

Number 17.0 - EMPLOYMENT RELATED INVESTIGATIONS

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Applicable To: All classified employees, as well as exempt and appointed, with the Executive Branch of the State of Vermont.

Issued By: Department of Personnel

Approved By: William H. Sorrell, Secretary of Administration

PURPOSE

The purpose of this policy is to establish the framework for conducting employment investigations.

Employment investigations may include, but are not limited to the following: sexual harassment complaints; other discrimination claims; other allegations of employee misconduct, such as cheating on expense accounts, filing false time reports, etc.

COLLECTIVE BARGAINING FRAMEWORK

The Vermont Labor Relations Board (VLRB) has held that the just cause disciplinary standard does not create any implicit requirements for investigation. The current collective bargaining Agreements between the State and Vermont State Employees' Association, Inc. (VSEA) contain limited requirements which govern employer investigations. Therefore, the employer is generally free to conduct an investigation in the manner considered to be appropriate for the circumstances, but there are some provisions of the agreement which apply, as follows:

A. VSEA Warning (for bargaining unit employees only:

Article 14, Section 7 of the Non-Management Unit Agreement⁽¹⁾ outlines the circumstances in which an employee must be informed that he or she may request the presence of a VSEA representative during an investigative meeting. It states:

"Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee ... he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting."

Therefore, an investigator who wishes to interview an employee suspected of wrongdoing must provide the employee with notice of the right to request VSEA's presence at the interview. Such a request may not be refused except on advice of legal counsel. It is recommended that a memo be issued to the employee, scheduling an investigative meeting and providing the required notice in writing. Should any question arise, the memo would resolve doubts as to whether the notification was given.

When the investigator seeks to interview an employee who is a potential witness but is not suspected of wrongdoing, the above notification is not required. But if the investigator thereafter determines, due to the discovery of new information or for any reason, that the interview may lead to discipline against the employee, the required notice must be provided. Should that situation arise during an interview, the interview should be interrupted for the purpose of providing the notification and appropriate allowance made for the employee to secure VSEA representation, if requested, before continuing the interview.

B. Deadlines for Completing Investigations:

1. Article 14, Section 1, of the Non-Management Unit Agreement states: "... the State will: a. Act promptly to impose discipline or corrective action with a reasonable time of the offense."

Investigations must be completed promptly so that the State may impose disciplinary action within a reasonable time of the offense. There is no universal rule which dictates how quickly investigations must be completed to satisfy this requirement, so each case will be reviewed on the basis of its individual facts. If the State has been reasonably diligent in a given case, this requirement should not create a problem.

In one case, it was found that a seven (7) month delay between the employee's offense and the discipline violated the contract. This was true even though the discipline was delayed because the employee's actions were a small piece of a larger investigation which legitimately took months to complete. The VLRB concluded that the employer should have separated the different parts of the investigation. It may be advisable, therefore, to investigate individual employees separately, or to carve out conclusions with respect to individual employees to ensure discipline is imposed within a reasonable time.

2. Individual State policies may provide time guidelines for the preparation of employer investigations which are separate from the collective bargaining agreements. For example, the State's policy on Sexual Harassment provides that the investigation should be normally completed within thirty (30) days. Thus, individual policies applicable to cases should be consulted to ensure deadlines are complied with.

C. Tape Recording of Investigative Meetings:

Under Article 14, Section 7a, of the Non-Management Agreement, whether or not investigative interviews are tape recorded is at the discretion of the State. If the State does not tape an interview, no other taping will be permitted without the State's consent. (See Section 7c of the contract.) However, if the State does tape an investigative interview of an employee against whom discipline is contemplated, it must allow the employee to also tape the interview and promptly provide him or her with a duplicate copy. Where the State tape records an interview involving a witness, rather than an employee against whom discipline is contemplated, the same rules apply except that the State need only provide the duplicate tape upon request. (See Section 7b of the contract.)

STATUTORY FRAMEWORK

There are some State statutes which are relevant to investigations conducted by the State as the employer.

A. Polygraphs or Lie Detector Examinations:

21 VSA 494, et. seq., substantially restricts the employer in the use of polygraph, or lie detector examinations. Therefore, polygraphs should never be conducted without the consent of legal counsel. In general, where an employee's job or some aspect of it is involved, the State as employer may not request or require; or administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant for employment; or request or require that they give an express or implied waiver of a practice prohibited by this statute. ⁽²⁾

As a general rule, therefore, polygraph examinations are not an investigative tool which is available to the State as an employer. They should not even be discussed with an employee in the course of an investigation before seeking advice from legal counsel.

B. Drug Testing:

21 VSA 511, et. seq., provides that drug testing is not permitted by employers unless done in compliance with its terms. Drug testing is defined as "a procedure of taking and analyzing body fluids or materials from the body for the purpose of detecting the presence of a regulated drug ..." 21 VSA 511 (4).

Random drug testing *may not* be requested, required, or conducted unless it is required by federal law or regulation. (See 21 VSA 513 (b).) **But, if** the State has **probable cause** to believe the employee is using or is under the influence of a drug on the job, drug testing may be conducted, but **only** in compliance with additional terms of 21 VSA 513. The State must also comply with the extensive

procedural requirements of 21 VSA 514 in doing so. Legal advice should be obtained before conducting any drug testing.

State employees holding Commercial Drivers Licenses are subject to federal regulations providing for random drug testing. The State has a separate policy applicable to drug testing of such employees, which appears at Section 21.2 of this Policy Manual.

WHEN TO INVESTIGATE

There are circumstances in which the State is obligated to conduct an investigation. When the State becomes aware that discrimination in employment may have occurred, either in the form of sexual harassment or otherwise, it is required by the Equal Employment Opportunity Commission (EEOC) federal regulations to investigate promptly and thoroughly. If the State has information that sexual harassment, for example, is ongoing, it may be appropriate to intervene and take steps to ensure that any offending behavior is immediately stopped. The employer is responsible for discrimination which it knew or should have known about. Thus, the State must investigate whether or not a written or formal complaint has been filed, and whether or not that is the desire of the person who made the complaint.

Since Article 14, Section 1 of the Non-Management agreement commits the State to take disciplinary action within a reasonable time of the offense, this requires the State to investigate promptly all matters which could lead to discipline or corrective action.

WHO SHOULD INVESTIGATE

As a general rule the State does not have a professionally trained unit of investigators to conduct employment investigations. Each organization unit is, therefore, responsible for conducting investigations. The Department of Personnel Employee Relations staff is available for consultation during investigations, and, occasionally to conduct investigations. Agency/department personnel officers, as well as agency/department legal counsel, should be consulted throughout the course of investigations. Personnel officers have a familiarity with contract requirements and personnel policies which may make them a good choice to conduct investigations.

It is appropriate, to the extent practicable, to ensure that any possible appearance of impropriety is avoided in the choice of investigators. Thus, for example, neither the direct subordinates nor superiors of the alleged wrongdoer(s) should be the investigators. Nor should staff generally be assigned an investigation when they

have had prior involvement in the events under investigation.

EMPLOYEE COOPERATION WITH EMPLOYMENT INVESTIGATIONS

State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.

Employees may occasionally answer questions regarding their own behavior, but object to disclosing the misconduct of their co-workers. An employee has the same obligation to cooperate in the investigation of co-workers as if the investigation were into their own conduct. Therefore, while the reluctance of employees may be understandable, honoring such concerns would inappropriately jeopardize the integrity of an investigation.

INVESTIGATION OF POTENTIAL CRIMINAL MISCONDUCT

Where an employee is suspected of violating the criminal law, legal counsel, employee relations and law enforcement personnel should be contacted before an employment investigation is initiated. This is because a criminal investigation is subject to numerous legal technicalities and may be undermined if inappropriate actions are taken by an employer. In such a case, it is generally appropriate to immediately place the employee on temporary relief from duty with pay. (See Article 14, Section 9 of the contract.)

Where there is a connection between an employee's criminal conduct and his or her employment, it may be appropriate to impose discipline for such conduct. The Agreement provides for the immediate dismissal of an employee convicted of a felony. However, a misdemeanor criminal conviction may justify discipline where there is a connection to the employee's job. In addition, even if there is no criminal conviction, discipline may be appropriate if an employee has committed criminal conduct related to the job.

State entities employing law enforcement personnel have occasionally assigned them to investigate the suspected criminal action of employees. This practice is strongly recommended against, because statutory and contractual obligations on employers may apply in such circumstances and may jeopardize flexibility and effectiveness of the criminal investigation. For example, the VLRB has held that investigations carried out by law enforcement personnel of a State agency were subject to the VSEA notice applicable to investigations. (See Article 14, Section 7 of the contract.)

It is recommended that employers work in such circumstances in cooperation with independent law officials. Some delay in the investigation by the employer may be appropriate while a law enforcement investigation or prosecution is

underway. The State's overall interests must be evaluated to determine whether and to what extent delaying the employer's investigation is warranted.

USAGE OF THE "GARRITY" WARNING

In ***Garrity vs. New Jersey***, the U.S. Supreme Court held that information provided to an employer under the threat of dismissal for non-cooperation with an investigation was not admissible in criminal court to be used against the employee. This legal doctrine may be relevant to a circumstance in which the State is investigating conduct by an employee which may have been criminal.

Employees may assert that they have a Constitutional Fifth Amendment right not to answer questions in an employment investigation which may tend to incriminate them in criminal activity. They may refuse to answer questions on those grounds. The State cannot in such circumstances force the employees to answer questions. However, neither the Constitution nor the contract prohibit the State from taking appropriate disciplinary action against such an employee for not cooperating with the employer's investigation.

Employees' Constitutional Rights remain protected in this context because the Constitution, under ***Garrity***, provides them with a form of immunity which prohibits the use of information provided to the employer under threat of dismissal against them in criminal court. Thus, the ***Garrity*** doctrine protects the Constitutional Rights of the employees in criminal prosecutions while permitting the employer to conduct an unrestricted investigation into potentially criminal misconduct in the work place.

The State has drafted a ***Garrity Warning*** (see Attachment A), which should be given to employees if they assert a Fifth Amendment Constitutional right to refuse to answer questions. It gives the employee notice of the operation of the ***Garrity*** doctrine in this context. Legal counsel should be consulted if the employee still refuses to answer questions, and discipline is under consideration.

Attachment A – Garrity Warning

Before you are asked any further questions, you should review this document, which is intended to advise you of both your rights and responsibilities as an employee of the State of Vermont in the context of this meeting.

The purpose of this meeting is to obtain your response to questions which arise from suspicions of misconduct relating to your job.

You are advised that this meeting is purely an administrative inquiry related to your employment. You have all the rights and privileges provided for under the United States and Vermont Constitutions, statutes, and the employee contract,

including the right to remain silent and the right to be represented by your choice of the Vermont State Employees' Association, Inc., or private legal counsel.

However, it is **extremely** important that you understand you have a duty as an employee of the State of Vermont to cooperate with an investigation by your employer, and to answer relevant and material questions which relate to your official duties. **Your failure to cooperate with this investigation, and your refusal to answer questions which relate to your job, may cause you to be subjected to discipline, including possible dismissal, by the State of Vermont.**

Therefore, while you have the right to remain silent, asserting that right in this context may subject you to dismissal from employment.

Any information or evidence you furnish in response to questions asked of you during this meeting, or any information or evidence which is gained by reason of your answers, may not be used against you in criminal proceedings, according to the ruling in **Garrity vs. New Jersey**, 385 US 493 (1967); however, any information or evidence you furnish in this meeting may be used against you administratively.

I certify that I have read and understand the above statement, and have received a copy of this warning.

Employee: _____

Witness: _____

Dated: _____

1. References herein are to the Non-Management Unit, and similar provisions are generally present in other unit agreements. However, the applicable unit agreement should always be consulted for specific reference.

2. See Also, 21 VSA 494b, which authorizes the Department of Public Safety to require polygraph examinations for applicants for employment as sworn police officers.