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 REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY PENDING APPEAL

The State of Vermont provides this reply in further support of its motion to stay to avoid potentially unnecessary disruption to both the State and state employees while the appeal of this matter is pending. VSEA has indicated it objects to the State filing a reply brief in this matter.[1] The Board has the authority to permit and consider a reply brief and should do so here because a reply is appropriate and necessary to respond to issues raised in VSEA's opposition. For the reasons set forth below, the Board should stay its April 1 Order to reinstate unnamed employees affected by the hybrid work standard and to enjoin the implementation of the hybrid work standard.[2]

I. The Board has the authority to consider a reply brief.

The Board's Rules are silent on whether a reply is permitted. See Rules of Practice of the Vermont Labor Relations Board, § 12.20. Given this silence, the Board retains the authority to permit and consider the State's reply. Importantly, even if the filing of a reply brief were

---

[1] *See* VSEA's Memorandum in Opposition to the State's Request to Stay the Board's Order Pending Appeal ("VSEA Opp.") 1, n.1.

[2] VSEA does not oppose the State's motion insofar as it seeks to stay the part of the order requiring the State to compensate employees for monetary losses. *See* VSEA Opp. 19.

expressly prohibited by the Board's Rules, the Board would still have the authority to waive that rule and permit the filing. *See In re Champlain Parkway SW Discharge Permit*, 2021 VT 34, ¶ 16, 214 Vt. 561, 256 A.3d 75 (adopting rule in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), which permits administrative agencies to waive procedural rules, explaining that failure to permit this flexibility "would force agencies to adhere inflexibly to all their procedural rules, producing irrational consequences in many cases and resulting injustice"). Here, strict adherence to any implied prohibition on a reply brief would be unnecessarily inflexible under the circumstances.

As set forth in the sworn declaration of Deputy Secretary of Administration Sean Brown,[3] the State is receiving questions from current and former employees and agency and department heads regarding how the Board's order will be implemented. These questions continued after the State filed its motion to stay and present concrete impacts on the State. Yet, VSEA suggests in its opposition that these concrete impacts are merely speculative. For example, VSEA argues that a stay of the reinstatement order is not appropriate because, "[a]s an initial matter, the State has failed to identify a single . . . circumstance" of a reinstatement request for a position that has

[3] VSEA implied that the Board should discount Deputy Secretary Brown's sworn statements because the Board disagreed with the State's witnesses as a whole regarding one factual issue during the proceedings. VSEA Opp. 11 ("This kind of speculative harm cannot support a stay . . . particularly when it is only tangentially based on the testimony of an affiant whose testimony below was described as 'circular and elusive." (citing Order at 52)). VSEA does not otherwise contest the factual statements in Mr. Brown's declaration that the State has received requests from state employees and agency and department heads on how to handle time-sensitive employee recruitment processes currently underway and how to handle reinstatement of employees following resignation or retirement. Brown Decl. ¶ 6. It also does not contest that these issues "may require double-filling positions that became vacant and have been filled since December 1, 2025." Brown Decl. ¶ 14.

been filled, "rendering this purported harm nothing more than speculation." VSEA Opp. 9. After the State filed its motion for a stay, but notably *before* VSEA filed its opposition with the Board, the State identified a specific example of the harm and confusion regarding the reinstatement order in a sworn declaration filed with the Vermont Supreme Court. *See* Second Declaration of Sean Brown (attached as Attachment 1). In that situation, an employee who ostensibly retired from state service because of the hybrid work standard asked about reinstatement as a result of the Board's Order. *Id.* ¶¶ 4–13. The highly specialized class-of-one position, however, had already been filled with a new employee relocating from another part of the country (with the State authorizing moving expenses) to begin work on April 6, 2026. *Id.* Thus, far from speculative, the issues the State has articulated are quite real. This factual development alone illustrates why permitting the State to reply to VSEA's opposition is appropriate. The Board can and should consider this reply.

II. The Board should stay the requirement that the State offer reinstatement to any employee who left State employment as a result of the hybrid work standard for the same reasons VSEA agrees to stay the monetary restitution order.

The purpose of a stay pending appeal is to preserve the status quo at the time of the Board's decision to prevent irreparable harm to the appellant or harm to others. While VSEA repeatedly refers to the Board's order as returning to the "*status quo ante*," the status quo has undisputedly changed since the filing of VSEA's charge.

VSEA suggests that this was caused by the State's own implementation of the hybrid work standard. *See* VSEA Opp. 8 ("The fact that the State alleges itself to have been inundated with remedial questions from employees in the aftermath of the Board's decision speaks only to the

sheer amount of harm *caused by the State* and cannot possibly be considered irreparable harm *to the State*." (emphasis in original)).

But this argument is not logically sound. The focus of a stay pending appeal is the balance of harms to the parties resulting from immediate implementation of the *order on appeal*. *See Nken v. Holder*, 556 U.S. 418, 421 (2009) (recognizing that a stay pending appeal "does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it"). If the Board discounted such harms merely because they arose from an action the Board ultimately found to be unlawful, it is unlikely a stay pending appeal would *ever* be appropriate. Indeed, VSEA has agreed to stay the monetary reimbursement part of the order, and the Board has frequently stayed monetary orders because of the irreparable harm to the State that would result from its inability to recoup payments. VSEA Opp. 19. But in VSEA's view, the monetary damages would be harm *caused by the State* and so not appropriate to consider on a motion to stay. That is simply not the correct analysis.

The substantial monetary and operational injuries caused by reinstating individuals who were not terminated but resigned or retired from State employment are no different. *See* Second Brown Decl. ¶ 13 ("As part of unwinding such retirements, the State would need to ensure such individuals do not simultaneously receive retirement benefits and salary as active employees as required by law, while also ensuring they maintain the appropriate type of health insurance benefits paid for by the appropriate funding source."). This explanation illustrates how requiring the State to unwind retirements and reinstate retired individuals—all while potentially "double-fill[ing] a position and pay[ing] two employees to perform one job," *Id.* ¶ 12—will create monetary and operational harms that would be difficult to recoup if the State's appeal is successful. For both types of monetary harm, the "cause" of the harm is not relevant to the

question of whether the State faces potential irreparable harm in complying with the Board's reinstatement order pending appeal. The Board should therefore stay the reinstatement order.

In arguing to the contrary, VSEA also suggests that this situation poses "the exact same hurdle the State faces every time the board orders reinstatement of an unjustly terminated grievant." VSEA Opp. 9 (citing *Grievance of Ryan*, 36 VLRB 135, 137 (2021)). That is incorrect for several reasons.

First, by its nature, an unjust termination grievance is specific to an identified individual. The Board's decision not to stay a reinstatement order is likewise specific to and supported by individual facts. *See, e.g., Appeal of Revene*, 28 VLRB 71, 73 (2005) (considering the employee's expressed desire to resume his employment, his ability to do so, and the difference in salary between that employee's former and current positions). This case presents something entirely different: reinstatement of an unknown number of unidentified individuals across every potential position type and with every single state agency. The fact that the order applies to many individuals across state government necessarily implicates different considerations and potential harms to the State. While having a single employee reinstated poses some, but perhaps not irreparable, harm to the State, if that harm is multiplied by an unknown number of employees the harm becomes much more substantial and difficult to recoup if the State is successful on appeal. VSEA presented no evidence to the Board of the number of individuals who left State employment as a result of the hybrid work standard and so the scope of the harm is unknown but undisputedly more than a typical grievance.

Second, a typical reinstatement order resulting from a successful grievance necessarily includes an adjudication of the grievant's right to reinstatement. Here, the Board's reinstatement order does not adjudicate any individual's right to reinstatement. Instead, the Order leaves it up

to the State, VSEA, and potentially the Board itself to determine who is eligible. The decision to retire or resign from State employment is an individualized determination that is simply not present in a case where an individual has been terminated. VSEA suggests that "there is certainly no irreparable harm flowing from communication with those employees *as to the reasons* for their departure and their potential desire to return to State service, with the assistance of the Board readily available to resolve any disputes relating to their right to reinstatement." VSEA Opp. 9 (emphasis added). This acknowledges that there are likely multiple reasons any given employee left State employment and implicitly acknowledges that there may be disputes as to whether any given employee left as a result of the hybrid work standard. VSEA suggests that the Board stands ready to adjudicate an unknown number of disputes as part of the remedy for the alleged unfair labor practice. But requiring adjudication of individualized decisions by state employees who retired or resigned would cause irreparable harm to the State; harm to those employees in having to see-saw between retirement, reemployment, and re-retirement with all the complications of pensions and health insurance; and harm to the Board itself (in the form of administrative inefficiency) if the Board's Order requiring reinstatement is reversed on appeal.

On the other hand, the harm to employees from a stay of the reinstatement requirement is minimal. Some presumably have either retired or taken other positions and may not be interested in reinstatement to begin with. Those who seek reinstatement do so at the risk of the Supreme Court overturning the Board's Order on appeal. Notably, the VSEA has not offered *any* evidence of an employee experiencing ongoing, irreparable harm that could be remedied immediately by the reinstatement requirement. And in any event, the Board's Order contains a monetary award

that may provide compensation for any harm resulting from implementation of the hybrid work standard, which could remedy any harm while the appeal is pending.

The reinstatement order poses irreparable harm to the State and harm to others if the State were to prevail on appeal. There is no evidence that a stay of the reinstatement requirement would cause significant harm to any employee. The Board should therefore stay the reinstatement order pending appeal.

III. The Board should stay the requirement that the hybrid work standard be rescinded and employees be permitted to telework more than two days a week.

VSEA concedes that when the executive branch is enjoined from doing something it is statutorily and constitutionally authorized to do, it suffers irreparable harm. VSEA Opp. 7. VSEA then suggests that because, in its view and the view of the Board, the Governor has exceeded his authority there can be no irreparable harm. *Id.* This reliance on the merits supports the proposition that if the State has any likelihood of success on the merits then enjoining the hybrid work standard while the appeal is pending constitutes irreparable harm. As described in the State's motion to stay, the State believes that the plain language of the Telework Policy gives the employer discretion to terminate any telework agreement "at any time, with or without cause." If this is correct and the Governor is lawfully authorized, as the employer, to execute that discretion, then enjoining him from doing so constitutes irreparable harm.

Without a stay, the Board's order also potentially hamstrings appointing authorities—who undisputedly have authority under the Telework Policy to change telework arrangements—in fulfilling their statutory duty to manage the personnel and operations of their agencies. Indeed, the VSEA implied in its opposition that the State, and affected employees, would be subject to Board and/or Human Rights Commission proceedings should an appointing authority terminate or modify telework arrangements. *See* VSEA Opp. 11, n.5. Thus, in addition to interference with

the Governor's authority—which the Board and VSEA dispute—the order interferes with the power the Board explicitly holds rests with appointing authorities.

Furthermore, the Board should stay its order to avoid uncertainty and potential disruption posed to state employees whose appointing authorities have changed or will change while the appeal is pending. Based on publicly available information, approximately five department heads, or "appointing authorities," have changed in the past several months. It is unclear whether or for how long new appointing authorities are bound by telework and operational need determinations of their predecessors. *See* Order 46 ("Only the Appointing Authority of a particular Agency or Department can assess the operating needs of the Agency or Department."); *see also* Order 59 (ordering that "the State shall give all affected employees the opportunity to return to the telework patterns exercised prior to the implementation of the Hybrid Work Standard" without regard to the decision-making authority of individual appointing authorities). This uncertainty harms employees, appointing authorities, and the State as a whole.

VSEA in its opposition still does not identify any concrete evidence of harm to state employees if the Order is stayed. The status quo prior to the issuance of the Board's order should remain in effect. Any state employees who have requested an exemption can continue to telework. At least in the short term while the appeal is pending, the exemption policy prevents

substantial harm to state employees during the pendency of this appeal and there is no evidence that any employee will be harmed in the interim.

Conclusion

For all the reasons articulated above and in the State's motion to stay pending appeal, the Board should grant the State's motion to stay the April 1 Order pending appeal.

Dated this 17th day of April, at Montpelier, Vermont.

STATE OF VERMONT
DEPARTMENT OF HUMAN RESOURCES

CHARITY R. CLARK
ATTORNEY GENERAL

By: /s Chris Florian
Chris Florian
Assistant Attorney General
Jonathan Rose
Solicitor General
Ryan Kane
Deputy Solicitor General
Wendy W. Chen
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171
Jonathan.Rose@vermont.gov

Vermont Supreme Court
Filed: 4/3/2026 2:55 PM

STATE OF VERMONT
SUPREME COURT

Vermont State Employees Association, Appellee,	)	Docket No. 26-AP-112
v.	)	
State of Vermont, Department of Human Resources. Appellant.	)	Appeal from Vermont Labor Relations Board, Docket No. 25-50

SECOND DECLARATION OF SEAN BROWN

I, Sean Brown, declare and state as follows:

1. In the short time since the receipt of the Vermont Labor Relations Board's April 1 Order in *VSEA v. State of Vermont*, the Agency of Administration (AOA) has received numerous questions from state employees, retired state employees, and from agency and department heads regarding the State's obligations under the Board's decision.

2. The general nature and scope of such questions were initially outlined in my declaration dated April 2, 2026.

3. As of today, questions received by AOA impact new hires slated to start work on Monday, April 6.

4. One example is as follows: an out-of-state resident accepted a position in state government with a start date of Monday, April 6, and has moved from out-of-state with their spouse and children to take the position.

5. The State has approved certain moving expenses related to the new employee's relocation.

6. Following the Board's April 1 Order, the prior holder of the position has expressed interest in being reinstated. The prior holder of the position is presently a retired state employee.

7. The position at issue is a highly specialized, classified position in a job class of one, meaning the State has no other existing positions in the same job class that might allow for the retention of the incoming state employee and the reinstatement of the retired employee.

8. I understand the retired employee states they retired because of the hybrid work standard and wanted to work remotely more than two days per week.

9. By law and policy, a retired state employee cannot work as a permanent state employee while receiving retirement benefits.

10. Administration of payments and benefits such as health insurance changes depending on whether someone is a retired state employee or permanent active employee.

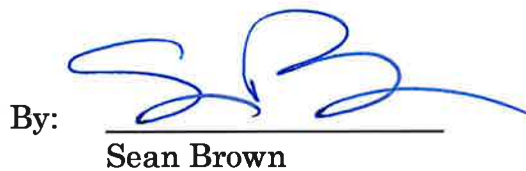
11. The example above highlights at least two unworkable outcomes of the Board's April 1 Order.

12. First, the State may be required to double-fill a position and pay two employees to perform one job as soon as Monday, April 6, or rescind a job offer accepted by an employee who has moved here from out-of-state for the position.

13. Second, the Board's Order could be read to require the State to immediately reemploy and reinsure those who claim to have retired due to the hybrid work standard. As part of unwinding such retirements, the State would need to ensure such individuals do not simultaneously receive retirement benefits and salary as active employees as required by law, while also ensuring they maintain the appropriate type of health insurance benefits paid for by the appropriate funding source.

I declare that the foregoing is true and correct to the best of my ability and is set forth herein under the pains and penalties of perjury.

DATED: April 3, 2026.



By: ______________________

Sean Brown