VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION, TRACEY BARNARD, CHERYL KAPITAN, DONNA SCOTT, and CHRISTINA TEMPLE	)	DOCKET NO. 93-55

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 16, 1994, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of VSEA and the following former employees of the Vermont Criminal Justice Training Council assigned to work in the cafeteria at the Vermont Police Academy in Pittsford, Vermont: Tracey Barnard, Cheryl Kapitan, Donna Scott, and Christina Temple. The grievance alleged that the State violated the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1992 - June 30, 1994 ("Contract") by laying off the cafeteria workers as a result of the contracting out of their work to a private company. Grievants specifically alleged that the State violated Article 2, Section 3, of the Contract by failing to demonstrate that the contracting out of their work met the contractual criteria required for such action, and by failing to give VSEA a meaningful opportunity to discuss cost-saving alternatives to such layoffs prior to taking the action. As a remedy, Grievants requested that the layoffs of Grievants be rescinded, and that Grievants be restored to their former positions, with full back pay and benefits.

Hearings were held before Labor Relations Board Members Charles McHugh, Chairman; Catherine Frank and Carroll Comstock on

May 19, June 2 and June 9, 1994. Assistant Attorney General Michael Seibert represented the State. Jonathan Sokolow, VSEA Legal Counsel, represented Grievants. At the beginning of the hearing on May 19, Grievants moved to amend their grievance to add Evette Cook as a grievant. The State opposed the motion, and the Board reserved decision on the motion. The parties filed proposed Findings of Fact and Memoranda of Law on June 27, 1994.

FINDINGS OF FACT

1. Article 2, Section 3, of the Contract provides as follows:

> No employee will be laid off or otherwise be removed from employment as a result of contracting out except in circumstances where the work is beyond the capacity of State employees, or that the work or program can be performed more economically under an outside contract, or that an outside contractor has management techniques, equipment or technology which will result in better public service and increased productivity. Prior to any such lay off or other job elimination under this paragraph the VSEA will be notified and given an opportunity to discuss alternatives. A permanent status employee who, as a result of contracting out, loses his/her job will be deemed to have been reduced in force under the Reduction in Force Article. When a State agency contemplates contracting out bargaining unit work and publishes a formal Request For Proposal, a concurrent notice of such publication will be sent to VSEA and the Department of Personnel. Upon request, VSEA shall be permitted to inspect the RFP specifications.

2. The Vermont Criminal Justice Training Council, created pursuant to statute, is primarily responsible for improving law enforcement in the State of Vermont through training and certification of entry level law enforcement personnel and through inservice training. The Council's training programs, conducted primarily at the Vermont Police Academy in Pittsford,

Vermont, include basic training, inservice programs, Department of Corrections training, youth programs, canine training and firefighter training. The basic training program includes a part-time and a full-time school as well as certification programs in Driving While Intoxicated ("DWI"), radar, verification of vehicle identification numbers and fingerprinting.

3. The facilities at the Vermont Police Academy include three classrooms, a gymnasium, eighty beds, thirty-six rooms, a library, offices, a firing range and a cafeteria. The Council historically has provided meals to its trainees at the Academy cafeteria.

4. The Council is comprised of various state officials and other members appointed by the Governor. The Council staff is headed by an Executive Director, Francis Aumand III. Aumand has been Executive Director for approximately the past four and one-half years. In addition to Aumand, at all times relevant herein prior to June 25, 1993, the Council employed two Training Coordinators, an Administrative Assistant, an Administrative Secretary, an Account Clerk, a Cook C, two Cooks B, and two Cooks A. The employees who staffed the cafeteria were Tracey Barnard, Cook C; Evette Cook and Christina Temple, Cook B's; and Cheryl Kapitan and Donna Scott, Cook A's. Barnard, Cook and Temple were full-time employees, while Kapitan and Scott each worked half-time (State's Exhibit 1).

5. Barnard was an employee in the Academy cafeteria for approximately 12 years. Cook, Temple and Kapitan were employees

in the cafeteria for at least five years. Scott was hired in approximately 1991. Barnard supervised the other employees, ordered food, monitored food costs, established the work schedules of employees, and generally was responsible for overseeing the entire operation of the kitchen. The employees performed their duties in a satisfactory manner.

6. The demand for law enforcement training, particularly basic training, to be conducted by the Council substantially decreased beginning in fiscal year 1992 (July 1, 1991 - June 30, 1992). This continued during fiscal year 1993 (July 1, 1992 - June 30, 1993) and, as of the Fall of 1992, was expected to remain low for fiscal year 1994 (July 1, 1993 - June 30, 1994). The decrease in demand was caused in substantial part by less employee turnover in the law enforcement agencies and law enforcement agencies hiring fewer new officers due to constrained budgets. As a result, the Council offered only one 14-week full-time officer basic training course in fiscal years 1992 and 1993, and expected to have only one such course in fiscal years 1994 and 1995. In previous years, the Council had conducted two 14-week full-time basic training courses (State's Exhibit 1).

7. Due to the decreased training services, the demand for food services from the Council also decreased. In fiscal year 1991, the Council served 30,367 meals, at a total cost (including personnel costs) of $167,637 and an average cost of $5.52 per meal. In fiscal year 1992, the Council served 25,560 meals, at a total cost of $153,518 and an average cost of $5.88 per meal.

Aumand estimated that the amount of meals to be served would be 18,400 in fiscal year 1993 (at a total cost - without supply costs - of $148,916 and an average cost of $8.09 per meal), and 20,000 in fiscal year 1994 (at a total cost of $152,200 and an average cost of $7.61 per meal) (State's Exhibit 19).

8. In the Fall of 1992, the Council submitted budget proposals for fiscal year 1994 to the Department of Finance and Management, which works with state agencies in preparing the Governor's proposed budget for each fiscal year. Larry Daum was the budget analyst for the Department of Finance and Management assigned to work with the Council. When Daum reviewed budget materials submitted by the Council to the Commissioner of Finance and Management, the Commissioner questioned why the Council was maintaining a full-time cafeteria staff to service a part-time training facility. The Commissioner determined that privatizing the cafeteria should be explored as a means of reducing the cost of the Council's food service. Daum subsequently determined that the Council could realize a significant savings in the food service by privatization. After discussions with his superiors, Daum called Aumand to inform him that the Governor would propose that the Council's fiscal year 1994 budget be reduced by approximately $70,000 (State's Exhibit 20).

9. Aumand and Daum subsequently discussed and investigated the possibility of purchasing catered food for Council trainees. They determined that catering appeared to be the least expensive

alternative for the Council food service, at an annual cost of $60,000.

10. Aumand submitted the fiscal year 1994 budget for the Council, based on the Governor's proposed budget providing for a $73,000 General Fund reduction in the Council's budget (State's Exhibit 2, page 3), on January 11, 1993, to the Department of Finance and Management. Copies of the document were distributed to all members of the House and Senate Appropriations Committees. In that document, Aumand used the figure of $60,000 as the annual cost of the Council food service. The organization chart and the listing of authorized positions contained in the document do not include the five cafeteria positions. In addition, the following entries in the document relate to the State's intent to privatize the Council's food service and eliminate the cafeteria positions:

> **PROBLEMS AND OPPORTUNITIES:** In FY 94 the food service section of the Training Council is targeted for elimination. It is anticipated that we will meet our food service needs through catering.
>
> **CURRENT/PROPOSED STAFFING:**
>
Current:	Proposed:
Classified - 10	Classified - 5
Exempt - 1	Exempt - 1
>
> **PROGRAM LINE ITEM JUSTIFICATION:** PERSONAL SERVICES DETAIL: The elimination of the food service section is the reason there is a decrease of 24.5% in this line item. This includes the salaries for four (4) classified positions, the benefits associated with the positions, and overtime. Also eliminated are two (2) temporary positions associated with the kitchen.
>
> (State's Exhibit 1)

11. The Governor's Fiscal Year 1994 Executive Budget Recommendations were issued on January 12, 1993. Under a section entitled "FY 1994 Highlights" for "Protection", it was indicated

that the Criminal Justice Training Council food service function was being privatized (State's Exhibit 2).

12. A detailed summary of recommendations attached to the Governor's budget address in January, 1993, which was provided to each Vermont legislator, contained the following entry:

> Criminal Justice Training Council
> - Privatized food service: the CJTC located in Pittsford offers a full-time food service to trainees and staff. This service will be replaced by a contractor and utilized only when necessary, rather than on a full-time staffing basis (State's Exhibit 3).

13. On or about January 11, 1993, Aumand spoke with Steven Janson, Director of Field Services for the VSEA, and informed him of the proposed budget reduction and the potential privatizing of food services and the elimination of the food service positions. Aumand informed the food service employees of this development at approximately the same time.

14. On January 26, 1993, Janson wrote a letter to Thomas Ball, State Employee Relations Director, which provided in pertinent part as follows:

> We have been informed that the Vermont Police Academy is soliciting bids from contractors to provide cafeteria/catering services at the Academy. This would result in the lay-off of the existing staff.
>
> Pursuant to Article 2, Section 3 of the existing Non-Management Unit collective bargaining agreement, please provide us with any Request for Proposal prepared in connection with this effort. In addition, we would like an opportunity to discuss alternatives to this plan, pursuant to Section 3.
>
> Due to the stress created by the public disclosure of this plan, we would like to meet as soon as possible. We have been told by affected staff that cost-saving alternatives to contracting out exist . . .
>
> (State's Exhibit 5)

15. By letter dated February 4, 1993, Ball responded to Janson's January 26 letter. The letter provided in pertinent part as follows:

> I have discussed your letter . . . with Executive Director Francis Aumand. Preliminary steps have been taken to explore the feasibility of providing alternative cafeteria/catering services. No final decisions have been made. I believe that Article 2, Section 3 may not apply at this time, however, Director Aumand is very interested in meeting with you and representatives of the affected employees to discuss this issue. I believe that labor/management discussions concerning cost saving alternatives, or other ideas to mitigate the impact of anticipated budget cuts, would be particularly useful and timely, now . . . Please contact Director Aumand directly to set up a mutually convenient time to discuss these issues . . . (State's Exhibit 9).

16. On January 29, 1993, Aumand testified before the House of Representatives Appropriation Committee on the Council's budget. In connection with that testimony, Aumand prepared an Executive Summary of the budget which he distributed to Committee members and which was consistent with the thrust of his testimony. The Executive Summary provided in pertinent part as follows:

> This budget has a reduction in general fund money totaling 17.25% or $73,000. In order to achieve this reduction a reduction in force must occur. At this time it is anticipated that the food service section of the VCJTC will have to be eliminated to sustain these cuts.
>
> The elimination of the food service section will cause the abolishment of four (4) classified positions. This will adversely effect (sic) 5 people causing them to lose their jobs.
>
> The alternative to producing our own food is to privatize the food service. This will have to be done through contracting for on site food preparation or catering. Preliminary inquiries reveal this may be expensive and difficult as our volume of meals are not sufficient to attract a vendor.

> The law enforcement community, for which the council relies heavily on for support, is very concerned with the potential loss of the kitchen. They see this loss as an erosion of support for law enforcement training and a demand for paying higher costs to attend the academy for training.
>
> (State's Exhibit 6)

17. At a February 1, 1993, meeting of the Vermont Criminal Justice Training Council, the Council decided that food should not be provided at the Vermont Police Academy through catering, but rather that the Council obtain food service bids providing for on-site food preparation (State's Exhibit 8).

18. Aumand followed up on his January 29, 1993, testimony before the House Appropriations Committee by letter dated February 16, 1993, to Committee Chairman Michael Obuchowski. Aumand informed Obuchowski that the Council had determined that it would continue to provide food prepared on-site rather than through catering. Aumand informed Obuchowski that the $60,000 which had been budgeted for catering would have to be increased to $140,000 for on-site food prepared by a contractor. As a result, Aumand informed Obuchowski that he would have to take various measures, including: increasing the special fund contribution, increasing user fees, laying off the Administrative Assistant, and reducing training (State's Exhibit 10).

19. On March 1, 1993, pursuant to the suggestion in Ball's February 4, 1993, letter to Janson, Aumand met with Richard Lednicky, VSEA Field Representative, and the food service employees. Lednicky called Aumand to arrange this meeting. Aumand expected that Lednicky and the employees would offer firm

cost-cutting proposals at this meeting. By the time of the meeting, the Governor's proposed budget for the Council, containing the $73,000 in General Fund appropriation reductions, had been passed by the House of Representatives and was awaiting action by the Senate. At the outset of the meeting, Aumand gave a status report on the budget. Aumand suggested to Lednicky that VSEA contact the Senate with respect to possible cost-saving measures and employees' concerns on the proposed privatization of the kitchen and the loss of jobs. Lednicky and the food service employees brought up at the meeting two alternatives to the layoffs of the employees. One alternative, suggested by employee Donna Scott, was laying off one of the two training coordinators. Aumand responded that the Council already had lost one training coordinator position in 1991, and that he did not consider losing another such position to be a viable option given that training was the primary Council mission. Another alternative, suggested by Lednicky, was the possibility of creating a flex-time or part-time schedule for employees if this was necessary for the employees to preserve their jobs. Lednicky indicated that he did not have the consensus of employees on this issue and provided no specifics concerning cost savings, particular schedules or total hours to be worked by employees. Lednicky and the employees did not discuss any other alternatives.

20. On March 10, 1993, Aumand met with Ball and Budget Analyst Larry Daum. They discussed whether a Request for Proposal ("RFP") to solicit bids from food service contractors should be done at that time. It was decided not to do so since the Legislature had not taken final action on the budget.

21. From the time of the March 1, 1993, meeting to mid-May, 1993, Lednicky contacted Aumand several times to inquire about the status of the budget deliberations. At these times, Lednicky did not indicate that he had any additional alternatives which he wished to discuss with Aumand or any concrete proposals with respect to flex-time or part-time schedules for the employees.

22. Aumand testified before the Senate Judiciary Committee on April 14, 1993, concerning the Council budget. Aumand discussed the proposal to privatize the food service operation and lay off the food service employees. There is no evidence that either Aumand or VSEA discussed with the Senate any cost saving proposals, or restoring funds proposed to be cut from the budget, which would have allowed the employees to retain their jobs.

23. On or about May 16, 1993, the Legislature approved the state budget, which included the $73,000 reduction in General Fund appropriations for the Council.

24. On May 17, 1993, Aumand wrote a letter to Ball, which provided in pertinent part:

> As you are aware, the legislative session has concluded. The legislative intent to privatize the kitchen is complete. This means there will have to be five (5) personnel laid off because of the lack of funding for these positions . . .
>
> We are quickly approaching the beginning of the next fiscal year. As of July 1, 1993, there is no funding for the above positions. Therefore, time is of the essence. Any help that you and your office can provide in quickly facilitating this layoff process will be greatly appreciated . . . (State's Exhibit 12)

25. Aumand sent a letter that same date to Janson. The letter provided:

> As you know, the legislature has concluded the session. Due to lack of funding, the food service is going to be

> contracted, which will adversely impact five (5) employees.
>
> In accordance with Article 2, Section 3, of the VSEA agreement, I am notifying you of our intent to publish a formal "request for proposal". This request will be to provide food service on the premises of the Vermont Police Academy.
>
> For your review and information, I have submitted a copy of this RFP (State's Exhibit 13).

26. On or about May 18, 1993, the Council published a Request for Proposal, inviting bids from contractors to operate the Academy's food service. VSEA received a copy of the Request for Proposal at around this time. The deadline for submitting bids was established as June 8, 1993, at 1:00 p.m. (State's Exhibit 17).

27. By letter dated May 20, 1993, the Department of Personnel notified VSEA of the impending layoffs of the five food service employees at the Academy. The effective date of separation was established as June 25, 1993. This letter was written pursuant to a requirement in the Contract that VSEA receive notice of layoffs five days before employees were notified (State's Exhibit 14).

28. The employees themselves were notified of their prospective layoffs by letters delivered to them on May 26, 1993 (State's Exhibit 15).

29. Lednicky contacted Aumand and requested a meeting pursuant to Article 2 of the Contract to discuss alternatives to the layoffs. Aumand and Lednicky agreed to hold the meeting after the June 8 deadline for submission of bids. The meeting was scheduled to be held on June 11, 1993.

30. By the deadline of June 8, 1993, the Council received two bids in response to the Request for Proposal. One bid was for

$130,000 and the other bid was for $106,397. The lower bid was submitted by Fitz Vogt & Associates of Walpole, New Hampshire. Aumand opened the bids on the afternoon of June 8 (State's Exhibit 18).

31. Lednicky did not request copies of the bids prior to the June 11 meeting. Tracey Barnard, the Cook C who supervised kitchen operations, was familiar with the financial operations of the Academy kitchen. Lednicky did not discuss such financial matters with Barnard in preparation for the meeting. Lednicky and the employees did not request more information from Aumand or other State officials prior to the meeting.

32. Lednicky and the food service employees attended the June 11 meeting, as did Aumand, Ball and Rosamond Noyes of the Department of Personnel. Aumand provided Lednicky with copies of the entire bids at the June 11 meeting. Lednicky and the employees proposed the following alternatives to the layoffs of the food service employees:

a. increase the fee charged for lunches and dinners by $.50;

b. require staff to pay for any meals taken;

c. increase the tuition rates for training at the Academy;

d. effect efficiencies and economies in the kitchen operation to reduce overhead and expenses;

e. limit serving sizes, or eliminate self-service food items such as the salad bar;

f. require firefighter training to be done during the week in order to avoid overtime for staff, or do not provide

meals during weekend training sessions;

g. as a last resort, arrive at an agreeable part-time work schedule for the food service staff.

33. Lednicky and the employees did not identify any specific projected revenues and cost savings associated with these proposals. They also did not identify any specific part-time schedules that would be agreeable to them. There was discussion about flextime schedules being arranged so that employees could work weekends and not receive overtime compensation for such work. The representatives of the State did not suggest specific part-time or flex-time schedules that may be acceptable.

34. At the June 11 meeting, the proposal to increase the fee charged for meals by $.50 was discussed. Aumand indicated that the Council, by statute, is not permitted to charge for any meals provided in basic training or certification courses. Meals provided during such training account for approximately 60 percent of the meals served by the Council. The proposal to adopt efficiencies and economies in the food service operation was discussed, and it was generally understood that any such savings would not be significant.

35. Between the June 11 meeting and June 22, 1993, neither the VSEA nor the Employer contacted each other with respect to further discussing alternatives to the layoffs of employees or setting up another meeting.

36. Following the June 11 meeting, Ball discussed the alternatives proposed by Lednicky and the employees with Aumand

and Daum. Ball spent a substantial amount of time examining the feasibility of the proposals.

37. On June 22, 1993, Ball wrote a letter to Lednicky which specifically responded to each alternative presented by Lednicky and the employees. In the letter, Ball reiterated that the Council is not permitted to charge for meals provided to basic training or certification course participants. Ball indicated that a significant amount of revenue could not be generated by charging for meals for other training, and that participants may eat elsewhere or there would be decreased enrollments due to increased costs (State's Exhibit 21, page 1).

38. The Council did in fact, effective July 1, 1993, increase its per meal charge by $.50 for the 40 percent of meals associated with training other than basic training or certification courses. The estimated amount of additional annual revenue to be raised by such increase was $4,000.

39. In his June 22 letter, Ball responded to the proposal of requiring staff to pay for any meals by conceding that this could be done. Ball indicated, however, that no savings could be guaranteed by this since the number of such meals is small and staff might eat elsewhere (State's Exhibit 21, page 2).

40. The Council did in fact, effective July 1993, require staff to pay for meals, resulting in additional revenue of about $1200 per year.

41. In his June 22 letter, Ball responded to the proposal of raising tuition rates by indicating that the Council would not increase tuition. Ball set forth the statutory limitation that

the Council is not permitted to charge tuition for basic training or certification training courses. Ball also indicated that raising the tuition for other training would result in decreased enrollment, and he questioned the appropriateness of raising tuition rates to support the food service function. These conclusions were reasonable (State's Exhibit 21, page 2).

42. In his June 22 letter, Ball responded to the proposal to effectuate efficiencies and economies in the food service operation by indicating that any such cost savings would be minor. This conclusion was reasonable (State's Exhibit 21, page 2).

43. In his June 22 letter, Ball responded to the proposal to limit serving sizes or eliminate self-service food items, by indicating that the Council was not prepared to reduce its level of services. Ball pointed out the fact that the bid submitted by Fitz Vogt & Associates proposed a higher level of services by offering two entrees, instead of one (State's Exhibit 21, page 2).

44. In his June 22 letter, Ball responded to the proposal requiring that firefighter training be done during the week, instead of on weekends, so as to eliminate the need to pay weekend overtime by stating that "(t)raining for volunteer firefighters cannot be accommodated during the normal workweek". This statement by Ball was an accurate depiction of the realities of accommodating the work schedules of volunteer firefighters. Ball responded to the alternative proposal that weekend food service to firefighters be eliminated by indicating that the

potential savings (i.e., saved overtime expenses minus lost fees) were not sufficient to warrant the reduction in services (State's Exhibit 21, page 2).

45. Ball stated as follows in his June 22 letter concerning the proposal to arrive at an agreeable part-time schedule for the food service staff:

> The part-time work schedule alternative would not offset the savings realized by contracting out the services. As Director Aumand pointed out at our meeting, there would still be a need to keep one staff person on a full-time schedule to provide administrative services such as meal planning, ordering, etc. For the remaining three positions (four employees) the State could only reduce staff work schedules to approximately 2/3 time to provide required services. The resulting savings in personnel costs is estimated to be $22,000, or less, if utilization of the facility increases beyond current projections. The State would still have to shoulder the other administrative costs associated with managing a State-run program. Cost reductions due to this part-time schedule might reduce the State's average FY 94 cost per meal to approximately $7.59, which is still higher than bids received from a contractor. Even when combined with increased meal fees, the State's cost per meal would still exceed that offered by an outside contractor, by a considerable amount.
>
> After considering each of the alternatives proposed, separately and collectively, the State is convinced that food service operations at the Academy will be performed more economically under an outside contract . . . (State's Exhibit 21, page 2-3).

46. Ball's conclusion that the State's average fiscal year 1994 cost per meal would be $7.59, after taking into account the cost reductions due to the part-time schedule, was based on his projection that the total cost of operating the Academy food service operation with the existing employees working a reduced schedule would be $152,000. He first projected the total cost, prior to taking into account the reduced part-time schedule, at

approximately $174,00 a year. This consisted of $107,400 in personal service costs (i.e., wages - other than overtime - and benefits), $12,600 in overtime costs, and $54,000 in food and other operating costs. Ball then subtracted the projected $22,000 in savings due to the part-time schedule to arrive at $152,000. He then divided this figure by 20,000 meals to arrive at the average per meal cost of $7.59 (State's Exhibit 21).

47. Ball's estimate of projected personal service costs, prior to the reduction due to the part-time schedule, of $107,400 was reasonable, as was his estimate of $54,000 in food and other operating costs (State's Exhibits 19, 20).

48. In arriving at his determination that staff other than the Cook C could have their work schedules reduced to approximately two-thirds time, with the resultant savings of $22,00, Ball used Aumand's estimate in the Request for Proposal that there would be 167 "feeding days" during fiscal year 1994 in which meals for trainees would have to be prepared and served (See State's Exhibit 17, page 1). Ball determined, after consulting with Aumand, that the Cook C would need to remain full-time to provide for planning and purchasing needs (in addition to food preparation and serving), and that the remaining employees would need to work only on "feeding days". Ball's conclusions on the estimated number of feeding days and the projected work schedules of employees were reasonable conclusions at the time in which he made them.

49. In arriving at the conclusion that there would be a savings of $22,000 in wage and benefit costs, Ball assumed that

there would be no savings in the $12,600 in overtime costs which he had projected. This was an erroneous assumption since there was discussion at the June 11 meeting about the employees working flex-time schedules to avoid the payment of overtime on weekends. Most overtime costs were incurred by the Council by requiring food service employees to work overtime hours on the weekend. It is possible that work schedules could have been established so that the need to pay overtime to employees could have been avoided. The additional savings in overtime could have resulted in total savings of $34,600 (i.e., the $22,000 projected by Ball plus the $12,600 in saved overtime costs) in projected wage and benefit costs, resulting in an estimated per meal cost of $6.97, rather than the $7.59 estimate arrived at by Ball.

50. The estimated per meal cost for the Fitz Vogt & Associates bid used by Ball and the Council was $5.32 per meal. This was arrived at by dividing the total cost of the bid submitted by Fitz Vogt (i.e., $106,397) by the estimated 20,000 meals (State's Exhibit 18).

51. In using this $5.32 per meal cost, Ball and the Council failed to take into account estimated unemployment compensation costs which would be incurred as a result of laying off the food service employees. Budget Analyst Larry Daum's reasonable estimate of these projected costs for fiscal year 1994 was $12,500. If these estimated costs are added to the cost of the Fitz Vogt bid, the estimated average per meal cost arising from the bid was $5.94.

52. VSEA received Ball's June 22 letter on June 23 or June 24, 1993. The food service employees were laid off on June 25, 1993. VSEA and the State had no meetings after June 22, and prior to the awarding of the food service contract to Fitz Vogt, with respect to further discussion of alternatives to the layoffs of the employees. VSEA presented no further proposals on alternatives to the layoffs.

53. The Council and Fitz Vogt & Associates entered into a contract for Fitz Vogt to operate the food service at the Academy. The term of the contract was July 1, 1993 to June 30, 1994. The maximum amount payable to Fitz Vogt under the contract was $107,000. Assistant Attorney General Mark DiStefano approved the contract, on behalf of the Attorney General, on August 4, 1993 (State's Exhibit 25).

54. Prior to the granting of such approval, DiStefano had to be satisfied that the contract satisfied the provisions of Agency of Administration Bulletin 3.5, including the so-called "ABC" test contained therein. Bulletin 3.5 provides as follows with respect to the "ABC" test:

> A contract may be created if all three of the following three conditions exist:
>
> A. The agency will not exercise supervision over the daily activities, times of work, or the means and methods by which the contractor provides services, either in fact or under the terms of the contract.
>
> **But:** The agency may ensure that the contractor meets performance specifications contained in the contract.
>
> B. The service provided is not of the kind usually provided by the agency
>
> . . .

> **And:** "Contracting out" may be specially approved by the Secretary of Administration. Contracting out will normally be approved when savings of 10 percent or more are likely in program cost . . .
>
> C. The contractor customarily engages in an independently established trade, occupation, profession or business. If the contractor retains the ability to engage other clients during the contract term, that normally proves the existence of an independently established business.
>
> . . .
>
> (State's Exhibit 27)

55. Under the contract, Fitz Vogt employed four employees to operate the Academy food service program. The chef-manager employed by Fitz Vogt works on a full-time basis, and the other employees work part-time on an as needed basis. From July, 1993, through April, 1994, the four employees had worked an aggregate average of 94 hours a week. This compares to the food service employees being scheduled for an aggregate average of 160 hours per week prior to their layoff, and 120 aggregate average hours which Ball had estimated that the food service employees could be scheduled to work in fiscal year 1994.

56. The chef-manager employed by Fitz Vogt received a higher hourly rate of pay than did Barnard as Cook C. The other Fitz Vogt employees were paid a lower hourly rate than were the state food service employees other than Barnard. The Fitz Vogt employees received substantially less benefits than did the state food service employees.

57. Through the end of April, 1994, Fitz Vogt had served 16,704 meals under the contract, and the Council had incurred $82,905 of costs under the contract.

MAJORITY OPINION

Grievants contend that the Employer violated Article 2, Section 3, of the Contract by engaging a private contractor to perform the food service work at Vermont Police Academy previously done by state employees, and laying off the state employees. Grievants first contend that the Employer has violated the Article 2, Section 3, requirement that "prior to any such layoff or other job elimination under this paragraph the VSEA will be notified and given an opportunity to discuss alternatives".

Grievants further contend that, even if the Employer complied with these notice and discussion provisions, the Employer has not met the provisions of Article 2, Section 3, allowing the layoff of employees as a result of contracting out provided that at least one of three standards are met. The Employer contends that two of the standards have been met. The Employer primarily relies on the standard that "the work or program can be performed more economically under an outside contract" in compliance with Article 2, Section 3. The Employer also claims that the contractor in this case "has management techniques, equipment or technology which will result in better public service and increased productivity" in compliance with Article 2, Section 3. Grievants contend that the Employer has failed to substantiate either of these claims.

Before discussing the merits of these contractual claims, we need to dispose of several preliminary issues. First, at the hearing, Grievants moved to amend their grievance to add Yvette

Cook as a party. Cook was one of the food service employees laid off, and was the only one not named as a party to the grievance when the grievance was originally filed. The Employer objected to the motion at the hearing, and the Board reserved judgment.

Section 12.7 of the Board Rules of Practice permits amendment of grievances as the Board "deems proper." In deciding whether to permit amendment of grievances, the Board examines whether amendment would prejudice the employer or be disruptive to the orderly and efficient processing of cases by the Board. Grievance of Rennie, 16 VLRB 1 (1993). Grievance of VSEA (Re: Refusal to Provide Information, 15 VLRB 13 (1992).

We conclude that it is proper to grant Grievants' motion to amend. Although Grievants clearly could have moved to amend prior to the first day of hearing in this matter, the Employer was not prejudiced by Grievants' delay. The Employer did not indicate that its preparation for the case, and the presentation of evidence, was affected in any way by whether or not Cook was a party to the grievance. Given that Cook was one of five employees laid off at the same time under common circumstances, we fail to see how adding her as a party to the grievance at this stage will have any prejudicial effect on the Employer. Also, granting the amendment will not be disruptive to the processing of this case by the Board.

The second preliminary issue which we must address is the contention by the Employer that Grievants did not properly or timely raise the issue of whether the contractor performs more economically than the state-run food service. The Employer

contends that the Board lacks jurisdiction to resolve this issue because Grievants did not raise it in the Step III grievance.

The Employer made this contention for the first time in its post-hearing brief filed in this matter. The Employer's answer to the grievance made no such claim. In opening statements made at the outset of the hearings, the Employer's attorney indicated that he agreed with Grievants that one of the issues presented in this grievance was whether the contractor performs more economically than the state-run food service. The failure by the Employer to raise this issue until the filing of post-hearing briefs prevented Grievants from presenting evidence and argument in response. Under these circumstances, the Employer's contention is untimely made and we will not consider it.

The final preliminary issue is the Employer's contention that Grievants did not timely raise criticism of the alleged refusal of Francis Aumand, the Employer's Executive Director, to discuss cost saving alternatives to layoffs at the March 1 meeting. The Employer contends that the failure of Grievants to complain of this issue until filing a Step III grievance on June 22, 1993, means that Grievants did not comply with the requirement of Article 15, Section 3(a)(1), of the Contract that grievances be filed within fifteen days of the date upon which grievants could have reasonably been aware of the occurrence of the matter which gave rise to the complaint.

We disagree. Again, the Employer did not raise this timeliness issue until the post-hearing brief. For the same reasons as stated above, the Employer's tardy raising of this procedural contention results in our dismissing the contention.

Moreover, Grievants' criticism of Aumand in this regard was in connection with their claim that the Employer did not provide them with a meaningful opportunity to discuss alternatives to layoffs in violation of Article 2, Section 3, of the Contract. The time clock to grieve such an alleged failure by the Employer did not begin to run until the employees were actually laid off. Until that point, any contention that the Employer violated the contractual requirement that VSEA be notified and given an opportunity to discuss alternatives to layoff "prior to any such layoff" would not be ripe. In sum, the Employer's contention in this regard is not well-taken. We will consider the March 1 meeting together with all other evidence in deciding whether the Employer met the obligation under Article 2, Section 3, to notify VSEA and provide VSEA with an opportunity to discuss alternatives to layoffs.

We turn to addressing the merits. Grievants first contend that the Employer has violated the Article 2, Section 3, requirement that "prior to any such layoff or other job elimination under this paragraph the VSEA will be notified and given an opportunity to discuss alternatives". Grievants contend that the Employer failed to engage in meaningful discussion with VSEA over alternatives to privatization of the food service at the Police Academy by using stalling tactics to avoid serious discussions until after the layoffs were a foregone conclusion.

In addressing this contention by Grievants, we need to decide the extent of the contractual obligation placed upon the Employer to discuss alternatives with VSEA before contracting out

work and laying off employees. The Employer must engage in good faith discussions with VSEA; otherwise the provision requiring discussion on alternatives would be meaningless. This requires discussing alternatives to layoff with an open mind and sufficiently in advance of the layoff so that alternatives can be adequately considered before a layoff occurs. This does not mean that all of the contractual obligations are placed on the Employer. The contractual provision that VSEA will be "given an opportunity to discuss alternatives" necessarily implies that VSEA, in seeking to avert a layoff, has an obligation to present concrete alternatives to the layoffs of employees. There is a mutual obligation to engage in good faith discussions to seek to avert the layoffs of employees.

In examining the facts of this case in light of this mutual obligation, we are struck by the failure of VSEA and the involved employees to sufficiently respond to the impending layoffs from the time they were aware such layoffs were possible until they actually occurred. VSEA and the employees knew, or should have known, by January of 1993 of the seriousness of the situation. Aumand informed VSEA and the employees at that time of the proposed budget reduction, submitted to the Legislature by the Governor, and the resultant privatization of food services and the elimination of the food service positions. It should have been evident to VSEA and the employees that they would need to develop specific alternatives to privatization and layoffs which would result in substantial cost savings in the existing food service program. Yet, when VSEA Representative Richard Lednicky

and the employees met with Aumand on March 1 to discuss cost saving alternatives to the potential layoffs, they presented Aumand with no specific cost saving alternatives. Instead, they presented the possibility of creating a part-time or flex-time schedule, but indicated there was no consensus among employees on this issue. They provided no specifics concerning cost savings, particular schedules or total hours to be worked by employees.

Grievants criticize Aumand for refusing to engage in any substantive discussion on alternatives during the March 1 meeting, and suggesting to Lednicky that VSEA contact legislators to seek to influence budget deliberations. Although it is apparent to us that Aumand was not proactive in developing alternatives to the layoffs of the food service employees, his actions at the March 1 meeting do not rise to the level of violating the contract requirement to provide VSEA with an opportunity to discuss alternatives. He reasonably expected VSEA and the employees to come to the March 1 meeting with firm cost-cutting proposals. When this did not happen, we cannot conclude that he refused to engage in substantive discussion on alternatives. A better conclusion to reach is that VSEA and the employees failed to present concrete alternatives sufficient to generate substantive discussion on averting the layoffs of employees.

This state of affairs did not improve in the next two and one half months. VSEA and the employees did not indicate during this period that they had any additional alternatives to discuss with Aumand or any concrete proposals with respect to flex-time

or part-time schedules for employees. This might be understandable if there were reasonable prospects that the Legislature would not enact the Governor's proposed budget for the Council, which contained substantial funding reductions. However, there is no evidence that either Aumand or VSEA discussed with the Legislature either cost saving proposals, or restored funding, which would have allowed employees to retain their jobs. It should have been no surprise to anyone when, in mid-May, the Legislature approved a budget containing the proposed reductions to the Council budget. The failure of VSEA and employees to have anticipated this legislative action, and have developed specific alternatives to layoffs (with estimated cost savings) to discuss with Aumand, is perplexing.

It is in this context that the June 11 meeting to discuss alternatives to layoffs must be discussed. By this time, bids from contractors to operate the food service program had been received, and the food service employees had been notified that their layoffs were scheduled to occur on June 25. It should have been evident to Lednicky and the employees that they needed to come to this June 11 meeting prepared to offer specific proposals, with estimated cost savings associated with the proposals, designed to persuade the Employer to avert the layoffs and not contract out the food service operation. Yet, the evidence does not indicate conscientious preparation. Lednicky and the employees did not request copies of the bids prior to the meeting, did not discuss the financial operations of the kitchen, and did not request more information from Aumand or

other state officials prior to the meeting. In short, they did not seem particularly well prepared to discuss specific alternatives to layoffs.

Grievants contend that, by the time of the June 11 meeting, the layoffs were a foregone conclusion and they were provided no meaningful opportunity to discuss alternatives to the layoffs at this meeting. We do not agree with such a conclusion. The proposals which VSEA and the employees did present were seriously considered by the Employer. The Employer concurred with some of the proposals put forward to obtain more revenues, and the revenue generating proposal to raise tuition rates was reasonably rejected on grounds of discouraging enrollments and constituting an inappropriate way to subsidize the food service program.

Proposals made to cut back on services were reasonably rejected based on a disinclination to reduce the level of services and the fact that the contractor was not proposing a reduction in the level of services. A proposal to cut back on overtime by requiring firefighter training to be done during the week was reasonably rejected as not compatible with the work schedules of volunteer firefighters.

The Employer did a substantial amount of work after the June 11 meeting, and prior to the layoffs of employees, with respect to the only proposal which Lednicky and the employees made which could result in significant cost savings - i.e., arriving at an agreeable part-time work schedule for the food service staff. The conclusions of the Employer on feasible

part-time schedules, as a result of this work, were reasonable at the time in which they were made. In sum, we conclude that the Employer considered in good faith alternatives presented by VSEA and the employees, and did not enter such discussions with the layoffs being a foregone conclusion.

Grievants' portrayal of discussions in this case as the Employer stalling serious discussions until the layoffs were a foregone conclusion simply is not accurate. Instead, VSEA and the employees were seriously deficient in not aggressively pursuing, and proposing, alternatives to the layoffs of the employees. It is apparent to us that the Employer could have been more proactive in developing alternatives to the layoffs of half of its staff. Nonetheless, we cannot conclude that the Employer's actions and inactions rose to the level of violating contractual obligations to provide an opportunity for VSEA to discuss alternatives to the layoffs of the employees.

The next contention of Grievants is that the Employer has failed to demonstrate that the work performed by the state food service employees can be performed more economically under the outside contract. In deciding this issue, we believe that it is appropriate to focus on reasonable cost estimates existing at the time the final decision whether to contract out the food service work was made - i.e., June 1993. Our decision generally should be guided by whether the Employer made a reasonable decision based on the information it had at the time the decision was made; a deviation from these estimates occurring in actual experience under the contract in the succeeding fiscal year is not in and of itself pertinent without more.

Here, the Employer reached the conclusion that there was a $45,600 difference in operating the food service program between the contractor and state employees. The Employer estimated that it would cost approximately $152,000 to operate the food service program with state employees, compared to the contractor's bid of $106,397.

In reaching this conclusion, the Employer determined that the work schedules of the state employees other than the Cook C could be reduced from full-time to two-thirds time by working only on days that meals would be served to trainees, and that the Cook C would remain on a full-time schedule. As our Findings of Fact indicate, these conclusions on the estimated number of feeding days and the projected work schedules of employees were reasonable conclusions at the time in which they were made.

Grievants are critical of the Employer's conclusions in this regard because actual experience demonstrated that the contractor employed its food service workers for less hours than the Employer had estimated was feasible for state employees to adequately operate the food service program. We do not find Grievants' criticism persuasive. First, as indicated above, the evidence indicates that the conclusions of the Employer were reasonable at the time in which they were made. Second, VSEA and the food service employees never presented proposals to the Employer setting forth specific reduced work schedules which they were agreeable to in lieu of being laid off. Given this failure, it is unclear to this day whether employees were willing to have their schedules reduced even as far as the Employer's estimate as

to what was feasible, never mind the further reduced schedules worked by employees of the contractor.

The Employer's conclusions with respect to reducing the work schedules of state employees resulted in an estimated savings of $22,000 in wage and benefit costs. This reduced the estimated cost of operating the food service program from $174,000 to $152,000. The Employer contends that this was the reasonable estimate of operating the food service program with state employees, and the Employer thus reached the conclusion that there was a $45,600 difference between the contractor and state employees in operating the food service program.

We conclude that the Employer did not take into account other factors which reasonably should have been considered to narrow this difference. The Employer concluded that $12,600 in overtime costs would be incurred if state employees remained employed to operate the food service program. This was an erroneous assumption since there was discussion at the June 11 meeting about the employees working flex-time schedules to avoid the payment of overtime on weekends. Most overtime costs were incurred by the Council by requiring food service employees to work overtime hours on the weekend. It is possible that work schedules could have been established so that the need to pay overtime to employees could have been avoided. In giving Grievants the benefit of the doubt, the additional savings in overtime could have resulted in total savings of $34,600, rather than the $22,000. This results in a reasonable annual cost estimate of operating the food service program with state employees of $139,400.

Further, the Employer failed to take into account estimated unemployment compensation costs which would be incurred by the Employer as a result of laying off the food service employees. It is appropriate to consider these costs because they are an actual expense incurred by the Employer for contracting out work. A reasonable estimate of these projected costs at the time the Employer made its decision to contract out the work was $12,500. Once these estimated costs are added to the cost of the contractor's bid, the estimated annual cost arising from the bid was $118,897.

Thus, the $45,000 difference in operating the food service program with state employees compared to the contractor can reasonably be narrowed to approximately $20,500. Nonetheless, this means that the state-run program still is 17 percent more expensive than the contractor-operated program. This is greater than the 10 percent savings differential set forth in Bulletin 3.5 before the contracting out of state programs is approved.

We note that the State is obligated by its own promulgated policy, Bulletin 3.5, to comply with the so-called "ABC" test before contracting out work. This test provides significant standards to guide the management determination whether to contract out work. However, Grievant has alleged no violation of Bulletin 3.5. In any event, the evidence does not indicate that the ABC test has been violated.

Grievants contend that there are additional savings that could have been realized by the Employer which would have allowed the operating of the food service program by state employees more

economically than with the contractor. In their post-hearing brief, a further decrease in staff hours was suggested by Grievants; this has been discussed above and will not be repeated here. Grievants also contend that the Employer inappropriately failed to take into account an additional $5200 in revenues which would be generated by increasing meal prices by 50 cents per meal and by charging staff for meals. We disagree that the Employer inappropriately failed to take into account these revenue-generating measures. These revenue-generating measures were implemented by the Employer in conjunction with the contracting out of the food service work. These measures cannot be used to support more economical operation of the state-run program compared to that of the contractor. These measures would have the same economic effect whether the contractor or state employees operated the food service program.

Grievants further contend that the Employer inappropriately failed to take into account the additional revenue which could have been generated through tuition increases. The Employer's conclusions that raising tuition would result in decreased enrollment, and that the appropriateness of raising tuition rates to support the food service function was questionable, were reasonable. We are not prepared to substitute our judgment for that of the Employer on these matters.

Finally, Grievants contend that the Employer inappropriately failed to take into account that the Employer could reduce food costs by adopting further efficiencies and economies in the kitchen. The Employer reasonably concluded that any such cost savings would be minor.

In sum, we conclude that the Employer has demonstrated that the contractor was able to operate the food service program at the Vermont Police Academy more economically than state employees within the meaning of Article 2, Section 3, of the Contract. This conclusion, along with our earlier conclusion that the Employer did not violate the notice and discussion provisions of Article 2, Section 3, suffice to dismiss this grievance.

As a result, we need not extensively discuss Grievants' further claim that the contractor did not possess management techniques, equipment or technology which would result in better public service and increased productivity than provided by the state employees. Suffice it to say that there is insufficient evidence before us to conclude that any significant difference exists among the contractor and state employees in this regard.

We would be remiss if we failed to indicate how troublesome this case was to hear and decide. Five state employees who performed satisfactorily lost their jobs to a contractor who paid employees less in wages generally, and substantially less in benefits. Yet, this action by the Employer was permitted by the Contract under circumstances where VSEA and employees were noticeably reticent to put forth specific alternatives to layoffs in a timely manner. This is particularly troublesome since further communications could only have helped and possibly saved the jobs of the state food service employees.

Charles H. McHugh, Chairman

Catherine L. Frank

DISSENTING OPINION

I concur with the majority opinion treatment of the preliminary issues in this matter. I also concur with the Findings of Fact, except as set forth in this opinion. However, I disagree with my colleagues' conclusion on the merits. I agree with Grievants that the Employer violated Article 2, Section 3, of the Contract by engaging a private contractor to perform the food service work at Vermont Police Academy previously done by state employees, and laying off the state employees.

Grievants first contend that the Employer has violated the Article 2, Section 3, requirement that "prior to any such layoff or other job elimination under this paragraph the VSEA will be notified and given an opportunity to discuss alternatives".

In order to address this contention, it is necessary to examine the entire period in which the contracting out of food service work was contemplated. Grievants are critical of Francis Aumand, the Employer's Executive Director, for refusing to engage in any substantive discussion on alternatives during the March 1 meeting, when VSEA Representative Richard Lednicky and the food service employees met with Aumand on March 1 to discuss cost saving alternatives to the potential layoffs. I agree with Grievants that Aumand did not appear to be ready to engage in serious discussions on alternatives to the layoffs at that point. He seemed to be more interested in using the meeting to divert attention away from discussing alternatives to the legislative budget process. This is evident by Aumand suggesting to Lednicky that VSEA contact legislators to seek to influence budget

deliberations. When Lednicky and the employees raised the possibility of employees being placed on part-time schedules, Aumand did not seek to discuss this issue in detail. Part-time schedules for employees presented a possible means by which to preserve the jobs of half of his staff, and it is perplexing to me why he would not have explored this issue more fully at the March 1 meeting if he was seriously concerned about averting the layoffs of the food service employees.

Aumand's efforts with respect to exploring alternatives to layoffs did not improve in the next two and one half months. He did nothing during this period to further examine the possibility of employees working a part-time schedule. Also, there is no evidence that Aumand discussed with the Legislature either cost saving proposals, or restored funding, which would have allowed employees to retain their jobs. It should have been no surprise when, in mid-May, the Legislature approved a budget containing the proposed reductions to the Council budget.

It is apparent that at this point in time the layoffs of the food service employees were a foregone conclusion in Aumand's mind. This is evident by two letters which Aumand authored on May 17, 1993, the day after the legislative session concluded. In a letter to Thomas Ball, State Director of Employee Relations, Aumand stated: "The legislative intent to privatize the kitchen is complete. This means there will have to be five personnel laid off because of the lack of funding for these positions . . ." In a letter to Steven Janson, VSEA Director of Field Services, Aumand stated: "Due to lack of funding, the food service is going

to be contracted, which will adversely impact five (5) employees". The definite nature of these statements by Aumand indicates that alternatives to layoffs did not exist in his mind: the food service program was to be contracted and employees were to be laid off.

It is in this context that the June 11 meeting to discuss alternatives to layoffs must be discussed. By this time, bids from contractors to operate the food service program had been received, and the food service employees had been notified that their layoffs were scheduled to occur on June 25. Grievants contend that, by the time of the June 11 meeting, the layoffs were a foregone conclusion and they were provided no meaningful opportunity to discuss alternatives to the layoffs at this meeting. Given the above statements by Aumand in his May 17 letters, and the failure of representatives of Employer to suggest specific part-time schedules at the June 11 meeting after Lednicky and the employees had indicated they were amenable to working out an acceptable part-time work schedule, I tend to agree with Grievants.

My conclusion is reinforced by the Employer's actions after the meeting. No further meetings were set up to work on specific alternatives to layoffs, and the Employer response to the proposals put forth by VSEA and the employees was limited to a letter received by VSEA one or two days before the layoffs. Under these circumstances, I conclude the Employer was not engaging in good faith discussions. Responding to proposals to avert layoffs one or two days before the layoffs actually were to occur did not

provide VSEA with a sufficient opportunity to discuss alternatives to layoffs, and indicates that the Employer truly did not have an open mind about entertaining alternatives to layoffs. Thus, I conclude that the Employer violated the requirement of Article 2, Section 3, to provide VSEA with an opportunity to discuss alternatives to the layoffs of employees.

The next contention of Grievants is that the Employer has failed to demonstrate that the work performed by the state food service employees can be performed more economically under the outside contract. This contention of Grievants is integrally connected to the issue previously examined of discussing alternatives to layoffs of employees. The determination whether the Employer has demonstrated that the food service work can be performed more economically under a contractor than by state food service employees requires examining the adequacy of attempts by the Employer to discuss and examine alternatives to contracting out work.

The Employer reached the conclusion that there was a $45,600 difference in operating the food service program between the contractor and state employees. The Employer estimated that it would cost approximately $152,000 to operate the food service program with state employees, compared to the contractor's bid of $106,397.

In reaching this conclusion, the Employer determined that the work schedules of the state employees other than the Cook C could be reduced from full-time to two-thirds time by working only on days that meals would be served to trainees, and that the

Cook C would remain on a full-time schedule. These conclusions on the estimated number of feeding days and the projected work schedules of employees appear to have been reasonable conclusions at the time in which they were made. The Employer's conclusions with respect to reducing the work schedules of state employees resulted in an estimated savings of $22,000 in wage and benefit costs. This reduced the estimated cost of operating the food service program from $174,000 to $152,000. The Employer contends that this was the reasonable estimate of operating the food service program with state employees, and the Employer thus reached the conclusion that there was a $45,600 difference between the contractor and state employees in operating the food service program.

Nonetheless, Grievants are critical of the Employer's conclusions in this regard because actual experience demonstrated that the contractor employed its food service workers for less hours than the Employer had estimated was feasible for state employees to adequately operate the food service program. Employees of the contractor have worked an average of 94 hours per week, compared to the 120 hours which the Employer estimated that the state food service employees would have to be scheduled to work to adequately perform their jobs.

The substantial discrepancy which existed between the Employer's estimate and the contractor's actual experience raises a serious question as to whether more conscientious examination and discussion of alternatives to layoffs of employees may have altered the Employer's conclusions in this regard. It is in this

area particularly that the Employer's violation of its contractual duty to discuss in good faith alternatives to layoffs with VSEA was most damaging. It is unclear whether contractual compliance would have resulted in a part-time work schedule which was both agreeable to employees and sufficiently cost-effective to avoid the contracting out of employees' jobs. However, given that five employees' jobs were at stake and the Employer violated its contractual obligations in discussing alternatives to layoffs, the Employer must bear responsibility for the resultant uncertainty.

I also conclude that the Employer did not take into account other factors which reasonably should have been considered to narrow this difference. The Employer concluded that $12,600 in overtime costs would be incurred if state employees remained employed to operate the food service program. This was an erroneous assumption since there was discussion at the June 11 meeting about the employees working flex-time schedules to avoid the payment of overtime on weekends. Most overtime costs were incurred by the Council by requiring food service employees to work overtime hours on the weekend. It is possible that work schedules could have been established so that the need to pay overtime to employees could have been avoided. The additional savings in overtime could have resulted in total savings of $34,600, rather than the $22,000 estimated by the Employer. This results in an adjusted annual cost estimate of operating the food service program with state employees of $139,400 minus the uncertain potential amount which could have been saved by further reducing employees' work schedule.

Further, the Employer failed to take into account estimated unemployment compensation costs which would be incurred by the Employer as a result of laying off the food service employees. As the majority opinion states, it is appropriate to consider these costs because they are an actual expense incurred by the Employer for contracting out work. A reasonable estimate of these projected costs at the time the Employer made its decision to contract out the work was $12,500. Once these estimated costs are added to the cost of the contractor's bid, the estimated annual cost arising from the bid was $118,897.

Thus, the $45,000 difference in operating the food service program with state employees compared to the contractor can reasonably be narrowed to approximately $20,500. In addition, a further reduction in employees' work schedules may have narrowed this difference substantially further.

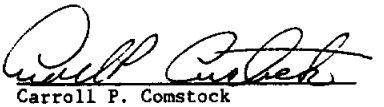
Grievants contend that there are additional savings that could have been realized by the Employer which would have allowed the operating of the food service program by state employees more economically than with the contractor. Grievants claim that the Employer inappropriately failed to take into account the additional revenue which could have been generated through tuition increases. Grievants further contend that the Employer inappropriately failed to take into account that the Employer could reduce food costs by adopting further efficiencies and economies in the kitchen. Further discussion on these issues beyond just the June 11 meeting, in conjunction with more extensive discussion of reduced work schedules for employees, may

have resulted in sufficiently cost-effective operation of the food service program by state employees so that contracting out, and the layoffs of employees, could have been averted.

In sum, I conclude that the Employer has failed to demonstrate that the contractor was able to operate the food service program at the Vermont Police Academy more economically than state employees within the meaning of Article 2, Section 3, of the Contract. The identified savings which the Employer failed to take into account, together with the potential savings which were not identified due to the Employer's failure to adequately discuss alternatives to layoffs, result in the Employer not making the required showing.

The final issue on the merits is Grievants' further claim that the contractor did not possess management techniques, equipment or technology which would result in better public service and increased productivity than provided by the state employees. I concur with my colleagues on this issue that there is insufficient evidence to conclude that any significant difference exists among the contractor and state employees in this regard.

Thus, I conclude that the Employer has violated Article 2, Section 3, of the Contract, and the grievance should be sustained.



Carroll P. Comstock

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of the Vermont State Employees' Association, Tracey Barnard, Cheryl Kapitan, Donna Scott, Christina Temple and Evette Cook is DISMISSED.

Dated this 17th day of October, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank