pursuant to a collective bargaining agreement." 21 V.S.A. § 309(d). The statute thus allows for parties to engage in negotiations to create more robust programs than the FWAA would minimally require. Far from proscribing or curtailing negotiations, the Legislature has, through the FWAA, encouraged negotiations over telework.

Moreover, though decisions of other state and federal labor agencies do not compel any particular result here due the different bargaining language employed in the various labor statutes, *see Vermont State Employees' Association v. State of Vermont (re: Electronic Communications Policy)*, 30 VLRB 210 (2009), citing *Vermont State Colleges*, 138 Vt. at 456,

the National Labor Relations Board ("NLRB") and the majority of state labor boards to have addressed the issue have found that telework is a mandatory subject of bargaining.

The NLRB first opined on the subject in *YP Advertising & Publishing LLC*, 366 NLRB No. 89 (2018), adopting an administrative law judge's decision that the Respondent engaged in unlawful direct dealing with an employee regarding her request to work from home. *Id.*, slip op. at 1, 5. In order to find such a violation, the Board first had to find that the subject of remote work was a mandatory subject of bargaining, which the Board necessarily did in finding a direct dealing violation. *Id.* slip op. at 5. More recently, the Board found that Goddard College engaged in an unfair labor practice when it unilaterally canceled an employee's telework arrangement, again finding that such a change in work location constituted a material change in working conditions that required bargaining. *Goddard College Corp.*, 372 NLRB No. 85 (2023), slip op. at 1, 10. *See also Nat'l Treasury Emps. Union & Fed. Comm. Comm'n*, 73 FLRA 101, 106 (2022) (recognizing that telework is a mandatory subject of bargaining for federal employees in upholding arbitrator's award that the agency had not improperly insisted that the union waive its right to negotiate over telework).

State labor agencies have followed suit. For example, the Rhode Island State Labor Relations Board held that a state agency committed an unfair labor practice by refusing to bargain over its remote work policies, which the board held to be a mandatory subject of bargaining. *Rhode Island Department of Elementary and Secondary Education*, Case No. ULP-6284, 2022 WL 4289643, at *8 (R.I. St. Lab. Rel. Bd. Aug. 16, 2022). The California Public Employment Relations Board recently reached the same conclusion in a unilateral change case. *East Bay Regional Park District*, PERB No. 2969-M, 2025 WL 2095960 (Cal. Pub. Emp. Rel. Bd. June 26, 2025). And the Maryland Public Employee Relations Board has also recently

concluded that telework is a mandatory subject of bargaining in finding that the University of Maryland unlawfully implemented a new telework policy while negotiations were ongoing and before impasse. *University of Maryland, College Park*, PERB ULP 2025-40, 2026-01 (Md. Pub. Emp. Rel. Bd. Nov. 21, 2025), https://laborboard.maryland.gov/Documents/PERBULP2025-40and2026-01_%20Decision%20and%20Order_11.21.2025.pdf. While the New Hampshire Public Employee Labor Relations Board has determined that telework is a permissive subject of bargaining, the New Hampshire board's determination would still require the state to bargain over the impacts of any change to telework. *State of New Hampshire*, Decision No. 2023-052, 2023 WL 2683169 at *4 (N.H. Pub. Emp. Lab. Rel. Bd. Mar. 17, 2023).[6]

Therefore, in consideration of the provisions of SELRA and the legislative guidance in the FWAA, and consistent with the decisions of the NLRB and the majority of state labor boards to have considered the question, the VLRB must find (as the State here has admitted) that telework is a mandatory subject of bargaining.

### B. The State Unilaterally Changed the Parties' Negotiated Telework Policy in Violation of 3 V.S.A. § 961(5) and (1) Without Giving the Union an Opportunity to Bargain to the Extent Required by Law.

It is an unfair labor practice for the State to refuse to bargain with its employees' exclusive representatives. 3 V.S.A. 961(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." *Re: Hiring*

[6] In 2024, the Nebraska Commission of Industrial Relations dismissed an unfair labor practice charge alleging an unlawful unilateral change in telework, but the Commission did so based on a finding that telework was "covered by" the management rights clause in the CBA without making any finding as to whether telework was otherwise a mandatory subject of bargaining under state law. *State of Nebraska*, Case No. 1561, 2024 WL 3717443 at *5 (Neb. Comm'n of Indus. Rel. July 11, 2024). The Commission's decision is on appeal before the Nebraska Supreme Court.

*Standards Policy,* 30 VLRB at 321, *citing Burlington Fire Fighters Association v. City of Burlington*, 142 Vt. 434, 435-36 (1983). As noted above, *supra* Part III.A., telework is a mandatory subject of bargaining, and the State must therefore be found to have violated SELRA as alleged by materially changing telework protocols without having given the VSEA an opportunity to bargain to the extent required by law.

As the VSEA noted throughout this proceeding, the State has materially changed the protocols for telework outlined in Policy 11.9, which the parties' specifically negotiated in 2011 and which have been strengthened in favor of the workforce through passage of the FWAA. The policy as it existed on and before the Governor's surprise announcement on August 7, 2025, contained the following parameters:

- pursuant to Policy 11.9 and the explicit provisions of the FWAA, employees were entitled to individual case-by-case determinations as to the extent they would be permitted to telework;
- pursuant to Policy 11.9, such decisions were to be made upon recommendation of the employee's own supervisor with approval by the appointing authority;
- pursuant to Policy 11.9 and the explicit provisions of the FWAA, such decisions were to be based on whether the employee's participation in telework would be inconsistent with business operations and had no basis in whether the employee had some need – let alone a "compelling need" – to engage in further telework;
- pursuant to Policy 11.9 and the precepts of the FWAA, employees were permitted to telework up five days per week – i.e., full-time remote work – and the accepted practice was that approximately 82 percent of teleworking employees engaged in remote work more than two days per week;
- pursuant to Policy 11.9 and the parties' practice, employees were permitted, with proper approval, to live out of State and to work remotely from their out-of-state residences without demonstrating any compelling need;
- while Policy 11.9 purported to require employees to have a current telework agreement on file, the established practice demonstrates that a number of employees continued to telework and/or increased the amount that they teleworked without having an accurate agreement on file.

As a result of the Governor's return-to-commute protocol, which was implemented on December 1 without bargaining, these listed protocols were all changed. Employees are now subject to an arbitrary two-day telework limit without regard to their individual circumstances; this limitation is as a result of a statewide determination at a level well above the appointing authority; and the decision to allow telework beyond two days is no longer based on whether telework is feasible within State operations but now requires a showing that the employee has some "compelling reasons" for needing additional telework. In addition, the State has severely limited the ability of out-of-state residents to engage in telework. These are significant and material changes to the parties' negotiated telework protocols.

The State defends its conduct here with the disingenuous assertion that it continues to act consistently with Policy 11.9 and the FWAA because it is purportedly exercising its discretion under Policy 11.9 to terminate telework. However, the discretion contained in the negotiated policy is merely the discretion to approve an individual employee's request for telework based on the factors contained in the policy and in the FWAA. The policy does not grant the State the unilateral authority to restructure the entire telework protocol. Indeed, had the State eliminated all telework for all employees, would it similarly stand before the Board arguing that such wholesale elimination of telework was merely a proper exercise of discretion?

The current case is similar in significant respects to the NLRB case of *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018). In *Ozburn-Hessey*, the Respondent maintained a policy allowing managers the discretion to approve or deny requests for paid time off based on workload. When the Respondent implemented a new rule requiring requests for time off to be submitted 48 hours in advance, it argued that this change was merely an exercise of managers' existing discretion to deny requests for time off; however, the Board adopted the administrative

law judge's determination that this was not a mere exercise of discretion. *Id.*, slip op. at 1, 86-87. The ALJ wrote:

> [C]alling the promulgation of the 48-hour rule just another exercise of the manager's existing discretion requires a contortion of language and a distortion of fact. In making this argument, the Respondent relies on a sentence in its written paid time office policy: "Managers have the discretion to approve the request based on workload." That provision clearly contemplates that a manager, upon receiving a request for paid time off, will evaluate whether the employee's services are essential to performing the available work. If not, the manager can reject the request.
>
> In other words, this policy contemplates that the manager will make a case-by-case determination, in each instance, as to the effect granting the time off would have on getting the work done. Such a policy is different from promulgating a new rule that employees must request leave 48 hours in advance, and then giving managers discretion to waive the rule when the workload allows.

*Id.*, slip op. at 87.

The changes to the telework in this case are of the same ilk as the changes wrought in the case before the NLRB. The eligibility provision of Policy 11.9 gives the appointing authority "the sole discretion to approve an employee's request for telework, and will only permit telework when consistent with the operating needs of the Agency or Department." [Ex. F at 0012.] This provision clearly contemplates a case-by-case analysis as to the employee's ability to telework consistent with the needs of the agency and does not authorize a unilateral, top-down, statewide limitation on telework not otherwise contained in the negotiated agreement.

During its cross-examination of the VSEA's Executive Director, the State also appeared to make an issue out of the fact that the telework protocols were contained in a State policy and not incorporated into the CBAs, but that distinction is meaningless. If a matter is a mandatory subject of bargaining, the State is prohibited from making a unilateral change regardless of whether the existing practice is codified in an agreement. It is for this reason that the VLRB permits grievances over past practices that are of significant import to the parties even if never

reduced to writing. *See Grievance of Hanifin*, 11 VLRB 18, 27 (1988); *Grievance of Allen*, 5 VLRB 411, 417 (1982); *Grievance of Beyor*, 5 VLRB 222, 238-239 (1982).

Finally, to the extent that the State suggests some sort of exigency that required implementation without satisfying its bargaining obligation, no such exigency exists under the facts of this case. *See RBE Electronics of S.D., Inc.,* 320 NLRB 80, 81 (1995) (permitting unilateral action when "economic exigencies compel prompt action"). Here, the facts show that the only reason for the December 1 deadline was the administration's desire to get the new protocol implemented before budget season. It wasn't a question of any budget impact. The Governor just didn't want to be bothered having to deal with this while simultaneously getting his budget passed. But the State offered literally no reason why the implementation couldn't have happened *after* budget season, which also would have coincided with the end of the school year when most working parents would have more flexibility in having their lives upended by the Governor's whim.

For the foregoing reasons, the VLRB must hold that the State made a unilateral change in the telework protocols in violation of 3 V.S.A. § 931(5) and (1) without having given the Union an opportunity to bargain to the extent required by law.

### C. VSEA Did Not Waive Its Right to Bargain, and the Unfair Labor Practice Charge Was Not Untimely Filed, Based on the State's Earlier Decision to Suspend Telework for a Small Unit of Employees Effectuated Within the Parameters of the Negotiated Policy.

In further defense of its unlawful unilateral change, the State suggests that the charge was untimely filed and/or that the VSEA waived its right to bargain when the VSEA failed to file charges in and after November 2024 when the State suspended telework for a subgroup of employees in the Economic Services Division of DCF. The State's argument lacks factual support.

In determining whether a union has waived its bargaining rights, the VLRB requires the employer to demonstrate that the union "consciously and explicitly waived its rights." *Re; Hiring Standards Policy*, 30 VLRB at 328, citing *Local 98, IUOE, AFL-CIO v. Town of Rockingham*, 7 VLRB 363 (1984). The Vermont Supreme Court defines a waiver under such circumstances as the "intentional relinquishment of a known right." *Id.*, citing *In re Grievance of Guttman*, 139 Vt. 574 (1981). A party can intentionally relinquish a right by failing to assert it in a timely manner. *VSEA v. State of Vermont*, 6 VLRB 217 (1983).

On the facts of this case, the VSEA did not consciously or explicitly waive its right to bargain over the December 1, 2025, changes to the telework policy when it took no action in the face of the limited suspension of telework for ESD employees in November 2024 because, unlike the changes at issue in this case, the suspension of telework for ESD employees was *consistent* with Policy 11.9 and the FWAA. The ESD telework restriction had all the hallmarks of the proper exercise of negotiated management discretion under Policy 11.9 in that (1) it was effectuated by the appointing authority; (2) it involved a small subgroup of similarly situated employees; (3) it didn't involve an arbitrary limitation on telework; and, most importantly, (4) it was supported by reams of data suggesting that continued telework was inconsistent with the effective operations of ESD. [7] The unilateral change at issue in this case has none of these hallmarks of compliance with Policy 11.9 inasmuch as the current change (1) was effectuated by the Governor; (2) involved every Executive Branch employee regardless of job or circumstances; (3) imposed an arbitrary limitation on telework not contained in the negotiated policy; and (4)

[7] It cannot escape the Board's notice that the State attempted to paint the ESD suspension of telework with the same brush as the current statewide restrictions while at the same time attempting to block the Union from presenting in evidence the documents produced by the State to prove that the suspension of ESD telework was in support of effective business operations. [Tr. I: 220-221.]

was not based on any data suggesting that the existing statewide telework protocols were inconsistent with business operations.

The facts establish that the State acted within its negotiated discretion when it temporarily suspended telework for ESD employees, and so there was no unilateral change for the Union to negotiate and no unfair labor practice charge for the Union to file. In contrast, as established above, *supra* Part III.A. and B., the December 1, 2025, implementation of the new Hybrid Work Standard amounts to a clear and patent change in the negotiated telework protocols supporting the Union's demand to bargain and the filing of the pending unfair labor practice charge on the day that the State refused the VSEA's demand to bargain.

For the foregoing reasons, both the bargaining demand and the charge were timely raised, and the VLRB must find that the State violated section 961(5) and (1) as the Union has alleged.

## IV. REMEDY

The Board's remedial authority for the prevention of unfair labor practices stems from 3 V.S.A. § 965, which allows the Board to "issue and cause to be served on [the Respondent] an order requiring him or her to cease and desist from the unfair labor practice and to take such affirmative action as will carry out the policies of [the Act]." The Board thus orders remedial make-whole orders designed to "restore the economic status quo, and recreate the conditions and relationships that would have existed but for the employer's wrongful act." *Re: Hiring Standards Policy*, 30 VLRB at 333, citing *Vermont State Colleges Faculty Federation v. Vermont State Colleges,* 17 VLRB 1, 17 (1994). Restoration of the economic status quo includes reimbursement to affected employees of monetary losses as a result of the State's unlawful action, together with interest at the statutory rate for such losses. *E.g., Vermont State Employees' Association v. Vermont State Colleges*, 38 VLRB 60, 69 (2025) (ordering reimbursement to employees of

childcare tax contributions collected from employees without negotiating with their unions, together with interest at the statutory rate).

To remedy the violation, the Board must start by ordering a return to the status quo ante – i.e., ordering the State to rescind the unilateral changes to the telework protocols and allow all affected employees to return to the telework and commuting patterns that existed prior to the unilateral change, which in this case would include making an offer of reinstatement to any employee who has left State employment as a result of the State's unilateral action. The VLRB must further order that the State cease and desist from making any further changes in the telework protocols unless and until it has given the Vermont State Employees' Association notice and an opportunity to bargain to the extent required by SELRA.

In addition, in order to remedy the harms caused by the State's unfair labor practice, the VLRB must order that the State reimburse employees for any monetary losses occasioned by the State's unlawful action, together with interest. Because of the expedited nature of these proceedings, the VSEA was unable to adduce evidence from all employees who have been economically harmed, but the VSEA has certainly established various types of economic harms that employees have suffered – including losses in pay and benefits for employees such as Jessica Steeby and Lisa Trimboli who have left State service and costs incurred by employees such as Amy Dodge who have incurred additional housing and other expenses in seeking to comply with the State's unlawful order. The VSEA respectfully requests that the VLRB retain jurisdiction and convene remedial proceedings in order to ascertain the true amount of damages that will be necessary to remedy the State's broadly impactful statutory violation on the affected employees.

Finally, in order to remedy the derivative violation of Section 961(1), the Board must order the State to ensure that the Board's decision is "communicated broadly" to employee affected by the unilateral change, which will require the State to post the Board's Order on bulletin boards throughout all agencies of the Executive Branch and to send all Executive Branch employees an e-mail transmission of the Board's Order in this matter. *Vermont State Employees' Association v. State of Vermont Judiciary Dept. (Re: Use of Personal Cell Phone),* 34 VLR 155, 179 (2017), citing *Vermont State Employees' Association v. State of Vermont (Re: Electronic Communications Policy)*, 30 VLRB 210, 236-237 (2009).

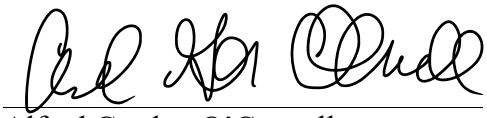
## V. CONCLUSION

For the reasons asserted herein, the VLRB must find that the State violated 3 V.S.A. § 961(5) and (1) when it unilaterally changed the parties' negotiated Telework Policy by implementing the Hybrid Work Standard without having given the VSEA an opportunity to bargain to the extent required by law. The VSEA respectfully requests that the Board order the relief set forth in the Proposed Order, attached hereto as Appendix A.

Respectfully submitted,

VERMONT STATE EMPLOYEES' ASSOCIATION,

by its attorneys,



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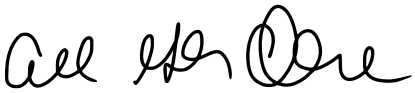
DATE: March 4, 2026

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 4, 2026, a copy of the above document was served upon Assistant Attorneys General Chris Florian and Wendy Chen, counsel for the State of Vermont, Department of Human Resources, by electronic mail to chris.florian@vermont.gov and wendy.chen@vermont.gov.



Alfred Gordon O'Connell

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## APPENDIX A – PROPOSED ORDER

Based on the foregoing findings of fact and for the foregoing reasons in this unfair labor practice case, Labor Relations Board Docket No. 25-50, Vermont State Employees' Association v. State of Vermont, Department of Human Resources (Re: Telework Policy), the Vermont Labor Relations Board has concluded that the State of Vermont (the "State") has committed unfair labor practices in this matter as forth in the Opinion, and it is ordered:

1. The State has refused to bargain in good faith and interfered with employees' exercise of rights, in violation of 3 V.S.A. Section 961(1) and (5), through unilaterally implementing changes to telework protocols applicable to employees in all three Executive Branch bargaining units – i.e., the Non-Management Unit, the Supervisory Unit, and the Corrections Unit – by implementing the new Hybrid Work Standard without negotiating with the Vermont State Employees' Association;

2. The State shall rescind the Hybrid Work Standard and shall return to the status quo ante with regard to the application of Policy 11.9 - Telework;

3. The State shall give all affected employees the opportunity to return to the telework patterns that they enjoyed prior to the implementation of the Hybrid Work Standard and shall offer reinstatement to any employee who has left State employment as a result of the State's unilateral implementation of the Hybrid Work Standard;

4. The State shall make all affected employees whole by reimbursing them for any monetary losses occasioned by the State's unilateral adoption of the Hybrid Work Standard, including losses of pay and/or benefits for employees who have left State service, reimbursement of additional housing and/or childcare or other costs employees have incurred as a result of the State's unilateral action, and any other losses reasonably associated with the State's unilateral action;

5. The State shall cease and desist from failing to bargain in good faith with the Vermont State Employees' Association over the required subject of bargaining of telework;

6. The State shall forthwith post copies of this order at all places normally used for employer-employee communications; and the State shall forthwith transmit by e-mail to all bargaining unit Executive Branch employees this order in PDF format (provided by the Vermont Labor Relations Board), accompanied by an e-mail message that states in its entirety as follows:

"Attached is the Order issued by the Vermont Labor Relations Board in an unfair labor practice case involving the State of Vermont Hybrid Work Standard implemented by the State on December 1, 2025."