VERMONT LABOR RELATIONS BOARD

In re Unfair Labor Practice Charge: Vermont State Employees' Association	)	Docket Number 25-50 (Return to Worksite)
v.	)	
State of Vermont, Department of Human Resources	)	

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATE OF VERMONT

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TABLE OF CONTENTS

PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

In accordance with Vermont Labor Relations Board Rule 12.16, the State of Vermont, Department of Human Resources ("the State"), submits the following Proposed Findings of Fact and Conclusions of Law.

INTRODUCTION

In late 2011 and early 2012, following the loss of state office space due to flooding caused by Tropical Storm Irene, the State and Vermont State Employees' Association (VSEA) bargained over a Telework Policy that permitted bargaining-unit employees to "request to work remotely from an alternate worksite, including an employee's home, on a regularly scheduled basis." During bargaining, both the State and VSEA agreed the State would retain the "sole discretion" to approve telework requests. They also agreed that either the State or the teleworking employee could terminate a telework authorization "at any time, with or without cause." The resulting bargained-for policy (2012 Telework Policy) was incorporated into the State's Personnel Policies and Procedures Manual as Policy 11.9.

During the Covid-19 pandemic, to avoid the spread of the virus, the Governor and the Secretary of Administration—at VSEA's request and with its support—broadly authorized many state employees to telework under the policy, even temporarily relaxing some of the policy's procedural requirements like submitting telework request forms. Thus, in the years following the pandemic, many employees were authorized to telework full-time. Still, though, most state employees did not telework either because their jobs could not be done from home—e.g., plow truck drivers, skilled trade and maintenance workers, correctional and law enforcement officers, healthcare workers, food service workers, and janitors—or because they or their employing agency simply preferred that they remain in the office.

Last year, the Governor determined that the interests of Vermonters would best be served by bringing some of the Executive Branch employees who were teleworking full-time during the pandemic years back to the office part time. Seeking to balance the interests of Vermonters with the flexibility afforded state employees by work-from-home arrangements, the State directed agency heads to limit telework for state employees to two days per week. The directive—referred to as the "hybrid work standard"—included an exception process under which employees could request more telework days. Several hundred have done so, and many of those who applied have been approved.

In this unfair labor practice (ULP) proceeding, VSEA claims that the State's recent actions violated the State Employees Labor Relations Act (SELRA), 3 V.S.A. § 901 *et seq.* Its allegations have changed over time. In its ULP charge, VSEA originally suggested that its argument was based on a pandemic-era "past practice" that it claimed supplanted the collectively bargained Telework Policy. For example, it alleged that "[s]ince in or around March 2020 the State at first directed and later permitted members of the Bargaining Units to engage in remote work without regard to the Telework Policy – i.e., without application made or approval granted under that policy."

At the hearing, however, VSEA presented a different, inconsistent theory. Contrary to its theory in the charge, VSEA claimed that the Telework Policy remained in place, and that the hybrid work standard actually *violated* the Telework Policy. Specifically, VSEA argued at the hearing that the Telework Policy: (1) prohibits the Governor from administering the policy directly—according to the VSEA, the policy may be administered only by the Governor's agents (VSEA calls this "local control"); and (2) prohibits the State from creating a uniform standard

across agencies (VSEA refers to this as the absence of an "arbitrary limitation" on telework and case-by-case standards.).

All of VSEA's arguments fail.

First, the charge is untimely because VSEA was on notice at least as early as November 2024 of the State's view of its discretionary authority under the 2012 Telework Policy, and failed to challenge the State's actions at that time.

Second, VSEA has abandoned the "superseding practice" theory it asserted in the original ULP, and the Board should therefore dismiss the charge on that basis. Moreover, VSEA should not be permitted to effectively amend the charge itself by presenting an inconsistent theory for the first time at the evidentiary hearing, where it asserted for the first time that "there is a right to telework."

Third, focusing on the terms of the ULP charge as filed, the Board should reject VSEA's claim that the 2012 Telework Policy was supplanted by pandemic-era past practice. At the Board hearing, VSEA effectively conceded that that claim was untrue by basing its case-in-chief on the terms of the 2012 Telework Policy. Moreover, the pandemic-era telework practice was entirely consistent with the discretion afforded the State under the policy, and did not alter the policy's terms.

Fourth, even if the Board could permit VSEA to essentially pursue a new ULP charge at the hearing, its claim that the State violated the 2012 Telework Policy fails as a matter of fact and law. VSEA's argument that the Governor cannot act as an appointing authority or as the employer under the Telework Policy belies the policy's plain language and the parties' practice. Indeed, VSEA acknowledged the Governor's authority when it approached him, rather than individual agency heads, to issue a broad telework order at the outset of the pandemic. Moreover,

VSEA's new theory is also contrary to the Governor's constitutional and statutory authority to administer the Executive Branch.

The ULP complaint should be dismissed.

PROPOSED FINDINGS OF FACT

Introduction

1. The State of Vermont's Executive Branch employs a total of 8,661 employees, including 7,941 classified employees. State of Vermont Workforce Report Fiscal Year 2025.[1] It is estimated that approximately 3,000 of those employees telework (44 percent), while the remaining approximately 5,500 employees (56 percent) do not. *See* Ex. Z at 0081.
2. The Vermont State Employees' Association is the exclusive representative of Vermont state employees in the Non-Management, Supervisory, and Corrections bargaining units. Exs. BB-DD. All three bargaining units currently have collective bargaining agreements (CBAs) that are effective from July 1, 2024, through June 30, 2026. Ex. BB at 0184; Ex. CC at 0304; Ex. DD at 0425. Successor bargaining agreements have been ratified for the Non-Management and Supervisory bargaining units. Tr. of Feb. 10 Hrg. ("Feb. 10 Tr.") at 50:4-50:17. Bargaining for a successor agreement for the Corrections bargaining unit was delayed due to a pending petition with the Board. Tr. of Feb. 9 Hrg. ("Feb. 9 Tr.") at 39:4-8.
3. Each CBA contains a management rights provision that reads:

> Subject to law, rules and regulations, including, for example, 3 VSA 311(a)(10) and 3 VSA 327(a), and subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to

[1] The State asks the Board to take judicial notice of the Report, which was prepared by the Department of Human Resources and provided to the Governor and the General Assembly as required by 3 V.S.A. § 309(a)(19). *See Carson v. Dep't of Employment Sec.*, 135 Vt. 312, 315, 376 A.2d 355, 315 (1977) (acknowledging that administrative bodies have authority to take official notice of judicially cognizable facts). The report is available at https://humanresources.vermont.gov/sites/humanresources/files/documents/DHR-Workforce_Report_1.pdf.

carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible; and with the approval of the Governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation. The statutory references in this paragraph are illustrative and do not confer the right to arbitrate their substantive terms.

Ex. BB at 0099; Ex. CC at 0211; Ex. DD at 0344.

4. The CBAs do not contain any substantive telework provisions. Stipulation of parties, Feb. 9 Tr. at 28:15-18. But VSEA and the State bargained for and agreed to a telework policy, which is memorialized as State Personnel Policy 11.9 - Telework ("Telework Policy").

The Telework Policy provides, in relevant part:

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.

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.

. . . .

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.

Ex. F at 12, 15.

5. The form attached to the Telework Policy ("Telework Form") instructs an employee who desires to engage in telework to identify their desired telework schedule, with start and end dates, and submit the form to their supervisor for review and approval. It further provides in relevant part:

> The Appointing Authority can, at any time during this period, require that you report to your official duty station or terminate your ability to engage in telework.
>
> I request that the above telework schedule become effective (must be the beginning of a pay period) on: _____ and end on: _____ (must be at the end of a pay period.) I understand that my request to telework is subject to the following conditions:
>
> **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
>
> . . . .
>
> **EVALUATION**
> Employee agrees to participate in all studies, inquiries, reporting and analysis relating to the telework program.

Ex. F at 16, 18.

6. The CBAs for all three bargaining units define appointing authority as "the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees." Solely for purposes of reduction in force, the CBAs provide that, "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 (NMU); Ex. CC at 0306 (Supervisory); Ex. DD at 0426 (Corrections).

7. For purposes of the State's personnel policies, the Rules and Regulations for Personnel Administration define "appointing authority" as "the officer, board, commissioner, person or group of persons authorized by statute or lawfully delegated authority to make appointments." State Personnel Policy 2.3 § 2.013.[2]

8. Every state employee is assigned an official duty station or work location under a separate personnel policy, Personnel Policy 11.0,[3] regardless of whether they are approved for telework. Some state employees are home-based, and their official duty station is their home. Most state employees, even those who telework five days a week under the Telework Policy, are not. *See* Berard, Feb. 10 Tr. at 75:25-76:24.

Testifying witnesses

9. Sean Brown has been the Deputy Secretary of the Vermont Agency of Administration (AOA) since December 2024. Tr. of Feb. 5 Hrg. ("Feb. 5 Tr.") at 26:25-27:12. He was the Chief Operating Officer for AOA between the fall of 2022 and his appointment as

[2] The State asks the Board to take judicial notice of the Rules and Regulations for Personnel Administration, which were adopted in 1981 under the authority of 3 V.S.A. § 310(d). *See Smith v. Highway Bd.*, 117 Vt. 343, 347, 91 A.2d 805, 808 (1952) ("Rules and regulations promulgated by authority of [the predecessor of 3 V.S.A. § 310] and within its scope must be given the force of law and we take judicial notice of them."). The Rules and Regulations for Personnel Administration are available at https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_2.3_RULES_AND_REGULATIONS_FOR_PERSONNEL_ADMINISTRATION.pdf.

[3] The State's Personnel Policies and Procedures Manual contains twenty "sections." The State asks the Board to take judicial notice of Section 11 ("Working Conditions") of the Manual, which includes both the Telework Policy and Policy 11.0 – Employee Workweek/Location/Shift, which was adopted in 1996 and revised in 1999 pursuant to 3 V.S.A. § 309(a)(13). *See Smith v. Highway Bd.*, 117 Vt. 343, 347, 91 A.2d 805, 808 (1952). State Personnel Policy 11.0 is available at https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_11.0_EMPLOYEE_WORKWEEK_LOCATION_SHIFT.pdf.

Deputy Secretary of Administration. Feb. 5 Tr. at 28:3-8. Deputy Secretary Brown also served as Commissioner of the Department for Children and Families (DCF) from 2020-2022, Deputy Commissioner of DCF's Economic Services Division (ESD) from 2014 through 2020, and an ESD Operations Director from 2012 to 2014. Deputy Secretary Brown also held various management positions in DCF's Office of Child Support beginning in 2001, worked in the Department of Mental Health's Legal Unit from 1997 to 2001, and worked in the Judiciary Branch between 1991 and 1994. Feb. 5 Tr. at 28:12-29:12.

10. John Berard is Vermont's Director of Labor Relations. In that role, which he has held since August 2016, he and his team assist with negotiating successor CBAs, interpreting those agreements and policies and procedures, and providing guidance to all levels of employees within the Executive Branch of the State. He has worked in the Vermont Department of Human Resources (DHR) for 21 years. Prior to becoming Director of Labor Relations, Mr. Berard was a Labor Relations Specialist and a Senior Labor Relations Specialist, where he performed similar duties to his duties as Director. Feb. 10 Tr. at 32:21-34:14.
11. Jaron Foster has been employed with DHR for approximately 10 years. He has been a Financial and Report Analyst for approximately three months. He was a Compliance and Report Analyst for the rest of his employment with DHR. In both roles, he assisted departments across state government with providing data within DHR's systems and assisting with data-related requests within DHR and statewide. Feb. 10 Tr. at 5:4-6:4.

12. Steven Howard has been the Executive Director of VSEA since June 2014. He was VSEA's Legislative Director between December 2012 and June 2014. Feb. 5 Tr. at 193:7-23.

13. Jessica Steeby was a finance manager III for the Agency of Human Services (AHS) from October 2023 to February 5, 2026. Feb. 5 Tr. at 173:16-22, 175:17-18, 184:5-9.

14. Michelle Salvador is an adolescent health program manager with the Department of Health. She has been a state employee for 28 years. Feb. 9 Tr. at 40:19-41:12.

15. James Nadeau has been an education data administrator for the Agency of Education (AOE) since June 2020. Feb. 9 Tr. at 103:6-11.

16. Amy Dodge has been a postsecondary programs coordinator for the AOE for approximately three and a half years. Feb. 9 Tr. at 120:4-8.

17. Lisa Trimboli was a high-end system of care staffing coordinator for DCF's Family Services Division, from August 2023 until January 23, 2026. Feb. 9 Tr. at 146:13-21, 159:17-19. She was a state employee for approximately nine years. Feb. 9 Tr. at 145:17-18, 159:17-19.

18. Bethany Ledoux is a health programs administrator for the Department of Vermont Health Access (DVHA). She has worked in that department since August 2020. Feb. 9 Tr. at 174:18-175:9.

Origins of the Telework Policy

19. In August 2011, Tropical Storm Irene caused significant damage to the Waterbury State Complex, displacing more than 1,000 state employees, including many at AHS. Managers sought guidance to support affected employees – both those who could potentially telework and those who could not. Brown, Feb. 5 Tr. at 31:9-32:23.

20. Following Tropical Storm Irene, the parties unsuccessfully sought to resolve a dispute regarding state employees displaced from their offices because of the storm. *See In re Grievance of VSEA*, 2014 VT 56, ¶ 12 ("Between August 30 and September 7, 2011 the State and VSEA unsuccessfully attempted to reach an agreement regarding payment for Waterbury complex employees who worked at alternate worksites. On April 16, 2012, VSEA filed its grievance with the Board.").
21. In or about the fall of 2011, John Berard engaged VSEA Interim Director Conor Casey to bargain over a new telework policy. VSEA delegated the task of bargaining to its general counsel at the time, Michael Casey. Berard, Feb. 10 Tr. at 34:23-35:8.
22. Mr. Berard spoke with Michael Casey (Mr. Casey) and then sent him a draft policy for VSEA's review and comment on October 11, 2011. Berard, Feb. 10 Tr. at 35:9-35:19.
23. On October 26, 2011, Mr. Casey emailed Mr. Berard to suggest changes and indicated that he had been primarily working to obtain the agreement of the Non-Management Bargaining Unit (NMU). He indicated that he believed the NMU would agree, and if so, he believed the Supervisory Bargaining Unit and the Corrections Bargaining Unit would probably also agree. Ex. B.
24. On October 28, 2011, Mr. Berard emailed Mr. Casey a revised draft of the proposed Telework Policy, which incorporated some of VSEA's suggested changes. Ex. B.
25. On January 13, 2012, Mr. Berard emailed Kathi Partlow and Gretchen Naylor, union representatives for VSEA, a revised draft of the proposed Telework Policy, which incorporated additional suggested changes from VSEA. Feb. 5 Tr. at 203:1-9; Ex. C.

26. On January 30, 2012, Mr. Berard and Ms. Naylor exchanged emails about whether the proposed Telework Policy would apply only to the NMU employees or statewide. Mr. Berard indicated the State wanted to implement it statewide. Ex D.

27. On January 31, 2012, Mr. Berard emailed Ms. Naylor a revised draft of the proposed Telework Policy. The next day, Ms. Naylor approved the Telework Policy on behalf of the NMU. Ex. G at 0019-0020.

28. On February 2, 2012, Ms. Naylor emailed Mr. Berard that the Supervisory Bargaining Unit wanted to be included in the proposed Telework Policy and requested changes that would give supervisors the option to telework. Mr. Berard agreed. Ex. E.

29. On February 3, 2012, DHR issued—and the Secretary of Administration approved – the Telework Policy, which was incorporated into the State's Personnel Policies and Procedures Manual as Policy 11.9. Ex. F.

Telework before the pandemic

30. In the approximately eight years following the February 2012 issuance of the Telework Policy, telework among employees was rare. Based on his experience at DCF and AHS, Deputy Secretary Brown estimated that employees who utilized the Telework Policy generally only teleworked one or two days a week. Brown, Feb. 5 Tr. at 33:25-34:19, 42:15-15. Indeed, prior to the pandemic, telework "was rare and it was infrequent." Howard, Feb. 5 Tr. at 205:5-14. According to one survey, less than a fifth of employees teleworked even one day a week prior to the pandemic. Ex. Z at 0080.

31. In Deputy Secretary Brown's experience, in the context of telework being rare and infrequent, DCF and AHS were responsible for approving telework requests from DCF employees. DCF or AHS considered whether the employee could effectively perform the

duties of their position remotely, whether remote work would be consistent with DCF's responsibilities to the public, and whether the remote work would raise security concerns. Brown, Feb. 5 Tr. at 35:12-36:17.

32. The Flexible Working Arrangements Act, 21 V.S.A. § 309, went into effect on January 1, 2014. Ex. 2. The Flexible Working Arrangements Act did not result in any changes to the implementation of the Telework Policy. Berard, Feb. 10 Tr. at 38:20-39:8.

33. Testimony at the hearing confirms that employees were aware that telework could be terminated at the discretion of the employer. Jessica Steeby, a state employee working at AHS, testified that she understood that "telework was a privilege that the State could revoke at any time" and that a condition of her Telework Agreement[4] was that telework could "be terminated by the employee or employer at any time with or without cause." Feb. 5 Tr. at 186:19-23, 187:10-18. Others testified similarly. *See, e.g.*, Trimboli, Feb. 9 Tr. at 165:19-24; Ledoux, Feb. 9 Tr. at 195:6-9.

Telework during the pandemic

34. On March 13, 2020, the Governor issued Executive Order 01-20, declaring a state of emergency due to the Covid pandemic. Among other things, the Executive Order directed that the "Secretary of Administration shall . . . in consultation with the Commissioner of Human Resources, encourage and facilitate telework among those State employees with the capacity to work remotely." Ex. I at 0031.

35. The same day, Secretary of Administration Susanne Young issued a memorandum to all "appointing authorities" as part of the Secretary's oversight responsibility across agency

[4] "Telework Agreement" refers to a Telework Form signed by the employee, division manager or director, and appointing authority or designee, as required by and attached to the Telework Policy.

heads[5] to recommend that they "[c]onsider telework options for state employees." Ex. J at 0034.

36. On March 14, 2020, VSEA President Dave Bellini wrote to the Governor, urging him to "require all employees who can work remotely and telecommute to do so, effective immediately." Ex. K.

37. On March 15, 2020, Secretary Young sent a memorandum to state employees, informing them that the Governor's March 13 Executive Order "directs the Secretary of Administration, in consultation with the Commissioner of Human Resources, to develop policies and procedures to encourage and facilitate telework among those employees with the capacity to work remotely." The memorandum provided a link where guidelines regarding telework could be found. The memorandum then advised employees to "consult with your supervisor to review your eligibility to telework." Ex. L at 0038.

38. The guidelines referenced in Secretary Young's memorandum provided information on teleworking basics and included a Frequently Asked Questions section. One of the questions specifically related to the normal requirement for a Telework Agreement and the applicability of the Telework Policy:

> **Am I required to complete a "Telework Agreement" if I am approved to telework?**
>
> No, submission of a formal "Teleworking Agreement" is not required related to the COVID-19 pandemic. However, the guidelines governing telework and use of State-owned equipment as outlined in DHR Personnel Policy 11.7 and those specific to an agency and/or department will be in full effect for employees when teleworking.

Ex. M at 0042.

[5] *See, e.g.,* 3 V.S.A. § 2222(a)(2).

39. Also on March 15, 2020, Secretary Young responded to VSEA President Bellini's March 14 letter. Secretary Young specifically addressed telework, stating, "[t]he Governor directed that telecommuting be encouraged and the Department of Human Resources issued additional guidance today. Any employee who has not taken advantage of our telecommuting policy should discuss options with their supervisor as soon as practicable." Ex. N at 0043.

40. On March 25, 2020, Secretary Young sent a memorandum to state employees, directing that "all State employees who can telecommute or work from home are directed to do so no later than March 25, 2020 at 5:00 p.m." Ex. O at 0045.

41. VSEA did not file a grievance or unfair labor practice charge regarding the Governor's and Secretary Young's 2020 decision to direct employees who could telework to telework. *See* Howard, Feb. 9 Tr. at 34:6-11.

42. On August 6, 2020, October 30, 2020, and March 1, 2021, Secretary Young sent memoranda to state employees, informing them that due to the ongoing Covid emergency, remote work would be extended. These memoranda extended remote work to May 31, 2021. Exs. P, Q, R.

43. On May 14, 2021, Secretary Young sent a memorandum to state employees informing them that, "through September 1, 2021 those employees who are able to telework, consistent with the expectations identified above, may do so, and those who would like to return to the worksite may do so as well, with approval of the appointing authority." The memorandum also elaborated on the status of future remote work:

> Through September 1, 2021, employees who are able to perform their job duties while working remotely may continue to telework, with approval of the appointing authority. Beginning September 1, employees who wish to continue some form of remote work must submit a request under existing

> Policy 11.9 Telework. While these requests are being prepared and evaluated, continued remote work 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.

Ex. S.

Transition period after Covid

44. On June 14, 2021, the Governor lifted the Covid state of emergency. Ex. T at 0056.

45. On August 24, 2021, Secretary Young sent a memorandum to state employees to address the next steps for telework options. The memorandum stated:

> One purpose of this memo is to remind employees that any employee who prefers to return to their worksite full time are welcome and encouraged to do so. Telework is voluntary, not mandatory. Appointing authorities and supervisors need to be cognizant of this and refrain from discouraging a return to the worksite for those who prefer to be there.

Ex. T at 0056-57. The memorandum also addressed expectations for employees starting September 1, 2021:

> 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.

Ex. T at 0057. The memorandum also required additional training for teleworkers and those who supervise teleworkers. Ex. T at 0058.

46. The State required all employees who wanted to telework on a regular basis after November 1, 2021, to have an approved Telework Form pursuant to the Telework Policy to ensure that the operating needs of the State could accommodate the amount of telework employees sought as the State returned to normal operations. Brown, Feb. 5 Tr. at 50:8-17.

47. VSEA did not file a grievance or unfair labor practice charge over the decision of the Governor and Secretary of Administration to allow employees to continue teleworking without an approved Telework Form after the end of the Covid state of emergency. It also did not file a grievance or unfair labor practice charge over the decision of the Governor or Secretary to require employees to have an approved Telework Form to telework after November 1, 2021. Furthermore, it did not file a grievance or unfair labor practice charge over the decision of the Governor or Secretary to require training for employees and supervisors, as a condition for telework. *See* Howard, Feb. 9 Tr. at 34:6-11.

48. In late 2021, VSEA President Aimee Bertrand Towne wrote to the Governor conveying concerns from VSEA members regarding the State's transition to formal telework arrangements and having additional employees work on-site at state facilities beginning November 1, 2021. *See* Ex. X at 0074.

49. On November 1, 2021, Secretary Young responded to Ms. Bertrand's letter to the Governor, explaining the precautions being taken to protect the health and safety of Vermonters in connection with the formal telework approval process resuming November 1, 2021. Ex. X.

50. To track telework by state employees, DHR asked employees to upload a copy of their approved Telework Form through an online system and complete a short questionnaire

with information about their number of hours of telework per week, their commuting distance, and their mode of transportation. *See* Foster, Feb. 10 Tr. at 11:3-16, 22:21-30:2; Ex. W at 0073. From August 9, 2021, through September 25, 2025, DHR received approximately 7,406 submissions through the online system. Those submissions are reflected on Ex. YY. Foster, Feb. 10 Tr. at 30:22-31:20. As of May 2023, an estimated 44 percent of employees teleworked regularly for an average of 28 hours a week. Ex. Z at 0081.

51. Despite supervising three employees, James Nadeau, a supervisor at the AOE, was approved to telework five days a week for upwards of five years, resulting in him only communicating with them virtually for a daily "stand-up meeting" and "if there's other things that we need to talk about, we can call each other on Teams. That's it." *See* Feb. 9 Tr. at 108:3-8.

52. Bethany Ledoux, a state employee hired to work at the DVHA in August 2020, has only worked with other teams occasionally, estimating that she has collaborated with other teams on training on a quarterly basis. *See* Feb. 9 Tr. at 185:6-11.

53. On or about July 10, 2023, Vermont experienced a significant rain event. Several state office buildings were damaged and unusable due to flooding, resulting in a temporary increase in telework among employees. Brown, Feb. 5 Tr. at 54:17-57-20.

2024 ESD suspension of telework

54. ESD "administer[s] benefits that help Vermonters to meet their basic needs." By law, it administers what are known as safety-net benefits, including food assistance known as 3SquaresVT or SNAP, once known as food stamps; cash and related assistance known as "Reach First," "Reach Up," and "Reach Ahead," which are associated with the federal

Temporary Assistance to Needy Families (TANF) program; fuel and energy assistance; emergency and general assistance related to housing; and other types of safety-net services.[6]

55. Beginning in or around November 2023, the State, including the Governor's Office, began receiving complaints from Vermonters attempting to obtain services from ESD. Exs. 10A-10K.

56. On October 18, 2024, ESD Deputy Commissioner Miranda Gray emailed ESD district office staff to notify them that telework would be suspended effective November 4, 2024, for an indefinite period for supervisors, senior benefit program specialists, benefit program specialists, case managers, administrative staff, and "3SNAP" workers. The suspension affected employees in 12 district offices throughout the state. She advised that the suspension was required for operational needs based on concerns from Vermonters, the lack of immediate support for frontline staff, and a disconnect between staff and the system. Ex. EE.

57. The State's decision to suspend telework for these employees was informed by conversations within DCF, AHS, AOA, and the Governor's Office. Initially, ESD and DCF leadership discussed the proposed suspension among themselves. The AHS Secretary then reviewed the proposal, after which the Secretary of Administration reviewed the proposal. The Governor's Office then reviewed and approved the suspension. Brown, Feb. 5 Tr. at 57:22-58:10, 58:25-59:7.

[6] The State asks that the Board take judicial notice of the responsibilities of ESD. *See Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4, 186 Vt. 605, 987 A.2d 258 (2009) (explaining that courts may take judicial notice of matters of public record). The information is available at https://dcf.vermont.gov/esd.

58. The State suspended telework for these ESD employees effective November 4, 2024. Ex. EE; Howard, Feb. 9 Tr. at 17:16-19.

59. On October 25, 2024, VSEA General Counsel Alfred Gordon O'Connell sent a letter to DCF Commissioner Chris Winters expressing VSEA's "outrage" at the State's decision to end telework for ESD workers. The letter claimed, "[t]he hybrid telework practice for ESD sprang up not as a result of the voluntary telework policy implemented by the State in 2012 but rather as a result of the COVID-19 pandemic and its aftermath." The letter requested that DCF "postpone the blanket termination or prohibition of telework until the parties have thoroughly discussed and negotiated the issue to the extent required by law." The letter also requested several items related to Deputy Commissioner Gray's communication to ESD employees. Ex. FF.

60. On November 17, 2024, Mr. Berard responded to Mr. O'Connell. The response stated:

> To the extent the decision to allow employees to engage in telework is considered a mandatory subject of bargaining, the State believes it met such obligations when it engaged in discussions with VSEA prior to the implementation of the current State Policy governing Telework. As such, we respectfully decline to engage in further bargaining over the matter.

Ex. GG. The response also indicated that the State would be pleased to meet with VSEA regarding ESD's decision with the understanding that neither party is waiving any legal position it has regarding the matter.

61. In November 2024, VSEA Executive Director Howard told a reporter from VTDigger.org that the State had the right to determine whether employees could telework in the first place. Howard, Feb. 9 Tr. at 18:16-20.

62. In February 2025, the State provided VSEA with the information that it had requested in its October 25, 2024, letter. Berard, Feb. 10 Tr. at 44:8-18.

63. After the State provided the requested documents to VSEA, VSEA representatives and impacted employees met with Mr. Berard and representatives of ESD in February 2025 via Teams to discuss issues related to suspension of telework. Berard, Feb. 10 Tr. at 44:19-45:4.

64. VSEA determined that the 2024 suspension of telework for ESD employees was consistent with the Telework Policy. Howard, Feb. 9 Tr. at 27:5-20.

65. VSEA did not file an unfair labor practice charge or grievance regarding the suspension. *See* Berard, Feb. 10 Tr. at 45:17-20.

2025 hybrid work standard and discussion between the parties

66. On August 8, 2025, Secretary of Administration Sarah Clark emailed state employees to advise that the State was formulating a plan to have those employees who are eligible for telework work on site more frequently and regularly. She explained that the plan would "center on the values of service and collaboration to ensure we can provide optimal value and service to Vermonters." Ex. 11.

67. On August 28, 2025, Secretary Clark emailed state employees to advise that with input from AOA, the Department of Buildings and General Services, DHR, and the State Recovery Office, the Governor was setting the hybrid work standard at a minimum of three days a week at the worksite. The email also communicated that appointing authorities could require more than three days, and the new standard would be effective December 1, 2025. The standard would be governed by existing State policies and employment statutes, and accommodations would be available when deemed reasonable and appropriate. Ex. 12.

68. On September 8, 2025, Secretary Clark sent to state employees a video message from the Governor, in which the Governor explained his reasoning for implementing the hybrid work standard. He stated, in part:

> We recognize the value of this type of flexibility, which is exactly why we're moving to a hybrid schedule for most employees rather than pre-pandemic full-time office work. But we're making this change because we need more consistency and predictability across the board.
>
> And the reality is, we need to get together more in person – across departments and agencies.
>
> It's not hard to see that something has been lost when we only see each other on the screen. And it's not just our co-workers, but our colleagues and mentors across state government.
>
> One of the things I'm most proud of as Governor is the silos we've broken down between agencies and departments. But we've lost some of that comradery and collaboration because we don't see each other in person where we can hear about what others are working on.
>
> Another thing I'm proud of is our work, together, to build faith and trust in government with more transparency and more access. But that too has been impacted by remote work. Because Vermonters want and need to access their government. They need to see us in their communities. They need to know where and how we work. And, most importantly, they want and need us to be good stewards of their tax dollars.
>
> And as public servants, it's our duty to uphold those values.
>
> So, to sum it all up, this move is about more connection, collaboration, and visibility for each other and the people we serve.

Ex. 14.

69. The hybrid work standard applies to all Executive Branch employees who report, directly or indirectly, to the Governor. It does not apply to Executive Branch employees who report to an elected official other than the Governor. Ex. 62 (frequently asked questions Q4 and A4).

70. On September 12, 2025, Mr. Berard wrote to Mr. Howard about the hybrid work standard, soliciting VSEA's input and requesting its assistance. Mr. Berard briefly explained the Governor's decision and noted that the initiative was "being implemented in accordance with the State's existing Telework Policy" and therefore was not subject to bargaining. He solicited VSEA's input on the initiative because the State "is interested in its employees' potential concerns, would like to ameliorate those concerns to the extent possible, and desires to make this change as transparent a process as possible." Ex. 15.
71. On September 18, 2025, Secretary Clark sent an email to state employees providing an update on the hybrid work standard. The update included information about a cross-agency advisory group tasked with minimizing disruptions as the hybrid work standard went into effect. It also noted that the State had extended an invitation to employees' representatives at VSEA to share their input and pose questions. Ex. 17.
72. On September 25, 2025, Secretary Clark sent another update to employees about the hybrid work standard. This update included a reminder that employees could find responses to frequently asked questions (FAQs) on DHR's website, as well as a link to the FAQs. Ex. 18. The FAQs have been periodically updated to provide additional information, and the most recent version was provided to the Board as Ex. 62. Stipulation of parties, Feb. 9 Tr. at 4:20-6:3.
73. On September 26, 2025, VSEA General Counsel O'Connell responded to Mr. Berard's September 12 letter, agreeing to meet to offer VSEA's perspective on the hybrid work standard initiative. Ex. 19.

74. Representatives for the State and VSEA met on October 10, 2025. Howard, Feb. 5 Tr. at 234:17-21. At the meeting, VSEA asked questions related to the Governor's decision and expressed its displeasure. Berard, Feb. 10 Tr. at 48:7-11.

75. In October 2025, the State issued guidance and procedures for out-of-state employees in connection with the hybrid work standard. The guidance explained that out-of-state employees would be required to meet the standard, but that employees who needed to relocate and committed to meeting the standard would have until June 30, 2026, to do so. The guidance also noted that an out-of-state employee may receive an exception to the hybrid work standard if all their job duties could be performed remotely and they had compelling reasons to work remotely more than two days a week. Ex. 22.

76. On October 14, 2025, Secretary Clark provided another email update to state employees on the hybrid work standard. The update explained that exceptions would be considered if all essential functions of a position could be performed remotely and compelling reasons existed. Ex. 23. The email included a link to guidance and procedures for requesting exceptions to the hybrid work standard. Ex. 25.

77. On October 24, 2025, Mr. O'Connell wrote to Mr. Berard to demand that the State engage in bargaining and cease and desist from implementing the hybrid work standard initiative in the meantime. He disagreed that the initiative "was being implemented pursuant to the existing Telework Policy," arguing that "the far majority of VSEA-represented employees currently working from home are not doing so as a result of signed agreements under the 2012 Telework Policy." He conveyed VSEA's position that, "[b]ecause the State has agreed to work-from-home arrangements falling outside the

strictures of the 2012 Telework Policy, those arrangements have become an established condition of employment which the State is not free to change unilaterally." Ex. 29.

78. On October 31, 2025, Secretary Clark sent a further update to state employees on the hybrid work standard. This update informed employees that action was required for employees who engage in telework on a recurring basis. It stated that to effectuate the hybrid work standard, "all previous/current Telework Agreements are considered rescinded as of December 1." The update further communicated that any employee who wanted to telework on a regular schedule would need to have a new approved Telework Form. Ex. 30.

79. Mr. Berard responded to Mr. O'Connell's October 24 letter on November 10, 2025, declining to engage in bargaining. He conveyed that the State's position remained "unchanged since receiving a similar demand to bargain from VSEA in October 2024; to the extent the decision to allow employees to engage in telework is considered a mandatory subject of bargaining, the State believes it met its obligations when it engaged in discussions with VSEA prior to the implementation of the current State Policy governing Telework." He also conveyed, "[s]hould VSEA wish to renegotiate Telework, the State believes that those discussions are best suited for the current negotiations for successor collective bargaining agreements." Ex. 33.

80. During negotiations for the successor bargaining agreements for the NMU and Supervisory Unit, VSEA proposed a provision related to telework. The proposal was not agreed upon. The CBAs for those units were ratified in or about December 2025 without any telework provision. Berard, Feb. 10 Tr. at 49:13-50:17.

Steps taken to prepare state facilities for the hybrid work standard

81. In preparation for more employees to work in person, the State leased additional office space at Pilgrim Park in Waterbury. *See* Brown, Feb. 5 Tr. at 74:17-75:8, 102:23-104:4, 148:23-149:12.

82. The Legislature is in the process of appropriating funds for the leases and for other costs of preparing buildings for the return of state employees. *See, e.g.,* H.790, § 51 (FY26 Budget Adjustment Act amends Act 27 of 2025 and appropriates $385,000 to AHS "for office fit-up costs at the Waterbury State Office Complex and Pilgrim Place," which is leased space nearby).

Exceptions from the hybrid work standard

83. The State has an exceptions process for those state employees seeking to telework more than two days per week.

84. Each of the six state employee witnesses who testified at the hearing teleworked more than two days a week after the hybrid work standard went into effect, consistent with the State's exception process. *See* Steeby, Feb. 5 Tr. at 188:4-14; Salvador, Feb. 9 Tr. at 92:14-16; Nadeau, Feb. 9 Tr. at 115:20-24; Dodge, Feb. 9 Tr. at 139:16-18; Trimboli, Feb. 9 Tr. at 168:15-19; Ledoux, Feb. 9 Tr. at 193:1-8.

85. To request an exception, employees may submit an Exception Request Form, Ex. 26, or they may request one verbally or through another form. The exception process includes a conversation between the employee and their supervisor regarding the request. The request is then reviewed by an appointing authority within the employee's agency or department before being reviewed by an exception review team composed of human resources professionals and the Chief Recovery Officer. The review team provides a

recommendation to the Secretary of Administration, who is the ultimate decision-maker. Brown, Feb. 5 Tr. at 65:10-66:22. The exception process is separate and distinct from the process to request a reasonable accommodation for a disability, which is also available to state employees. Brown, Feb. 5 Tr. at 69:12-70:3. While an exception request is being considered, the employee may continue the teleworking arrangements they had prior to the hybrid work standard. Brown, Feb. 5 Tr. at 140:13-18.

86. The Secretary has approved approximately 127 of the approximately 610 employee exception requests that were submitted; the remaining requests are pending. *See* Brown, Feb. 5 Tr. at 68:1-14. In addition to those 600-plus employees, "several hundred" are working their pre-hybrid work standard telework schedules due to a pending reasonable disability accommodation request. Brown, Feb. 5 Tr. at 150:4-22.

87. The Secretary has also considered and approved exception requests from agency and department appointing authorities. For example, the Department of Health and the Department of Vermont Health Access within AHS have received exemptions from the hybrid work standard due to office space limitations, and the Agency of Education has an exception request pending to allow certain employees to telework five days a week until the State's plan to open regional offices across the state has been implemented. *See* Brown, Feb. 5 Tr. at 74:17-76:5; Nadeau, Feb. 9 Tr. at 112:19-24; Ledoux, Feb. 9 Tr. at 193:1-8; Ex. 58B.

88. All approved Telework Forms are retained electronically in a central repository within DHR to allow better tracking of the use of telework across the Executive Branch. Brown, Feb. 5 Tr. at 64:4-11.

Grievance and unfair labor practice proceedings

89. On November 10, 2025, VSEA filed a ULP charge with the Board alleging that the State violated 3 V.S.A. §§ 961(1) and (5) by failing to bargain over the hybrid work standard initiative. VSEA alleged that the State established a "remote work protocol" separate and apart from the Telework Policy as of March 2020 by "at first direct[ing] and later permit[ting] members of the Bargaining Units to engage in remote work without regard to the Telework Policy." VSEA alleged that the State could not implement the hybrid work standard without bargaining because it amounted to a "unilateral change in the remote work protocol," affecting a condition of employment.

90. VSEA also filed a Step III grievance over the hybrid work standard with the DHR Commissioner. *See* Howard, Feb. 9 Tr. at 33:23-34:5. VSEA filed a Step IV grievance with the Board on December 3, 2025. The State answered the Step IV grievance on December 23, 2025. *See Vermont State Employees' Association v. State of Vermont*, VLRB Docket No. 25-57.

91. On November 25, 2025, the State responded to VSEA's ULP charge. The State argued that the bargained-for Telework Policy gave the State sole discretion to determine whether and to what extent an employee could telework. The State argued that the Telework Policy had been in effect since 2012, and the hybrid work standard initiative was being implemented pursuant to the Telework Policy. The State also argued that the charge was untimely and VSEA had waived its claim because the State had suspended telework for ESD employees in 2024 and communicated to VSEA that no further bargaining was required because the issue of telework had already been bargained.

92. On December 3, 2025, the Executive Director held an investigative conference with the parties. During the conference, VSEA "outlined its position that the passage of the flexible work statute, 21 V.S.A. § 309, and the changes to the use and practice of telework in response to Covid and its aftermath created a new telework or remote work protocol replacing the 2012 Telework Policy." During the conference, the State reiterated that "the September 2025 return to office was consistent with the bargained for 2012 Telework Policy which gave the State sole discretion to allow, modify, or disallow telework arrangements." *See* Dec. 5, 2025, Order.

93. On December 5, 2025, the Board issued an order "adopt[ing] for the purposes of this complaint the allegations contained in the charge and caus[ing] this complaint to be issued." The Board's order relied on VSEA's charge, the State's response, information provided by the parties at the investigative conference on December 3, 2025, and additional documents provided by the parties on December 4, 2025, to conclude that, "taking the allegations in the charge in the light most favorable to the charging party, it appears to the Vermont Labor Relations Board that an unfair labor practice complaint should be issued, that the unfair labor practice charge is timely and the Union has not waived its right to challenge the September 2025 decision."

94. The Board held an evidentiary hearing on February 5, 9, and 10, 2026. At the hearing, the State presented the testimony of Sean Brown, Jaron Foster, and John Berard. VSEA presented the testimony of Steven Howard, as well as the testimony of six current or former state employees, Jessica Steeby, Michelle Salvador, James Nadeau, Amy Dodge, Lisa Trimboli, and Bethany Ledoux.

95. During the hearing, documentary evidence was admitted into the record. Specifically, the State's exhibits A-Z, BB-GG, MM-NN, QQ, and XX-PPP were admitted, as well as VSEA's exhibits 2, 10-23, 25-31, and 33-64.

PROPOSED CONCLUSIONS OF LAW

In its ULP charge, VSEA charges the State with violating 3 V.S.A. § 961(1)—which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule, or regulation"—and 3 V.S.A. § 961(5)—which prohibits an employer from "refus[ing] to bargain collectively with representatives of the employees subject to the provisions of subchapter 3 of this chapter." The Board should dismiss the charge.

First, VSEA's charge is untimely, and VSEA waived its right to argue that the State was required to bargain over the hybrid work standard. Second, VSEA's charge fails for lack of proof, and VSEA should not be permitted to rely on a new legal theory that is inconsistent with the charged theory and presented for the first time at the evidentiary hearing. Third, VSEA has not—and could not—establish that the State's pandemic-era telework practices supplanted the 2012 Telework Policy because those practices were authorized by the policy. And finally, the hybrid work standard is a permissible implementation of the Telework Policy.

A. VSEA's charge is untimely and VSEA waived its right to pursue an unfair labor practice claim that the State was required to engage in mid-term bargaining.

Even though the State declined in November 2024 to engage in mid-term bargaining regarding the exercise of its discretion to unilaterally suspend employees' telework under the Telework Policy, VSEA did not file an unfair labor practice charge until November 10, 2025, well after the expiration of the six-month period for doing so.

"No complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 3 V.S.A. § 965(a). If a party knows of an alleged violation, yet fails to assert its statutory rights in a timely manner, the party's charge should be dismissed as untimely filed. *VSEA v. State of Vermont, Dep't of Public Safety*, 6 VLRB 217, 222-23 (1983).

On October 18, 2024, the State notified ESD employees that it had decided to suspend telework arrangements for ESD district office employees starting November 4, 2024, for an indefinite period. Ex. EE. As explained by Deputy Secretary Brown, the decision was based on the discretion afforded the State under the Telework Policy, and was based on consideration of ESD's operating needs. Feb. 5 Tr. at 59:8-20. On October 25, 2024, VSEA General Counsel O'Connell sent a letter to the DCF Commissioner requesting, in part, that "the Department postpone the blanket termination or prohibition of telework until the parties have thoroughly discussed and negotiated the issue to the extent required by law." Ex. FF. Director of Labor Relations John Berard responded in a letter dated November 17, 2024, communicating the State's position that it had already met its bargaining obligations:

> To the extent the decision to allow employees to engage in telework is considered a mandatory subject of bargaining, the State believes it met such obligations when it engaged in discussions with VSEA prior to the implementation of the current State Policy governing Telework. As such, we respectfully decline to engage in further bargaining over the matter.

Ex. GG. In his testimony, VSEA Executive Director Steve Howard acknowledged that VSEA did not file a grievance or unfair labor practice charge challenging the State's refusal to engage in further bargaining in 2024. Feb. 9 Tr. at 27:21-25.

On October 24, 2025, after the State notified VSEA of the upcoming implementation of the hybrid work standard, VSEA General Counsel O'Connell sent another demand to bargain,

again arguing that the State was required to bargain over teleworking arrangements. Ex. 29. Mr. Berard's November 10, 2025, letter in response specifically referred to his previous correspondence regarding the issue:

> The State's position remains unchanged since receiving a similar demand to bargain from VSEA in October 2024; to the extent the decision to allow employees to engage in telework is considered a mandatory subject of bargaining, the State believes it met its obligations when it engaged in discussions with VSEA prior to the implementation of the current State Policy governing Telework. As such, we respectfully decline to engage in further bargaining over the State's decision to return employees to their official duty stations.

Ex. 33.

VSEA filed its ULP charge on November 10, 2025, more than 11 months after the State communicated its position that further bargaining of the issue was not required because the bargained-for Telework Policy vested the State with sole discretion to approve, deny, or terminate telework arrangements. During the investigative conference, VSEA took the position that the hybrid work standard initiative was a separate or distinct occurrence from the November 2024 suspension of telework for ESD employees. *See* Dec. 5 Order at 2. However, the Board has repeatedly rejected similar arguments, explaining that, "[t]he six month clock begins running on an alleged unilateral change in a condition of employment upon the implementation of the [purported] change," and "the failure of a union to protest an alleged unilateral change in a condition of employment within the six month period for filing an unfair labor practice [charge] means the union has waived the right to bargain over it during the term of the present contract." *Local 2323, Int'l Assoc. of Firefighters v. City of Rutland*, 13 VLRB 48, 55 (1990); *VSEA v. State of Vermont, Dep't of Public Safety*, 6 VLRB 217, 225-26 (1983).

For example, in *VSEA v. State of Vermont, Department of Public Safety*, VSEA contended the State committed an unfair labor practice by refusing to bargain a change to a

practice that allowed delayed reporting to a new duty station in the event of involuntary transfer for State Police members, a practice known as "moving time." The Board found that VSEA was aware of a unilateral change to the policy approximately one year before filing its unfair labor practice charge, even though the State's refusal to enter into mid-term bargaining occurred within six months of the charge. *VSEA v. State of Vermont, Dep't of Public Safety*, 6 VLRB at 224-25. The Board therefore concluded that VSEA had intentionally relinquished a known right by failing to assert it in a timely manner. *Id.* at 226.

Here, VSEA became aware on November 17, 2024, at the latest, of the State's position that the Telework Policy allowed it to unilaterally change or suspend telework arrangements for groups of employees without bargaining.[7] VSEA failed to file an unfair labor practice charge within six months of becoming aware of the State's position. Thus, although the 2025 hybrid work standard represented a separate exercise of the State's discretion under the Telework Policy, that exercise was founded on the same reading of the policy—i.e., that it allowed the State discretion to make changes to telework arrangements without bargaining. It did not revive VSEA's ability to pursue a legal remedy it chose not to pursue in response to the State's position that the matter had already been bargained. Due to VSEA's failure to timely challenge the State's position that the Telework Policy allowed it to unilaterally modify the telework arrangements for groups of employees, this unfair labor practice complaint is not properly before the Board.

[7] Again, this seems to have been VSEA's understanding—at least until recently—as well. VSEA asked the Governor to direct all eligible state employees to telework in 2020, and it repeatedly corresponded with the Secretary of Administration and others within AOA regarding administration of telework across state government during and after the pandemic. *See* Ex. K; Ex. X.

B. The allegations in the complaint were abandoned and new allegations not raised in the unfair labor practice charge are not properly presented for the Board's consideration.

During the hearing, VSEA abandoned the allegations in its original charge, presenting no evidence to support the claim that a "past practice" had developed during the Covid pandemic and replaced the bargained-for Telework Policy. Indeed, VSEA conceded that the Telework Policy remains in effect and governs the State's actions. VSEA's original allegations are unsubstantiated—and in fact, have been abandoned—and it therefore has not met its burden to establish the charged violation. *See S. Burlington Bd. of Sch. Directors v. S. Burlington Educ. Ass'n*, 32 VLRB 56, 84 (2012).

Instead of presenting evidence in support of the allegations in the charge, VSEA conceded at the hearing that the Telework Policy remained in effect through 2025 and raised a new argument: that the hybrid work standard was inconsistent with the Policy. Specifically, VSEA argued that the Telework Policy contains three fundamental "pillars," which amount to the following prohibitions on the State: (1) the policy can only be administered by the Governor's agents (VSEA calls this "local control"); and (2) it bars creation of a uniform standard across agencies (VSEA refers to this as the absence of an "arbitrary limitation" on telework and case-by-case standards). According to VSEA, the hybrid work standard violates each of those prohibitions.

Because VSEA did not amend its charge to include its new claim, that claim cannot now serve as the basis for a decision of the Board. Moreover, VSEA cannot show that it is now entitled to amend its charge under the Board's Rules of Practice. "The Board, upon application by the moving party and by notice to all interested parties, may permit withdrawal of the petition, charge, appeal or grievance, in whole or in part, and may permit amendment thereof as it deems proper." Board Rule 12.7. Although the Board's Rules offer litigants

latitude for variance between the pleadings and proof, an amendment is material if it substantially prejudices proceedings. *Fair Haven Graded School Teachers Ass'n, Vermont-NEA v. Fair Haven Bd. of Sch. Directors*, 13 VLRB 101, 106 (1989). Amendment of an unfair labor practice charge serves two purposes: (1) it provides an opportunity for the Board to decide whether to issue a complaint based on the issue; and (2) it provides notice to the charged party so that it can adequately respond and prepare a defense. *S. Burlington Bd. of Sch. Directors v. S. Burlington Educators' Ass'n*, 32 VLRB 56, 92 (2012). Failure to amend a charge to include new allegations precludes consideration of those new allegations by the Board. *Id.*

VSEA's charge and the Board's complaint were grounded in VSEA's claim that a past practice that developed during the Covid emergency had replaced the Telework Policy. Specifically, VSEA alleged, "since in or around March 2020, the State at first directed and later permitted members of the Bargaining Units to engage in remote work without regard to the Telework Policy – i.e., without application made or approval granted under that policy." ULP Charge ¶ 5. The charge did not allege that the Telework Policy remained in effect in 2025 or that the hybrid work standard was inconsistent with the policy. The charge contains no allegations related to the "three pillars" claim that VSEA presented to the Board for the first time during opening argument at the hearing: that the Governor was not an appropriate authority to issue the hybrid work standard, that teleworking determinations must be made on a case-by-case basis, and that there should be no "arbitrary" set number of days required for employees to report to the worksite. Feb. 5 Tr. at 6:21-8:18.

VSEA did not raise any of its "three pillars" claims at the Board's investigative conference, either. As memorialized in the Board's Order dated December 5, 2025: "The

Union . . . outlined its position that the passage of the flexible work statute, 21 V.S.A. § 309, and the changes to the use and practice of telework in response to Covid-19 and its aftermath created a new telework or remote work protocol replacing the 2012 Telework Policy." Dec. 5 Order at 2. The Board adopted the allegations contained in the charge—not VSEA's new "three pillars" theory—when issuing its complaint. *Id.* at 3.

Again, VSEA's new "three pillars" claim was presented to the State for the first time during opening statements at the hearing. Feb. 5 Tr. at 6:21-8:18. The new allegations prejudiced the State in two ways. First, because the claims were not presented in any pleading, the State was not given an opportunity to evaluate the legal sufficiency of the claims and raise defenses in advance of the hearing. For example, to the extent VSEA now claims that the hybrid work standard violates a bargained-for policy, its arguments should have been considered by the Board through the grievance process, not through an unfair labor practice complaint. *See VSEA v. State of Vermont Agency of Nat. Res., Dep't of Forests, Parks, & Recreation*, 26 VLRB 261, 262 (2003) ("Available remedies under a collective bargaining agreement's grievance procedure must be exhausted before a statutory unfair labor practice complaint will be issued.").

Second, the State was deprived of a full and fair opportunity to prepare a defense and present testimony and evidence at the hearing on VSEA's new theory. This prejudice is particularly acute because the compressed time frame in which proceedings were conducted prevented the parties from engaging in the normal discovery process, which ordinarily would shed light on the evidence and claims that will be presented by the opposing party. The absence of notice of VSEA's new allegations prevented the State from fully presenting relevant evidence at the hearing in connection with those allegations, including providing

additional evidence regarding the factual context underlying the Telework Policy. *See* 3 V.S.A. § 965(a)-(b) (providing that the Board has the power to amend the complaint at any time before it issues an order, but the party complained of shall "have the right to file an answer to the original or amended complaint and appear in person or otherwise and present evidence in connection therewith").

This is not a situation where the allegations of the charge were vague or unclear, such that liberal construction of the pleadings would allow for consideration of VSEA's contentions. *See Grievance of Schwaner*, 33 VLRB 432, 433 (2016) (finding that a grievance "sufficiently sets forth what actually happened to Grievant, what harm came to him, and what he is seeking to remedy"). VSEA asks the Board to consider a claim that is fundamentally inconsistent with its original charge and based on allegations not found in the charge that the Telework Policy remained in effect, and the hybrid work standard was inconsistent with the Telework Policy. Board precedent makes clear that the Board will not consider alleged violations not set forth in the pleadings. *Grievance of McIsaac*, 26 VLRB 24, 82-83 (2003); *Grievance of Sunderland*, 31 VLRB 35, 67 (2010). Given VSEA's failure to amend its pleadings to provide appropriate notice of its new allegations, the Board should decline to consider those allegations to preserve the integrity of the process.[8]

C. *The hybrid work standard is consistent with the bargained-for Telework Policy.*

VSEA's claims also fail on the merits. At its root, VSEA's argument is that the State was required to engage in mid-term bargaining before implementing the hybrid work standard.

[8] Similarly, the doctrine of judicial estoppel would prevent VSEA from adopting an inconsistent position with its charge in this matter. It is an unsettled question whether the doctrine of judicial estoppel will be adopted under Vermont law. *See In re Chittenden Solid Waste Dist.*, 2007 VT 28, ¶ 29, 182 Vt. 38, 928 A.2d 1183 (2007); *Hathaway v. Tucker,* 2010 VT 114, ¶ 35 n.10, 189 Vt. 126, 14 A.3d 968 (2010). Judicial estoppel applies where a party's inconsistent position was adopted in legal proceedings. *Avery v. Avery*, 2018 VT 59, ¶ 10, 207 Vt. 570, 192 A.3d 1250 (2018). In this matter, VSEA's allegations were explicitly adopted by the Board when it issued the complaint. Dec. 5 Order at 3.

However, VSEA's argument is incorrect because the issue of telework has already been bargained, and the hybrid work standard is within the terms of the bargained-for policy which makes telework discretionary and revocable by the employer at any time without cause.[9]

In general, an employer is required to bargain changes in mandatory subjects of bargaining during the term of a contract. *See Orleans Cent. Educ. Assoc. v. Orleans Cent. Supervisory Union Bd. of Sch. Directors*, 35 VLRB 126, 132 (2019). However, because the hybrid work standard was implemented pursuant to discretion granted to the State by an existing bargained-for policy, VSEA's claim that additional bargaining was required fails. Moreover, as discussed above, VSEA waived any right to mid-term bargaining over telework when it failed to file a grievance or ULP charge over the State's 2024 suspension of telework for ESD staff.

1. The Telework Policy reflected a bargained-for agreement that supplemented the existing CBAs.

As stipulated by the parties, the CBAs between the State and the relevant bargaining units do not contain substantive provisions which specifically address telework.[10] Feb. 9 Tr. at 28:15-17. However, the 2012 Telework Policy is a bargained-for agreement between the parties, as shown by the negotiations prior to issuance of the policy and the subsequent actions of the parties.

[9] To the extent VSEA argues that impact bargaining is required, its claim fails for the same reasons. The hybrid work standard does not have any impact on a working condition that is severable from the issue of telework – a matter that is within the sole discretion of the employer under the Telework Policy. *See Lackawanna Cnty. Detectives' Ass'n v. Penn. Labor Relations Bd.*, 762 A.2d 792, 795 (Pa. Cmwlth. Ct. 2000) (explaining that impact bargaining is only required if there is a demonstrable impact on wages, hours, or working conditions, matters that are severable from the managerial decision).

[10] The only reference to telework in the CBAs relates to additional pay to employees during emergency closures or reductions of the workforce present in work locations due to emergencies. Ex. BB at 153 (excluding employees who are teleworking from receiving additional pay pursuant to general provisions for emergency closings); Ex. CC at 269 (same); Ex. DD at 398 (same).

When management and a union enter into a side agreement that applies "generally to all or to certain categories of employees" and does not conflict with the CBA's existing terms, the side agreement supplements the CBA and becomes enforceable between the parties. *See In re Aleong*, 2014 VT 15, ¶ 32, 196 Vt. 129, 94 A.3d 1150 (2014); *see also Price v. Unite Here Local 25*, 883 F. Supp. 2d 146, 152 (D.D.C. 2012) ("Side letters mutually agreed to by the parties in a collective bargaining relationship may supplement the original collective bargaining agreement."). Personnel rules may also attain the status of contractual rights and duties when they are not at variance with contract provisions. *Grievance of Allen*, 5 VLRB 411, 417 (1983).

The bargaining history shows that the Telework Policy reflects the parties' intent to enter into an agreement. As explained in the testimony of Director of Labor Relations John Berard, the State recognized that telework is a term or condition of employment requiring bargaining. As a result, before issuing a telework policy, Mr. Berard contacted VSEA bargaining unit representatives about the proposed policy. The parties discussed the policy by email and by phone, and multiple drafts of the policy were exchanged. Ultimately, the State incorporated VSEA's requested revisions. Feb. 10 Tr. at 34:25-35:19. When the policy was issued, VSEA issued a press release celebrating the policy as a "great cooperative effort between VSEA members and the State." Ex. H. VSEA Executive Director Steve Howard testified that VSEA similarly viewed the Telework Policy as a bargained-for agreement. Feb. 9 Tr. at 8:23-25.

The parties' subsequent actions similarly reflect that both understood the policy as a bargained-for agreement. During the initial stages of the Covid pandemic, both VSEA and the State recognized the need for rapid expansion of telework for the safety of employees. In a

letter dated March 14, 2020, VSEA President Dave Bellini requested that the Governor immediately "require all employees who can work remotely and telecommute to do so," a rapid expansion facilitated by the existing Telework Policy. Ex. K. And as the Covid emergency began to recede in 2021, DHR Commissioner Beth Fastiggi exchanged correspondence with VSEA President Aimee Bertrand Towne regarding measures to ensure the safety of employees as the State returned to formal telework arrangements, which would result in additional employees working on site beginning November 1, 2021. Ex. X at 0074.

As shown by these continuing interactions between the State and VSEA, the parties did not engage in bargaining regarding adjustments to telework, as a bargained-for agreement was already in effect in the form of the Telework Policy. Thus, the Telework Policy reflected a bargained-for agreement, setting forth the understanding of the parties regarding the rights and duties of employees and the State.

2. The Telework Policy remains in effect and was not replaced by a new practice.

Although VSEA claimed in its charge that the Telework Policy was replaced by a new practice established during the Covid pandemic, both the documentary evidence and the testimony at the hearing—including the testimony of VSEA's lead witness— reflect that the Telework Policy remained in effect during the Covid pandemic and the years that followed.[11]

While the parties' conduct under an agreement can inform how the agreement is interpreted, conduct and practice cannot repeal or replace an agreement's express terms. *See In re Cole*, 2008 VT 58, ¶ 17, 184 Vt. 64, 954 A.2d 1307 (2008); *In re Kelley*, 2018 VT 94, ¶ 20,

[11] The parties' continuing use of the Telework Policy throughout the Covid pandemic and the subsequent recovery period likewise reflected the parties shared understanding that the Telework Policy was not invalidated by the enactment of the Flexible Working Arrangements statute. Ex. 2. Moreover, the flexible working arrangements statute, which went into effect January 1, 2014, expressly provides that its terms cannot diminish the rights of parties under a collectively bargained agreement. 21 V.S.A. § 309(d).

208 Vt. 303, 198 A.3d 44 (2018) (stating that past practice cannot change the meaning of a contract, although it may give meaning to, supplement, or qualify a contract). Contractual provisions and personnel policies that have been recognized by the parties remain in effect unless explicitly altered by contract provisions. *Cole,* 2008 VT at ¶ 16; *VSEA v. Judiciary Dep't*, 34 VLRB 155, 170-71 (2017). "Collective bargaining can change the effect of the Personnel Rules; if it has not, we presume the applicable section of the Rules remains in effect." *Grievance of Cronin*, 6 VLRB 37, 70 (1983).

Even more so than Tropical Storm Irene, the Covid emergency presented an extraordinary set of challenges for the administration of state government. *See, e.g., State v. Young*, 2023 VT 10, ¶ 17, 217 Vt. 537, 292 A.3d 689 (2023) ("[T]he pandemic was an extraordinary moment in modern history that presented unprecedented logistical challenges[.]") (internal quotation omitted). Nonetheless, the memoranda issued during and after the Covid emergency show that the Telework Policy remained in effect, even if the State temporarily relaxed some of its procedural requirements for purposes of pandemic-related arrangements. Specifically, on March 15, 2020, Secretary Susanne Young issued a memorandum to all state employees noting that the Governor's emergency order had directed her, in consultation with the DHR Commissioner, to encourage and facilitate telework among employees with the capacity to work remotely. Ex. L at 0038. Guidelines attached to the memorandum included frequently asked questions that explained, "[S]ubmission of a formal 'Teleworking Agreement' is not required related to the COVID-19 pandemic. However, the guidelines governing telework and the use of State-owned equipment as outlined in DHR Personnel Policy 11.7 and those specific to an agency and/or department will be in full effect for employees when teleworking." Ex. M at 0042.

As the Covid emergency ended, the State resumed the use of Telework Forms. An August 24, 2021, memorandum from Secretary Young informed employees that, "[b]eginning 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. . . . Employees should expect to be working under an approved telework agreement or working on-site by November 1, 2012." Ex. T at 0057. From August 2021 through September 2025, the State approved more than 7,000 Telework Forms submitted by employees. Ex. YY.[12]

Testimony from both State and VSEA witnesses reflected that the Telework Policy remained in effect. Deputy Secretary of Administration Sean Brown testified that the Policy served as the basis for the State's authority to suspend telework for ESD employees in 2024. Feb. 5 Tr. at 59:8-20. Moreover, he explained that the State continued to operate under the Telework Policy as it implemented the 2025 hybrid work standard. *Id.* at 63:2-13.

Director of Labor Relations John Berard similarly testified that the hybrid work standard was an exercise of the employer's discretion that was "specifically built into the agreement." Feb. 10 Tr. at 87:1-8. He elaborated that at the time the Telework Policy was created, "we built complete discretion into the policy from our perspective," and the hybrid work standard—much like the State's flexible implementation of the Policy during the pandemic—was not a modification, but a use of the State's discretion. *Id.* at 87:24-88:12.

VSEA Executive Director Steve Howard also testified that the Telework Policy remained in effect during the Covid emergency and the period that followed, undercutting any argument that a new "past practice" had gone into effect. He acknowledged that the Telework

[12] As explained by Financial and Report Analyst Jaron Foster, Exhibit YY includes only those employees who completed an additional process to upload their Telework Forms into a DHR system. It is possible that additional employees completed a Telework Form but did not submit the form into DHR's system. Feb. 10 Tr. at 31:9-20.

Policy was an agreement between the State and VSEA that remained in effect, at least up until the hybrid work standard went into effect on December 1, 2025. Feb. 9 Tr. at 29:16-24.

Thus, the evidence conclusively shows that, contrary to the position advanced by VSEA's in its ULP charge and at the investigatory conference, the bargained-for Telework Policy remained in effect and was not replaced at any point by a new "past practice." Consequently, VSEA cannot sustain its claim that the State's implementation of the hybrid work standard was a departure from any such "past practice" that required further bargaining.

3. The State exercised its discretion under the bargained-for Telework Policy to implement the hybrid work standard.

The State implemented the hybrid work standard pursuant to and consistent with the bargained-for Telework Policy. The Policy gives many rights to the State as appointing authority and as employer. The State is entitled to the benefit of the parties' bargain and need not engage in mid-term bargaining to act under an existing policy that the parties have already negotiated.

VSEA's interpretation of the Telework Policy hinges on "appointing authority" and "employer" being distinct terms, and the former excluding the Governor. The Telework Policy gives "the employer" the right to *terminate* an employee's participation in telework, and gives "the appointing authority or designee" sole discretion to *approve* an employee's request for telework. Ex. F. The policy and attached form use the two terms seemingly interchangeably: "employer" appears ten times; "appointing authority" eight. Regardless, there is no need to parse these terms in this context: "employer" and "appointing authority" clearly refer to the State, and the State is administered by the Governor.

Whether through consideration of plain language, the parties' course of conduct under the policy, constitutional and statutory law, or the absurd results that strictly "local" approval

of telework would create, there can be no doubt that the State, through its chief administrator, has sole discretion to permit telework across state government.

a. The Telework Policy's plain language gives the Governor, acting individually or through his subordinates, discretion to approve, deny, or terminate an employee's participation in telework.

The parties dispute whether the Telework Policy gives the State discretion to implement the hybrid work standard. Resolving the dispute requires the Board to interpret the Telework Policy. The cardinal principle of contract interpretation is to give effect to the parties' intent. *VSEA v. Judiciary Dep't (Re: Use of Personal Cell Phones)*, 34 VLRB 155, 168 (2017).

"A contract will be interpreted by the common meaning of its words where the language is clear." *In re Stacey*, 138 Vt. 68, 71, 411 A.2d 1359, 1361 (1980); *see also Cheever v. Albro*, 138 Vt. 566, 569, 421 A.2d 1287, 1289 (1980). "If the plain language is clear, the terms are enforced as written. But if the plain language is ambiguous, such that reasonable people could differ as to its meaning, extrinsic sources of interpretation may be employed." *In re Miller*, 2024 VT 35, ¶ 13, 219 Vt. 380, 323 A.3d 984 (2024) (internal citations omitted). "The threshold question of whether contract language is ambiguous is a question of law." *In re Spear*, 2014 VT 57, ¶ 15, 196 Vt. 517, 99 A.3d 618 (2014). In determining whether ambiguity exists, "a court may consider limited extrinsic evidence, including 'the circumstances surrounding the making of the agreement as well as the object, nature and subject matter of the writing.'" *Id.* ¶ 15. (quoting *Cameron's Run, LLP v. Frohock,* 2010 VT 60, ¶ 20, 188 Vt. 610, 9 A.3d 664 (2010) (mem.)).

In construing contractual provisions to ascertain the parties' intent, the Board considers them "in relation to the contract as a whole in order to 'give effect to all material parts of the

contract and to form a harmonious result.'" *In re Spear*, 2014 VT 57, ¶ 15, 196 Vt. 517, 99 A.3d 618 (2014) (quoting *In re Stacey*, 138 Vt. 68, 72, 411 A.2d 1359, 1361-62 (1980)). No additional terms should be read into a contract, unless they arise by necessary implication. *VSEA v. Judiciary Dep't (Re: Use of Personal Cell Phones)*, 34 VLRB 155, 169 (2017).

The Telework Policy's plain language grants the Governor the right to fully or partially terminate employees' telework agreements. The Policy's "Termination of Telework" section provides that "[t]elework is a voluntary program" that is "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." Ex. F (emphasis added). Under SELRA, "employer" means the State "represented by the Governor or designee." 3 V.S.A. § 902(7)(A); *see also* 3 V.S.A. § 305(a) (Governor or designee "shall act as the employer representatives in collective bargaining negotiations and administration").

By design, the Telework Policy authorized the employer (the Governor) to terminate all telework agreements with or without cause, and the Governor did so effective December 1, 2025. *See* Ex. 30 ("All previous/current Telework Agreements are considered rescinded as of December 1."). The Telework Policy further grants the Governor authority to set parameters on telework agreements going forward, including by instituting a presumptive in-person requirement for State employees. The Telework Policy vests "sole discretion" to approve an employee's telework request in "the Appointing Authority or designee." On the Telework Form attached to the Telework Policy, employees are advised that "[t]he Appointing Authority can, at any time during this period [of approved telework] require that you report to your official duty station or terminate your ability to engage in telework."

The Governor is "the ultimate appointing authority." Brown, Feb. 5 Tr. at 63:9-10. The State's Rules and Regulations for Personnel Administration define "appointing authority" as "the officer, board, commissioner, person or group of persons authorized by statute or lawfully delegated authority to make appointments." State Rules and Regulations for Personnel Administration 2.3, § 2.013. Similarly, the CBAs between the parties define "appointing authority" as "the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees." *See* Exs. BB, CC, DD. The Governor is clearly authorized by statute or other lawful authority to appoint employees. *See, e.g.,* 3 V.S.A. § 2221(a) (Secretary of Administration appointed by Governor); 6 V.S.A. § 2 (same for Secretary of Agriculture); 19 V.S.A. § 7(a) (same for Secretary of Transportation); 21 V.S.A. § 1(b) (same for Commissioner of Labor). Vermont's Constitution also grants the Governor the supreme appointing power in state government, in that it grants him the "power to commission all officers, and also to appoint officers." Vt. Const. ch II, § 20.

Had the parties intended to give agency heads exclusive authority to approve telework, they could have said so if permitted by law. When the Legislature has assigned exclusive personnel responsibilities to agency heads, it has done so with plain language. *See, e.g.,* 3 V.S.A. § 310(b) ("It shall be the responsibility of the head of each department to provide current job descriptions for all positions within his or her department[.]"); *s*ee *also In re Carnelli*, 2020 VT 12, ¶ 15, 211 Vt. 522, 228 A.3d 990 (collecting cases construing § 310(b) as granting exclusive power to create job descriptions to agency heads).

To the extent the Telework Policy's reference to "appointing authorities" refers to Executive Branch employees or officials other than the Governor, the hybrid work standard represents a valid directive to those officials consistent with the Governor's constitutional and

statutory power. *See, e.g.*, 3 V.S.A. § 209 (granting Governor power to "adopt and . . . enforce such rules as the Governor may see fit for the conduct of such departments and alter or add to the same in the Governor's discretion"). That power includes the power to direct the Governor's subordinates to approve new telework agreements if they meet certain requirements. That is precisely what the hybrid work standard does.

Under the Telework Policy, the State, as employer, has an absolute right to terminate telework agreements. The State exercised that right when the Secretary of Administration communicated the State's termination of all current telework agreements to Executive Branch employees on October 31, 2025. Ex. 30. Given that the State has broad authority to terminate telework agreements, it would make no sense to interpret the Policy to mean that the State could not take the lesser action of limiting the scope of telework that may be approved. The Board must find that the State was within its rights under the bargained-for Telework Policy to terminate Telework Agreements, and inherent in the authority to "terminate" is the authority to take the less drastic step of creating a hybrid work standard.

b. The bargained-for Telework Policy must be read in the context of constitutional, statutory, and other law affording the Governor oversight over Executive Branch employees.

The Telework Policy, like all state personnel policies, must be read against the legal backdrop of centralized Executive Branch control. First, the Governor is the ultimate employer and administrator pursuant to Vermont's Constitution, SELRA, and many statutes designed to "ensure proper executive supervision by the Governor." *See, e.g.,* 3 V.S.A. § 213(a). Second, uniform administration of state government is operationalized through AOA and its Secretary. Examples of this constitutional and statutory law are below.

"When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law." *Resol. Tr. Corp. v. Diamond*, 45 F.3d 665, 673 (2d Cir. 1995); *see also 2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein.").

The Governor is of course the chief executive officer of the Executive Branch. His duties to appoint officers, supervise state agencies, and approve actions of agency heads are unique across state officers. The Governor must ensure the laws are "faithfully executed"; Vt. Const. ch II, § 20; in other words, he is "responsible for the efficient and effective delivery of state services." *See* Howard, Feb. 9 Tr. at 38:9-17.

Many legal requirements—some well-known, others esoteric—charge the Governor and Agency of Administration with serving as employer, appointing authority, supervisor, and administrator of the Executive Branch. They include:

- Vt. Const. ch. II, §§ 3, 20: The Governor has "Supreme Executive power" and power to "commission all officers, and also to appoint officers, except where provision is, or shall be, otherwise made by law or [the Constitution]."

- 3 V.S.A. § 206: Department heads may only "prescribe and [ ] enforce rules, subject to the approval of the Governor, for the government and administration of such department, the conduct of its employees and the custody, use, and preservation of the records, books, documents, and property pertaining to the administration of the department."

- 3 V.S.A. § 209: The Governor "shall adopt and have power to enforce such rules as the Governor may see fit for the conduct of such departments and alter or add to the same in the Governor's discretion" and may "transfer, temporarily or permanently, subordinates of any one of such departments to another department as the needs of the State may seem to the Governor to require."

- 3 V.S.A. § 212: Creating administrative departments in state government "through the instrumentality of which the Governor, under the Constitution, shall exercise such functions as are by law assigned to each department respectively."

- 3 V.S.A. § 213(a): "All administrative bodies in the Executive Branch shall be placed within one of the foregoing agencies or departments to ensure proper executive supervision by the Governor."

- 3 V.S.A. § 212: Creating administrative departments in state government "through the instrumentality of which the Governor, under the Constitution, shall exercise such functions as are by law assigned to each department respectively."

- 3 V.S.A. § 905(a): The Governor "shall act as the employer representatives in collective bargaining and administration."

Some of the above laws are over 100 years old. For example, the statute requiring agency heads to obtain the Governor's approval in implementing rules of employee conduct and department administration, 3 V.S.A. § 206, was enacted in 1923 and has hardly changed since. *See* 1923, No. 7, § 7.

Centralized control of the Executive Branch is further embodied in the many statutes governing AOA and giving its Secretary operational control over agencies and departments across state government. "The Agency of Administration plays a unique role in Vermont state government because it has oversight authority over the other state agencies." *Conway v. Searles*, 954 F. Supp. 756, 763 (D. Vt. 1997). The provisions providing for this cross-agency oversight authority are numerous and include:

- 3 V.S.A. § 2222(a)(1)-(3): The Secretary of Administration is the Governor's principal administrative aide and authorized to issue, with the approval of the Governor, general policy statements, rules, and regulations applicable to the Executive Branch to implement executive orders or legislative mandate. The Secretary is the only cabinet member who, "upon request [shall] advise the Governor and the Legislature on all matters relating to general administration."

- 3 V.S.A. § 2224: The Secretary of Administration, with the approval of the Governor, may transfer classified positions between state agencies subject only to personnel laws and rules.

- 3 V.S.A. § 2251(a): The Secretary of Administration, with the approval of the Governor, appoints the Commissioner of Human Resources.

- 3 V.S.A. § 260(b): The Secretary of Administration determines, with approval of the Governor, the location of agencies and departments.

- 29 V.S.A. § 165: The Commissioner of Buildings and General Services, who reports to the Secretary of Administration, must "implement all reasonable and necessary measures to utilize all available space" in state government before entering into leases.

The Secretary is recognized as the "first among equals" in the Governor's Cabinet. *Conway*, 954 F. Supp. at 763. The Secretary is akin to the pinnacle of operational control of state government, through which all other appointing authorities ultimately report to the Governor. Accordingly, the Agency is very involved with day-to-day operations across agencies. The Secretary and Deputy Secretary meet regularly with leadership from agencies and departments throughout the Executive Branch and, if needed, bring issues to the Governor's attention. *See* Brown, Feb. 5 Tr. at 27:9-25, 29:13-30:17.

VSEA's argument disregards constitutional and statutory law. VSEA posits that only agency heads can set telework standards. According to VSEA, the Governor and AOA are prohibited from setting uniform telework standards, despite their authority to appoint and remove agency and department heads, supervise state government, determine the location of state offices, and, most fundamentally, serve as the employer of Executive Branch employees.

The State's Personnel Policies and Procedures Manual reflects the centralized control structure of the Executive Branch. *See* State Personnel Policy 1.0 ("These policies and procedures are intended to serve as guidelines to assist in the uniform and consistent management of personnel. This policy manual provides essential information on how to accomplish the agency/department mission within the administrative framework of Vermont State Government."). The Telework Policy is one of more than 90 policies in the Manual and

must be read consistently with the other policies. For example, practically speaking, employees seeking to telework five days a week on a permanent basis may be seeking a change in their work locations. Work locations, however, are assigned by the State under Personnel Policy 11.0. There is no evidence to support VSEA's theory that the Telework Policy, bargained in the wake of Tropical Storm Irene when the State experienced a historic loss of state offices and work stations, was intended to upend the State's existing work location policies.

There is also no evidence that the parties intended for the Telework Policy, negotiated after the worst natural disaster the State experienced in almost a century, to strip the Governor of his authority to oversee the Executive Branch. As Mr. Berard testified, "[A]t the end of the day, though, it's all subject to the Governor's direction from the standpoint of him being THE, kind of all caps, appointing authority. He gets to set direction, and then appointing authorities are required to fall within that framework." Feb. 10 Tr. at 54:24-55:4. Nothing in the Telework Policy restricts the Governor's authority to set the parameters within which agency heads can exercise their discretion. Instead, by statute, the Governor must approve agency-level implementation of operational rules. *See, e.g.,* 3 V.S.A. § 206.

c. The parties' course of conduct shows that the Governor has the authority to implement the Telework Policy.

To the extent contract language is ambiguous, the practical construction the parties place on a contract is controlling in determining the meaning of the contract. *In re Cole*, 2008 VT 58, ¶ 19, 184 Vt. 64, 954 A.2d 1307 (2008). The Governor, through the Secretary of Administration or DHR Commissioner, has frequently handled implementation of the Telework Policy when operating needs or other circumstances warranted. VSEA has never protested until now.

In many circumstances, agency heads approve their subordinate employees' telework requests. But over the 14 years the State's Telework Policy has been in effect, the Governor has

regularly exercised his right to set parameters for their exercise of discretion to approve telework. He has instructed appointing authorities statewide to approve telework for certain employees or imposed certain conditions on appointing authorities' discretion to approve telework.

For example, during the pandemic, the Governor at first encouraged and then ordered employees who could telework to telework, without regard to agency or department appointing authorities' assessment of whether telework was consistent with their agency or department's operating needs. On March 14, 2020—before the Governor ordered employees who could telework to telework—VSEA, apparently believing he had authority to do so without bargaining, called on him to "require all employees who can work remotely and telecommute to do so, effective immediately." Ex. K.

The Governor lifted the Covid state of emergency effective June 14, 2021. On August 24, 2021, though the State was no longer operating under a state of emergency, the Secretary of Administration advised that the State was allowing employees to continue teleworking until November 1, 2021 with or without a Telework Form approved by an appointing authority. Ex. T. VSEA did not object. In fact, VSEA wrote to the *Governor* and urged him to allow Executive Branch employees to continue teleworking as they had during the Covid state of emergency after November 1, 2021. Howard, Feb. 9 Tr. at 14:20-16:2; *see also* Ex. X. Apparently, in or about November 2021, VSEA understood that the Governor was within his rights under the Telework Policy to direct whether and to what extent employees across the Executive Branch could telework, without regard to the position of any agency or department appointing authority.

Moreover, on October 25, 2021, the DHR Commissioner announced that the State was requiring any employee who wanted to participate in the telework program after November 1,

2021, to undergo statewide telework training and any supervisor who wanted to approve an employee's participation in the telework program after November 1, 2021, to undergo statewide supervisor telework training. Ex. W; *see also* Ex. V at 0068.

Another example of a statewide requirement is reflected in a "Telework FAQs" document dated July 27, 2021. For an employee to live out-of-state and telework full-time, the employee was not merely required to have a supervisor and an appointing authority approve telework but was specifically required to have approval from their department's commissioner and their agency's secretary. Ex. V at 0070. This statewide requirement comported with VSEA's understanding of the Telework Policy. *See* Howard, Feb. 5 Tr. at 211:22-212:11.

In the fall of 2024, VSEA understood that the State, not merely an agency or department appointing authority, had a right to determine whether employees could telework. As Mr. Howard testified:

> Q: And at that time, so I'm talking about sort of the November 2024 time frame, VSEA understood that the State had a right to determine whether employees could telework?
>
> A: Yes.

Feb. 9 Tr. at 18:11-15. Mr. Howard made a similar representation about VSEA's position to a VTDigger.org reporter in or about November 2024. Curiously, despite testifying at the hearing in this matter that VSEA's position during that time frame was that "the State had a right to determine whether employees could telework," Mr. Howard also testified that he "misspoke" to the reporter. Feb. 9 Tr. at 18:16-20, 19:11-14.

According to Mr. Howard, VSEA determined that the 2024 suspension of telework for ESD employees was consistent with the Telework Policy after meeting with the State and after receiving information from the State in or about February 2025. Feb. 9 Tr. at 27:5-20. He

testified that VSEA determined the suspension was consistent with the Telework Policy because the decision came from a "local appointing authority" regarding a specific division and was supported by evidence that telework was inconsistent with the operations of that division. *Id.*. Mr. Howard also testified that VSEA decided not to file a grievance or an unfair labor practice charge over the suspension after it made that determination in or about February 2025. *Id. at*. at 27:21-25.

It is unclear how the information the State provided in February 2025 could have affected VSEA's decision not to file a grievance over the suspension, given that Article 15 of the CBAs for the affected employees in the NMU and Supervisory Bargaining Unit require that grievances (other than termination grievances filed directly with the Board) be filed within 15 workdays of the date the grievant "could have reasonably been aware of the occurrence of the matter which gave rise to the complaint." *See* Exs. BB (NMU) at 0110-14, CC (Supervisory) at 0224-28.

Nevertheless, there is no dispute VSEA did not file a grievance or an unfair labor practice charge over the suspension or that its Executive Director told a reporter, purportedly in error, that VSEA's position was that the State has a right to determine whether employees can telework.

Also of note is the fact that every employee with an approved Telework Form is on notice that the State can terminate their participation in telework at any time, with or without cause, as such notice appeared on each Telework Form they signed. Ex. F at 16. As Jessica Steeby testified, she understood that "telework was a privilege that the State could revoke at any time" and that a condition of her Telework Agreements was that telework could "be terminated by the employee or employer at any time with or without cause." Feb. 5 Tr. at 186:19-23, 187:10-18. Other state employee witnesses testified similarly. *See, e.g.*, Trimboli, Feb. 9 Tr. at 165:19-24; Ledoux, *id.* at 195:6-9.

Given the practical construction that the State, VSEA, and individual employees placed on the Telework Policy, it is apparent the parties agreed that the Telework Policy vested the Governor, as the chief executive of the State, with the right to approve, deny, restrict, or terminate telework for employees, either directly or indirectly through his subordinates.

4. The State appropriately exercised its discretion under the bargained-for Telework Policy to implement the hybrid work standard.

    a. The State is entitled to determine the operating needs of an agency or department, and telework at ESD supports the Governor's rationale in setting the hybrid work standard.

The Telework Policy prohibits approval of an employee's telework request unless two conditions are met. First, the employee's duties must be suitable to being performed away from their official work location. The Policy states that "positions involving the direct supervision of employees, direct in-person client contact, and/or significant administrative support may not be amenable to telework." Ex. F at 0012. Second, the telework request must be consistent with the operating needs of the agency or department. *Id.* ("Appointing authority … will only permit telework when consistent with the operating needs of the Agency or Department.").

In other words, if telework is inconsistent with the operating needs of the agency or department, the appointing authority is prohibited from approving it. The record reflects the Governor's statement of operating needs across state agencies and further reflects how those needs were not met in the case of telework by ESD employees.

Governor's statement of operating needs across agencies. Subject to laws, rules, regulations, and the terms of the parties' CBAs, nothing in SELRA or the parties' CBAs "shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods

and means in the most appropriate manner possible." *See* Exs. BB (NMU), CC (Supervisory), DD (Corrections); *see also* 3 V.S.A. § 905(b)(1).

The State's reservation of management rights allows the Governor to determine operating needs, and the Governor determined that the proper functioning of the Executive Branch, including its agencies and departments, required an increased in-person presence. In his address to state employees on September 8, 2025, the Governor explained the needs of state agencies and departments as a whole. "It's not about any individual employee's or team's performance. … [A]s Governor, along with my cabinet secretaries and commissioners, we have to look at our organization as a whole – as well as all the Vermonters we serve." *See* Ex. 14.

The Governor, in consultation with agency secretaries and department commissioners, determined that the operating needs of the Executive Branch were best served by setting a three-days-on-site/two-days-remote standard for employees who can work remotely. As the Governor explained:

> And the reality is, we need to get together more in person – across departments and agencies.
>
> It's not hard to see that something has been lost when we only see each other on the screen. And it's not just our co-workers, but our colleagues and mentors across state government.
>
> One of the things I'm most proud of as Governor is the silos we've broken down between agencies and departments. But we've lost some of that comradery and collaboration because we don't see each other in person where we can hear about what others are working on.
>
> Another thing I'm proud of is our work, together, to build faith and trust in government with more transparency and more access. But that too has been impacted by remote work. Because Vermonters want and need to access their government. They need to see us in their communities. They need to know where and how we work. And, most importantly, they want and need us to be good stewards of their tax dollars.
>
> And as public servants, it's our duty to uphold those values.

> So, to sum it all up, this move is about more connection, collaboration, and visibility for each other and the people we serve.

Ex. 14. At the same time, he also recognized that employees who could telework valued the flexibility that telework provided. He therefore created a three-days-on-site/two-days-remote standard:

> We recognize the value of this type of flexibility, which is exactly why we're moving to a hybrid schedule for most employees rather than pre-pandemic full-time office work. But we're making this change because we need more consistency and predictability across the board.

Ex. 14.

Witness testimony at the hearing is consistent with the Governor's rationale for requiring three days in person to facilitate collaboration. For example, VSEA witness Bethany Ledoux testified that, since working remotely all but one day per month, she has only worked with other teams occasionally, estimating that she has collaborated with other teams on training on a quarterly basis. *See* Feb. 9 Tr. at 185:6-11.

Operational impact of telework on ESD. Clearly, telework among district office ESD employees was not consistent with the operating needs of state government. As the records the State provided to VSEA show, the State, including the Governor's Office, had received significant complaints regarding Vermonters' ability to access safety-net benefits and services at ESD as early as November 2023. *See* Exs. 10A-10K. After assessing these complaints, the State made the appropriate decision to suspend telework and require all district office employees to return to on-site service.

The ESD experience illustrates at least two things. First, it shows the organizational, as opposed to individualized, considerations the Telework Policy requires. Individual ESD employees may have continued to perform while working remotely, but ESD as an organization

did not. Second, it highlights the balance of equities at issue in this ULP dispute. VSEA suggests that the State can only limit telework *after* receiving complaints from Vermonters about not accessing services. VSEA's theory of a right to telework in this regard is unreasonable at best, and certainly contrary to the policy making telework discretionary and subject to the operating needs of an agency. More concerning, however, is that VSEA's theory of limiting telework on a reactive-only basis potentially puts Vermonters, including Vermont's most vulnerable citizens, at risk of not accessing services they depend on state government to provide.

The Governor's reasons for the hybrid work standard, including Vermonters' need to "access their government," "see us in their communities," and "know where and how we work," *see* Ex. 14, reflect the reasonable exercise of discretion in determining the needs of state government. They are also consistent with his unique constitutional charge to ensure faithful execution of the law.

b. The exception request and review process is consistent with the bargained-for Telework Policy.

As part of the hybrid work standard initiative, the State required employees seeking more than two days per week of telework to submit an "exception request" outlining their request and the reasons for their request. Under the Telework Policy, the State has a clear right to seek this information from employees who telework, as the policy requires employees participating in telework to also "participate in all studies, inquiries, reporting and analysis relating to the telework program." Ex. F at 0018. The exception request and review process does not represent a change to the Telework Policy; it more specifically articulates a study, inquiry, reporting, or analysis provided for in the Telework Policy. *See VSEA v. State (Re: Electronic Communications Policy)*, 30 VLRB 210, 228 (2009) ("To more specifically articulate conduct already prohibited does not trigger a change obligating the State to bargain.").

Creating a process for the Secretary of Administration to review and approve requests for exceptions to the hybrid work standard is consistent with the Telework Policy. Again, the Telework Policy prohibits appointing authorities from approving telework that is inconsistent with operating needs. The Governor determined that employees engaging in more than two days of telework per week is generally inconsistent with the State's operating needs, and evidence from the ESD experience supports this conclusion. It was therefore appropriate for the State to establish a process for determining when an individual employee or a group of employees could telework more than two days per week without compromising operating needs, particularly given the Flexible Working Arrangements statute, 21 V.S.A. § 309.

Under the hybrid work standard, agency and department appointing authorities continue to exercise discretion to approve telework to the extent consistent with the Governor's determination of the operating needs of the State. Prior to December 1, 2025, the Telework Policy required an employee who wanted to telework on a regular schedule to any extent to discuss their wishes with their supervisor, then obtain approval from the division manager or director and the appointing authority. This did not change as of December 1, 2025. The Telework Policy still requires an employee who wants to telework on a regular schedule to any extent to discuss their wishes with their supervisor, then obtain approval from the division manager or director and the appointing authority.

The hybrid work standard initiative made no change to the process for an employee to request one or two days of telework a week, but requires an employee to submit an exception request if they want to telework more than two days a week. The exception request is reviewed by the employee's supervisor, the appointing authority, a DHR manager, the exception review team, and the Secretary of Administration. Upon approval of the exception request by the

Secretary of Administration, the employee must enter into a Telework Agreement signed by the division manager or director and the appointing authority, per the Telework Policy.

An agency or department appointing authority who believes the operating needs of the agency or department in whole or in part are better served by having some or all employees telework more than two days a week can discuss their position with the Secretary of Administration and seek an exception to the hybrid work standard. If approved, each employee must enter into a Telework Agreement signed by the division manager or director and the appointing authority, per the Telework Policy.

The Secretary of Administration has reviewed employee and appointing authority exception requests on an individualized case-by-case basis. The Secretary has approved approximately 127 of the approximately 610 employee exception requests that were submitted; the remaining requests are pending. *See* Brown, Feb. 5 Tr. at 68:1-14. The Secretary has also considered and approved exception requests from agency and department appointing authorities. For example, the Department of Health and the Department of Vermont Health Access within AHS have received exemptions from the hybrid work standard due to office space limitations, and the Agency of Education has an exception request pending to allow certain employees to telework five days a week until the State's plan to open regional offices has been implemented. *See id.* at 74:17-76:5; *see also* Nadeau, Feb. 9 Tr. at 112:19-24; Ledoux, *id.* at 193:1-8; Ex. 58B.

Even if the Board finds that the Governor is not included in the definition of "appointing authority" for purposes of approving telework under the Telework Policy, the exception request and review process is nonetheless consistent with the Policy, given that the Policy gives the State (as employer) the absolute right to terminate any individual employee's Telework Agreement.

To the extent the Board considers the Secretary's role in approving telework of more than two days per week for employees outside of AOA inconsistent with the terms of the Telework Policy, such an interpretation would lead to an impractical result that puts form above substance. It would mean that, if the Secretary, as the Governor's designee, determines that an employee teleworking more than two days per week is inconsistent with operating needs, the Secretary could not prevent an agency or department appointing authority from approving the employee's request to do so; but the Secretary could, however, *terminate* a Telework Agreement after the agency or department appointing authority enters into the Agreement with the employee.[13] This sort of inefficient administration of the Telework Policy would be more disruptive to state employees and makes no practical sense.

c. The hybrid work standard provides for individualized review of telework requests and does not preclude employees from teleworking more than two days a week; indeed, many Executive Branch employees are teleworking more than two days a week under the hybrid work standard.

The hybrid work standard requires individualized review of state employee telework requests. VSEA wrongly asserts that the State has arbitrarily capped all telework at two days a week. Telework of up to five days a week remains available to employees who have a compelling reason or require a reasonable disability accommodation to work fewer than three days on site per week. The State has also authorized employees who have requested an exception to the hybrid work standard or a reasonable disability accommodation to continue teleworking more than two days per week pending a final determination of their request.

[13] To the extent the Board determines that the Telework Policy only gives the State the right to terminate Telework Agreements but not to approve them because approval is left to the sole discretion of a "local" appointing authority, such a determination would also possibly mean that the Secretary of Administration as the Governor's designee could not approve exception requests that an agency or department appointing authority denies. The remaining aspects of the exception request and review process clearly fit within the terms of the Telework Policy, however. As discussed above, the Telework Policy requires teleworking employees to participate in any inquiries or reporting the State establishes.

Notably, each of the six state employee witnesses VSEA called to testify at the hearing continued to telework more than two days a week after the hybrid work standard went into effect. *See* Steeby, Feb. 5 Tr. at 188:4-14; Salvador, Feb. 9 Tr. at 92:14-16; Nadeau, *id.* at 115:20-24; Dodge, *id.* at 139:16-18; Trimboli, *id.* at 168:15-19; Ledoux, *id.* at 193:1-8. Indeed, as of the hearing, over 600 employees were teleworking three or more days a week under the hybrid work standard because they submitted an exception request. In addition to those 600 employees, there are an estimated "several hundred" doing so due to a pending reasonable disability accommodation request. *See* Brown, Feb. 5 Tr. at 150:4-22. That these employees or an appointing authority had to submit an exception request is clearly allowed under the plain language of the Telework Policy, which has required employees participating in the voluntary telework program to participate in studies, inquiries, reporting, and analysis since its inception. Telework of up to five days a week also remains available to some employees of some agencies and departments due to operating needs, such as space availability.

As Deputy Secretary Brown testified, at the Telework Policy's inception, "the operating [ ] needs of the state government were paramount," and the number of "telework days could be limited based on operating needs and supporting Vermonters." Feb. 5 Tr. at 82:18-24. To the extent there were no inconsistencies with business operations, an employee could telework five days a week. The implementation of the hybrid work standard did not change this. Upon a showing that the State's operating needs can accommodate an individual employee or group of employees teleworking up to five days a week, an appointing authority can still approve up to five days a week of telework.

5. VSEA's interpretation of the bargained-for Telework Policy would lead to absurd results.

A contract should be interpreted in a manner that avoids an "unequal, unreasonable, and improbable" result, so long as the interpretation is consistent with the language in the contract. *Grievance of Gorruso*, 150 Vt. 139, 143-44, 549 A.2d 631, 634 (1988). Interpreting the Telework Policy to deprive the Governor, as chief executive of the State, of a role in the State's telework program would lead to absurd results.

VSEA's strictly "local control" theory of the Telework Policy would result in numerous absurd results. First, all agency heads in the Executive Branch serve at the pleasure of the Governor. *See, e.g.,* 3 V.S.A. § 2702 (Secretary of Education); 3. V.S.A. §§ 2821-2822 (Secretary of Natural Resources); 3 V.S.A. §§ 3021-3022 (Secretary of Human Services). The Governor could remove any agency head for any reason; nothing in the Telework Policy changes this fact.[14] Second, the Governor "may transfer, temporarily or permanently, subordinates of any one of such departments to another department as the needs of the state may seem to him or her to require." *See, e.g.,* 3 V.S.A. § 209. In other words, the Governor ultimately determines which agency head state employees serve under. Third, one of the centralized functions of the Agency of Administration is to determine the appropriate use of state office space. *See, e.g.,* 3 V.S.A. § 260(b); 29 V.S.A. § 265. VSEA's theory that one agency head could permit every employee in that agency to work remotely, without coordinating with and receiving approval from AOA, could result in unused, empty state office buildings which, under VSEA's theory, the Governor would be powerless to address.

[14] *See, e.g., McFeeters v. Parker*, 113 Vt. 139, 143, 30 A.2d 300, 303 (1943) ("[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.") (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935)).

Fourth, as discussed above,[15] there can be no dispute that the plain language of the Telework Policy allows the State as employer, represented by the Governor, to terminate a Telework Agreement at any time, with or without cause. If the term appointing authority excludes the Governor, that would mean the Telework Policy allows a department commissioner, but not the Governor, to approve an employee's telework request, but once an approved Telework Agreement is in place, the Governor can terminate it. [16] VSEA offered no evidence to suggest the parties intended to bargain away the Governor's authority to direct agency heads or to create an unnecessarily disruptive process for state employees requesting to telework.

D. A remedy granted based on VSEA's new arguments would have no practical effect.

VSEA's current arguments are grounded in its assertion that the Governor could not implement the hybrid work standard without bargaining, but at the same time VSEA has conceded that a subordinate appointing authority could validly change or completely suspend telework for employees. If the Board adopts the arguments presented by VSEA and orders that the State cease and desist from the conduct that VSEA claims is improper, the relief will have no practical effect and lead to anomalous results.

SELRA authorizes the Board to order the State to cease and desist from an unfair labor practice and take such affirmative action as will carry out the policies of SELRA. 3 V.S.A. § 965(d). The scope of the remedy the Board may grant is shaped by the evidence presented by the parties. For example, in a case where VSEA presented no evidence of any losses or discipline suffered because of an invalidated provision of a policy, the Board found "there is

[15] *See* Section C.3.
[16] In addition, because the Telework policy vests the approval of a telework request in an appointing authority or their designee, nothing would prevent the designation of the Governor as an approving official.

no applicable 'make whole' order for us to issue in this regard." *VSEA v. State of Vermont (Re: Electronic Communications Policy)*, 30 VLRB 210, 237 (2009).

At the hearing, VSEA claimed that implementing the hybrid work standard constituted an unfair labor practice because it was initiated by the Governor instead of through "local control" by the appointing authority, because it was not implemented on a case-by-case basis, and because it was based on a requirement that employees are generally expected to report to the worksite a specific number of days per week. Feb. 5 Tr. at 6:21-8:18. Testimony from VSEA Executive Director Steve Howard shows that VSEA's position appears to be more narrowly focused on the first element—control by a local appointing authority—rather than the other two elements. Specifically, Mr. Howard conceded the State's 2024 suspension of telework for ESD employees was a permissible exercise of the State's discretion under the Telework Policy. Feb. 9 Tr. at 27:17-20. The suspension was not implemented on a case-by-case basis, and it required all affected employees to report to the worksite a specific number of days per week (five days a week). *See* Ex. EE.

Based on VSEA's concession that the State's 2024 decision to indefinitely suspend telework for ESD employees was a valid exercise of the State's discretion, there is no dispute that individual appointing authorities could require subordinate employees to report to the worksite three days per week (or even five days per week). Thus, if the Board were to order the State to cease and desist the alleged unfair labor practice of the hybrid work standard initiative, agency heads could implement the exact same requirements without running afoul of the cease and desist order.

Therefore, if the Board were to grant relief in the form of a cease and desist order based on the arguments and concessions made by VSEA at the hearing, it would lead to anomalous, confusing, and potentially disruptive results.

Because the Telework Policy undeniably reflects the understanding that "[t]elework 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," *see* Ex. F at 0015*,* a return to the status quo through a cease and desist order could not result in changing the Telework Policy's provision that allows for the complete discontinuance of an employee's participation in telework by the employer.

CONCLUSION

For the reasons set forth above, the State respectfully requests the Board order:

(1) That new allegations not raised in the charge or complaint cannot be considered;[17]

(2) That there is no ground upon which to conclude that an unfair labor practice was committed; and

(3) That the unfair labor practice complaint be dismissed.

DATED at Montpelier, Vermont on this 4th day of March 2026.

Respectfully submitted,

CHARITY R. CLARK
ATTORNEY GENERAL

[17] In the alternative, if the Board determines that the additional allegations of VSEA not presented in the charge may be considered, it should afford the parties an opportunity to fully present evidence regarding those additional allegations.

By: */s/ Chris Florian*
Chris Florian
Assistant Attorney General

/s/ Wendy W. Chen
Wendy W. Chen
Assistant Attorney General

Certificate of Service

I, Chris Florian, counsel for the State of Vermont, Department of Human Resources, certify that I served the foregoing State's Proposed Findings of Fact and Conclusions of Law on the Vermont State Employees' Association on March 4th, 2026, by contemporaneously sending a copy by electronic mail to the following addresses:

Alfred Gordon O'Connell: agordon@pylerome.com
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DATED at Montpelier, Vermont this 4th day of March, 2026.

/s/ Chris Florian
Chris Florian
Assistant Attorney General