

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
MARY ELLEN COLE and	)	DOCKET NO. 06-1
CHARLES CROSS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 11, 2006, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Mary Ellen Cole and Charles Cross ("Grievant"). Grievants alleged that the State of Vermont ("State") violated Articles 15, 20 and 28 of the collective bargaining agreements between the State and the VSEA for the Corrections Unit and the Supervisory Unit, effective July 1, 2005 – June 30, 2007; and Personnel Policy 5.2; by: a) not allowing Grievant Cole to bid to work on the first shift at the Northwest State Correctional Facility, even though she has sufficient seniority to do so; b) denying Grievants Cole and Cross the ability to work overtime on the same shift; c) failing to discuss the Step II grievance filed in this matter with Grievant Cole within ten workdays of receipt of the grievance, and d) not rendering a Step III decision on the grievance.

A hearing was held in the Labor Relations Board hearing room in Montpelier on August 3, 2006, before Board Members Richard Park, Acting Chairperson; John Zampieri and Joan Wilson. VSEA Staff Attorney Jes Kraus represented Grievants. Assistant Attorney General Julio Thompson represented the State. Grievants and the State filed post-hearing briefs on August 28, 2006.

## FINDINGS OF FACT

1. The Corrections Contract provides in pertinent part as follows:

...

### **ARTICLE 2 MANAGEMENT RIGHTS**

1. Subject to law, rules and regulations, including, for example, 3 VSA 311 (a) (10) and 3 VSA 327(a), and subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible; and with the approval of the Governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation. The statutory references in this paragraph are illustrative and do not confer the right to arbitrate their substantive terms.

...

### **ARTICLE 15 GRIEVANCE PROCEDURE**

...

#### **2. DEFINITION**

...

- (b) "Grievance is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

...

#### **3. GRIEVANCE PROCEDURE**

...

##### **(b) STEP II (Department Head Level)**

...

- (2) The grievance shall be discussed informally, either in person or via telephone, within ten (10) workdays of its receipt, between the employee, and/or his/her representative, and the department head or designee.
- (3) The employee shall be notified in writing of the department's decision within five (5) workdays after the discussion. The parties may mutually agree to postpone the discussion, but shall hold it as soon as practical.

##### **(c) STEP III (Department of Human Resources Level)**

...

- (2) If the aggrieved employee so requests, the Department of Human Resources shall hold a meeting with the aggrieved employee, his or her representative, or both, within ten (10) workdays following receipt of the Step III grievance, unless a satisfactory solution can be agreed to before that time.

...

- (4) The Department of Human Resources shall notify the aggrieved employee and his or her representative of its decision in writing within five (5) workdays after the Step III grievance meeting.

...

- (6) In the event the employer fails to render a decision at Step II or III within the prescribed time, the grievant may proceed to the next step within the time limits established above.

...

#### **(4) GENERAL PROVISIONS**

...

- (f) In the event the employer fails to render a decision at Step I, II, or III within the prescribed time, the grievant may proceed to the next Step within the time limits established above.

...

### **ARTICLE 20**

#### **EMPLOYEE WORKWEEK/WORK LOCATION/WORK SHIFT**

...

#### **3. SELECTION FOR ASSIGNMENT TO A NEW SHIFT/NEW WORKWEEK/NEW GEOGRAPHIC AREA**

...

- (b) Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (thirty (30) days or more) of an employee(s) with a special skill or experience, to a different or new shift, workweek or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous state service) seniority, i.e., the most junior employee(s) possessing the special skill or experience which fulfills the Department's needs, will be selected.

...

#### **5. SHIFT BIDDING**

- (a) Correctional Officer II not assigned under 3(b) above shall receive shift assignments based on seniority.
- (b) Correctional Officer I with more than three (3) years seniority not assigned under 3(b) above shall receive shift assignments based on seniority.

...

(d) Every six (6) or four (4) months starting on September 1, 1994, unless the parties mutually agree to a different date, each facility will open shift assignments not assigned under 3(b) above to bidding, and such assignments will be granted on the basis of seniority to those identified in subsection 5(a) & (b) above . . .

...

(g) Correctional Officer I's with less than thirty (30) months seniority shall not have bidding rights under this subsection.

(h) Seniority under this Section (shift bidding) is defined as length of continuous Departmental service. . .

...

## **ARTICLE 28 OVERTIME**

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### **2. DISTRIBUTION OF OVERTIME**

(a) Appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees . . .

(Grievants' Exhibits 1, 3 and 4; State's Exhibit 5)

2. The provisions of the Corrections Contract cited above have remained substantively unchanged since at least 2001. The Supervisory Contract has the same contract provisions as the Corrections Contract cited above except that the Supervisory Contract does not contain the shift-bidding section of Article 20. These provisions of the Supervisory Contract have remained substantively unchanged since at least 2001 (Grievants' Exhibits 5 & 6; State's Exhibit 6).

3. Provisions of the Corrections Contract concerning shift bidding were first introduced into the contract in 1984. At no point during negotiations between the State and VSEA from 1984 to the present were there discussions between the parties of whether or to what extent shift-bidding rights of employees may be affected by the State's conflict of interest policy.

4. The reference in Article 20, Section 3(b), of the Corrections Contract concerning assignment of employees with a "special skill or experience" was discussed

by VSEA and the State during negotiations with respect to job-specific skills or experiences, such as the Department of Corrections (“DOC”) needing a firearms-qualified officer to work a particular post. There was no discussion between the parties concerning “special skill or experience” referring to domestic partners working on the same shift.

5. At all times pertinent to this grievance, the State Personnel Policies and Procedures have provided in pertinent part:

...

#### **Number 1.0**

Effective Date: March 1, 1996

Subject: **POLICY MANUAL ADMINISTRATION**

...

#### **PURPOSE AND POLICY STATEMENT**

The State of Vermont Personnel Policies and Procedures Manual is designed to set forth the policies and procedures currently in effect in State government, and to establish the requirements for initiating changes and revising such policies.

...

This manual is designed to further the following goals:

- To provide a uniform system of human resource administration throughout State government.
- To assist managers in the development of sound management practices and procedures, and to make effective consistent use of human resources throughout State government.
- To promote effective communication among managers, supervisors and employees.
- To ensure, protect and clarify the rights and responsibilities of both the employer and employees.

These policies and procedures are intended to serve as guidelines to assist in the uniform and consistent administration of personnel policy. This policy manual is

provide(sic) essential information on how to accomplish agency/department mission within the administrative framework of Vermont State Government.

**This manual is not, nor are any of its provisions intended to be, part of a contract between the State and any of its employees. None of these provisions shall be deemed to create a vested contractual right in any employee and the State reserves the right to repeal or modify these policies or procedures. These policies and procedures are not to be interpreted as promises of specific treatment. They provide general guidance with respect to the practice and procedure which has developed pursuant to the collective bargaining agreements, rules and regulations, and statutes governing employment matters. the(sic) final analysis, however, the legal rights of employees are those which are created by the agreements, regulations, and statutes, and this manual is intended not to expand nor diminish those rights.**

## **DEFINITIONS**

**POLICY** – A written directive that is a broad statement of principles.

**PROCEDURE** – A written directive that is a guideline for carrying out agency/department policies.

...

## **Number 5.2**

Effective Date: February 1, 2002

**Subject: CONFLICTS OF INTEREST ARISING FROM EMPLOYMENT**

Supersedes Policy 5.2 Dated March 1, 1996

...

## **POLICY STATEMENT**

It is the State's responsibility to conduct employment matters in a manner that avoids not only conflicts of interest, but also any appearance of a conflict of interest. Conflicts of interest may arise in: hiring employees; their employment by the State in more than one capacity; outside employment or activities engaged in by employees; and the award of contracts to employees. This policy is intended to promote avoidance of conflicts of interest and the appearance thereof that arise through the employment in the same governmental unit of people who share certain familial or other close relationships. The primary goal is to avoid instances in which the hiring process or any term or condition of employment is

inappropriately influenced by such familial or other relationships, or the perception among members of the public or other employees of such impropriety.

It is the general policy of the State that no one will be employed in the same department, institution, or organizational unit that employs a relative. In addition, it is the general policy of the State that no one will be employed in the same department, institution, or organizational unit as a person with whom he or she resides, or the relative of a person with whom he or she resides. It is important to note that the definition of “relative,” for purposes of this Policy, includes spouses, civil union partners, and domestic partners, in addition to the other familial relationships listed in the definition.

This policy applies to all employment decisions . . .

### DEFINITIONS

. . .

DOMESTIC PARTNER – a person of the same or opposite sex who lives with a State employee under circumstances in which they have agreed between themselves to be responsible for each other’s welfare.

. . .

RELATIVE – includes parent, grandparent, spouse, civil union partner, domestic partner, child, brother, sister, grandchild, aunt, uncle, niece, nephew, parent-in-law, brother-in-law, sister-in-law, step-parent, step-child, any other person so related through marriage, and any other person so related to one’s civil union partner or domestic partner.

### PROCEDURES FOR REQUESTING WAIVERS

Requests for waiver of the general policy may be submitted to the Commissioner of Personnel. Waiver requests will be evaluated to determine the extent of current or potential conflicts of interest, or the appearance thereof. The Commissioner’s consideration will include, but not be limited to the following:

- \* the size of the employer;
- \* the closeness or remoteness of the relationship between the family members or co-habitants;
- \* the reporting relationships within the organization and the likelihood that the employees would work together or either employee would be in a position to influence any aspect of the other’s employment;
- \* the degree to which the action would aid the department in attaining an applicable affirmative action goal;
- \* the level, status, and geographic location of the positions;
- \* the extent to which the proposed employment may reduce management’s flexibility with respect to work assignments or future transfer or promotion of such person;

\* the availability of other qualified , suitable, and interested applicants for the position, as demonstrated by the documented results of the recruitment effort for the position that is the subject of the waiver request.

Waivers will not be approved to allow employment of a person in any case in which the waiver would be necessary because of a relationship with a management employee (either classified or exempt) of the department, except in the limited circumstances described below. Waivers will not be granted in any case in which one of the affected persons is designated a managerial position, except those cases in which the managerial position is assigned to a defined region separate from the departmental headquarters and does not normally take part in the general, state-wide management of the department or a department-wide program. Waivers under this limited exception are disfavored and will be granted only when the lack of potential conflicts is apparent and the waiver is plainly in the State's best interest.

...

#### CONFLICTS OF INTEREST ARISING DURING EMPLOYMENT

Conflicts of interest that arise (or become known) during employment must be avoided to the extent that is reasonably practicable. Employees who during their employment become the relative (including by marriage or civil union) or domestic partner of another employee, or who begin to reside with another department employee, must make those facts known to the employing department. They will not be required to leave State employment solely as a result of that change in circumstances. However, any favoritism or other inappropriate action by either employee that is attributable to the relationship with the other employee will lead to corrective or disciplinary action, up to and including dismissal.

Where a conflict of interest has arisen during employment, the employer must take all reasonable and practicable measures, including, but not limited to, changes in supervision, work location, and/or work shift, to avoid to the greatest extent possible the conflict or the appearance thereof.

The policy shall also apply to promotion or other subsequent employment action that affects an employee. The employer shall avoid creating or exacerbating any conflict of interest situation that arose during employment by any promotion or other subsequent actions involving the affected employees.

...

(Grievants' Exhibit 7, p.51-52, 55-5757; State's Exhibit 1, p.1-5)

6. The State has had a conflict of interest policy in effect since 1966. The State made changes in the policy in 1996 and 2002. VSEA has not sought to negotiate over the conflict of interest policy. VSEA has not made representations in negotiations



that it considered employees' shift bidding rights to circumscribe the conflict of interest policy.

7. Agency of Administration Bulletin 47.9, entitled "Employment of Relatives", provides in pertinent part:

POLICY STATEMENT

It shall be the general policy of the Agency of Administration to disapprove any request for the employment of relatives within any agency, institution, or other organizational unit, except in instances in which conditions of employment require a husband and wife combination.

In departments employing large numbers of persons in several divisions, it shall be the policy of the Agency of Administration to permit the employment of relatives, provided that such persons are hired to work in different organizations or under different chains of command. However, the Agency of Administration will not approve, under any circumstances, the employment within the department of relatives of employees above the division director level.

DEFINITIONS

RELATIVE – includes mother, father, husband, wife, sister, brother, aunt, uncle, niece, nephew, and any other person closely related through marriage.

...

(Grievants' Exhibit 7, p.58, State's Exhibit 1, p.13)

8. In the secure area of the Northwest State Correctional Facility ("NWSCF") in St. Albans where inmates reside, Correctional Officer I's ("COI's") report to, and their work is overseen, by Correctional Officer II's ("COII's"). COII's report to and are directly supervised by the Correctional Facility Shift Supervisor ("CFSS") assigned to their shift. Both COI's and COII's are subject to direction and supervision from the CFSS assigned to their shift. COII's conduct performance evaluations of COI's. The NWSCF Superintendent expects that CFSS's provide their input into evaluations if they have knowledge of the work performance of the officer being evaluated (Grievants' Exhibit 10).

9. A CFSS is primarily responsible for security operations within the secure area. The CFSS patrols the entire secure area while on duty and addresses security and staff performance concerns that may arise during the shift. Inmate grievances, often concerning alleged correctional officer misconduct, are given to the CFSS on duty who in turn forwards them to the Security and Operations Supervisor (“SOS”). The SOS then submits inmate grievances to the NWSCF Assistant Superintendent for investigation. The CFSS has the authority to issue performance feedback to COI’s and COII’s on duty, and is expected to report to the SOS instances of alleged misconduct of which he or she is aware.

10. Correctional Services Specialists (“CSS’s”) are assigned to specific inmate housing units to provide individual casework and counseling services to inmates residing in the unit. CSS’s are not security employees like correctional officers. CSS’s report to and are supervised by a Living Unit Supervisor. Living Unit Supervisors report to the NWSCF Assistant Superintendent (Grievants’ Exhibit 10).

11. Administrative staff at NWSCF, such as the business manager and administrative assistants, primarily work in offices separate and apart from the secured area of the facility. They ultimately report to the NWSCF Superintendent.

12. In 1999, Grievant Charles Cross was a CFSS for first shift at NWSCF. He has remained in that position to the present. As CFSS, Cole has approximately 21 correctional officers working under him. In May 1999, Grievant Mary Ellen Cole started working at NWSCF as an activity therapist.

13. Cole and Cross began dating in July of 1999. In June of 2000, Cole began working as a Correctional Officer I at NWSCF. She was assigned to work first shift. This

resulted in her working on the same shift as Cross. Cross issued Cole negative feedback on two occasions.

14. Cole and Cross became domestic partners in January of 2001, living together as a couple and sharing expenses. They have remained domestic partners since that time.

15. Every six months, in March and September, correctional officers at NWSCF with at least three years of service as correctional officers engage in bidding for the shift to which they will be assigned for the next six months. During the March 2001 shift-bidding, Grievant was reassigned from first shift to third shift. Cole's supervisor explained to Grievant that she needed to get more experience working on all shifts. Cole did not have shift bidding rights at the time because she did not have three years of service as a correctional officer.

16. On July 12, 2001, Cole sent an e-mail message to Steve Maranville, then Superintendent of NWSCF. Therein, Cole indicated that a recent request she had made to work on first shift had been denied because it would result in her and Cross working on the same shift. Cole indicated that she was upset by this decision. Maranville responded by indicating that a decision had been made to keep employees "with relationships as separated as we can to avoid the appearance of impropriety". Maranville told Cole that he was "sorry the response could not be more favorable". Neither Cole nor Cross filed a grievance concerning the denial of Cole's request to work the first shift (State's Exhibit 11, p.91-92).

17. In June 2002, Cole informed Chuck Hatin, who had recently become NWSCF Superintendent, that she wanted to have a discussion with him concerning her

working on the same shift as Cross. Cole subsequently forwarded to Hatin a list of reasons why she should be allowed to work on first shift. Hatin discussed Cole's request with Garon. In October 2002, Garon informed Cole that she needed to request a waiver pursuant to Policy 5.2 and seek approval for the waiver from the State Department of Personnel (subsequently renamed the Department of Human Resources). Neither Cole nor Cross filed a grievance in 2002 in response to the requirement to submit a conflict of interest waiver request. They also did not submit a waiver request in 2002 (State's Exhibit 11, p.93-98).

18. Cole became eligible for shift bidding in the summer of 2003 when she completed her third year of service as a correctional officer. She bid for a first shift post in August of 2003, but was notified that she was assigned to the third shift. By memorandum dated August 21, 2003, Cole filed a Step I grievance. She contended that she was being denied her contractual bidding rights under the Corrections Contract because she was not allowed to work on the first shift with Cross (State's Exhibit 12, p.99-101).

19. Prior to September 23, 2003, there were occasions where Cole and Cross worked on the same shift when one or both of them were working overtime. On October 1, 2003, Cole sent an e-mail message to Peter Garon, Department of Corrections Human Resources Administrator, indicating that her supervisor informed her that it was decided at a September 23, 2003, meeting of supervisors that she and Cross would no longer be able to work overtime on the same shift. Cole requested that Garon inform her whether this was true. Garon responded that day, stating: "You need to address this concern to

Chuck (Hatin). However this limitation is consistent with limitations now placed on anyone falling under Policy 5.2” (Grievants’ Exhibit 23, p.174; State’s Exhibit 11, p.90).

20. In early October 2003, Cole wrote a letter to Cynthia LaWare requesting that she be granted a waiver pursuant to Personnel Policy 5.2 so that she would be able to work the same shift as Cross. By letter dated October 22, 2003, Garon responded to Cole’s request. He stated:

This is the reply to your letter to Commissioner Cindy LaWare of the Department of Personnel. That letter was returned to the Department of Corrections, as we had not had the opportunity to review it prior to being received at Personnel.

I realize that over the last year or so you have received communications from many people about Policy 5.2. Partially as a result of your questions, we have attempted to clarify both policy and process. One of the clarifications is that waiver requests need to be made by the Department and that there is no process for an individual to make their own request. In deciding whether to make a waiver request, the Department has to consider what is in its best business interest, and how specific the policy is with regard to the issues of the specific case.

As we read the Policy, it is clear that we are prohibited from taking any employment action that exacerbates the conflict of interest situation. The Department has concluded that placing you and Mr. Cross on the same shift would make the situation worse. This is so particularly as he is a Shift Supervisor. However it would also be the case if he were not. We have chosen to not make a waiver request for your circumstances and the Department now considers the matter closed (State’s Exhibits 13, p. 108, 112-13; State’s Exhibit 13).

21. Grievant filed a grievance over the denial of the waiver request. The Employer denied the grievance at the earlier steps of the grievance procedure. Cole filed a Step IV grievance with the Labor Relations Board on April 1, 2004. Cole withdrew the grievance in October 2004 prior to the Board hearing in the case (State’s Exhibit 12, p.102-107).

22. In February 2004, and again on January 12, 2005, Kari Miner, Labor Relations Specialist for the Department of Human Resources, sent Garon a completed

waiver form concerning Cross and Cole. Miner indicated that the waiver had been issued by the Department of Human Resources in March 2001, but had not been returned by the Department of Corrections. Miner stated: “Unless there has been some change in employment status for either employee, the conditions of the waiver remain the same.” The document Miner sent Garon, entitled “Conditional Approval to Hire a Relative”, provided in pertinent part:

Your agency/department requested a waiver to Agency of Administration Bulletin 47.9, Employment of Relatives, to permit the employment of a relative in your department.

Employee Name:	Charles Cross
Department:	Department of Corrections
Employee Name:	Mary Ellen Cole
Relationship:	Domestic Partners

The request is approved with the following conditions:

The Department must look for ways to create a separation by moving one member of the couple into a different facility or field office, so long as the paygrade and position are comparable to the current paygrade and position. Until such transfer occurs, there must be no work contact between the employees, they must work on separate shifts at all times, they must have entirely separate reporting relationships. Both the applicant and the employee have been notified, as confirmed by the signatures below, that this waiver is effective only for the current situation, and that any future personnel change by either employee will be subject to a new review by the Department of Human Resources under the Employment of Relatives policy. The granting of this request in no way limits the Department of Human Resources from applying the Employment of Relatives policy if circumstances change or new issues arise in the future.

...

(Grievants’ Exhibit 23, p. 170-71; State’s Exhibit 9)

23. On January 26, 2005, VSEA Steward Steve Mitchell filed a Step I grievance on behalf of Cole alleging discrimination because Cole was not allowed to work first shift when Cross was working first shift (State’s Exhibit 7).

24. By memorandum dated January 31, 2005, Garon requested that Susan Blair, NWSCF Superintendent, provide the document that Miner sent Garon on January

12, 2005, to Cole and Cross for their review and signature (Grievants' Exhibit 23, p.172-73).

25. On February 8, 2005, Cross sent an e-mail message to Blair requesting that he "be able to work the third shift overtime this weekend as the shift supervisor." In a response dated February 17, 2005, Blair stated: "You are not able to work overtime on 3<sup>rd</sup> if Mary Ellen Cole is working" (State's Exhibit 8, p.84).

26. On February 9, 2005, Cole sent an e-mail message to Blair requesting that she "be able to work overtime on first shift". In a response dated February 17, 2005, Blair stated: "You are not able to work overtime on first shift if Charles Cross is working" (State's Exhibit 8, p.85).

27. In March of 2005, Cole and Cross signed the document that Miner sent Garon on January 12, 2005, after adding the following statement: "I am signing this and understand it but, I don(sic) not feel this applies to me". Superintendent Blair sent Cole and Cross a memorandum dated April 21, 2005, concerning the statement they added to the document. Blair informed them: "You need to be very clear that whether you believe this policy and waiver apply to you, they do. The conditions of employment established by this document are conditions and expectations that do apply to you, and you will be expected to abide by these conditions" (Grievants' Exhibit 23, p.172-73; State's Exhibit 9, p.86-88).

28. Superintendent Blair signed the waiver document on April 29, 2005, that Cole and Cross had signed in March 2005. The Department of Human Resources did not receive the document signed by Blair until June 3, 2005. Linda McIntire, Human

Resources Commissioner, approved and signed the document on June 13, 2005

(Grievants' Exhibit 23, p.173; State's Exhibit 9, p.86)

29. The next shift bidding cycle after the issuance of the waiver document was in September of 2005. Cole bid to work the first shift. Her request was denied. By memorandum dated September 7, 2005, VSEA Steward Steve Mitchell requested a Step I grievance meeting on behalf of Cole "to discuss the refusal of her contractual bidding rights that allow her to bid for first shift". Cross joined Cole as a grievant at Step II of the grievance process. DOC denied the grievance at the first two steps of the grievance procedure. Miner issued a Step III decision dated December 28, 2005, denying the grievance. Cole did not receive a copy of the decision (State's Exhibit 10, Grievants' Exhibit 34).

30. Cross is a member of the Local Emergency Response Team ("LERT") at the CRCF. LERT is comprised of specially-trained officers who respond to hostage situations and other critical incidents at the facility.

31. The DOC is of the view that domestic partners and other employees falling within the definition of Policy 5.2, the conflict of interest policy, should not be placed in situations where one supervises the other. The DOC takes the position that there is an appearance of a conflict of interest if one supervises the other, and that if such a situation existed among correctional officers there would be an adverse effect on the morale of other correctional officers. DOC also believes that a security risk would be created in a correctional facility if a supervisory relationship existed between correctional officers who were domestic partners. If inmates physically endangered one partner, DOC believes this could have an effect on the judgment of the other partner in responding to



the situation. Further, DOC is of the view that domestic partners on the same shift would increase the likelihood of inmate manipulations of security staff.

32. There is no evidence of any situations where DOC has allowed domestic partners or spouses to be assigned to the same shift in a correctional facility where the couple consists of a CFSS and COI or COII, or a COII and COI.

33. Robert Kupec was hired by DOC in December of 2004 to fill the newly created Correctional Facilities Executive position at DOC central office in Waterbury. All correctional facility superintendents report directly to Kupec. In Kupec's absence from the workplace, the superintendents report directly to the DOC Deputy Commissioner. Kupec also is responsible for the Security and Operations Unit at DOC central office in Waterbury. The unit is composed of a director, who reports to Kupec, and two staff who report to the director. At the time of Kupec's hiring and down to the present, Lawrence McLiverty served in one of the two staff positions in the unit. McLiverty has been designated as a managerial employee in this position, although McLiverty has not supervised any employees in this position since Kupec reorganized his job duties by February or March of 2005. Since then, McLiverty has performed duties such as auditing local jail lockups, supervising facilities renovations in conjunction with the State Department of Buildings and General Services, acting as a liaison with juvenile justice agencies, handling weekly drug and contraband reports, and bringing to Kupec's attention certain incident reports.

34. In late 2004 and early 2005, DOC experienced difficulties recruiting for the position of Assistant Superintendent for Programming at the Southeast State Correctional Facility in Windsor, a women's correctional facility located approximately

70 miles from the DOC central office in Waterbury. The position was vacant for five months from late 2004 through April 2005 while DOC conducted two separate recruitment efforts. Ultimately, there were four finalists for the position. One of them was Kathleen Astemborski, the wife of McLiverty. Kupec had changed McLiverty's job duties prior to his awareness that Astemborski was a candidate for the Assistant Superintendent position (Grievants' Exhibit 12).

35. In April of 2005, Kupec recommended to the DOC Commissioner that Astemborski be hired as Assistant Superintendent. Kupec determined that Astemborski was the most qualified candidate for the position. DOC submitted a request to the Department of Human Resources for a conflict of interest waiver so that it could offer Astemborski the job. In support of its request, DOC indicated that Astemborski and McLiverty would be in two different units within DOC and they would not supervise or exercise authority over the other. On April 20, 2005, the Department of Human Resources approved a conflict of interest waiver for Astemborski and McLiverty subject to the condition that "(t)here is no direct work contact between these individuals as they are employed in different departments, have disparate work functions and different supervisors". DOC hired Astemborski as Assistant Superintendent. McLiverty has exercised no supervisory responsibility over Astemborski (State's Exhibit 14, p.131-140, Grievants' Exhibit 12).

36. DOC had difficulty in 2005 recruiting for the Security and Operations Supervisor ("SOS") position at the Chittenden Regional Correctional Facility ("CRCF") in South Burlington. The SOS performs supervisory, administrative and coordinating work involving the planning, implementation, direction and evaluation of the security and

operations procedures at the facility. At the time of recruitment, Gunther Hetzel, one of the applicants for the position, had been a CFSS for 18 years and had worked a total of 25 years at CRCF. Mr. Hetzel's wife, Kristy Hetzel, has been the CRCF Business Manager since 1999. She was not married to Gunther Hetzel when she was first hired (Grievants' Exhibits 9, 13).

37. Gunther Hetzel served as the interim SOS from May 2005 to January 2006 while the position was under recruitment. In this position, he did not supervise his wife. Both Hetzels reported directly to CRCF Superintendent Jay Simons. Gunther Hetzel worked primarily within the secure area of the facility. Kristy Hetzel worked in the facility administrative offices, outside of the secure perimeter (Grievants' Exhibit 13).

38. DOC twice asked the Department of Human Resources in 2005 for a conflict of interest waiver to move Gunther Hetzel into the SOS position on a permanent basis. The Department of Human Resources denied the requests due to the fact that the Hetzels would both be reporting directly to the facility Superintendent, requiring DOC to conduct further recruitment. In January of 2006, DOC made a third request for a conflict of interest waiver. DOC indicated that Gunther Hetzel was the only viable candidate for the position. On January 31, 2006, the Department of Human Resources approved the conflict of waiver request with the proviso that "in an effort to mitigate any real or perceived conflicts of interest that may arise, DOC must transfer either employee to a comparable vacant position elsewhere within the organization as soon as one is available." DOC selected Hetzel for the SOS position on a permanent basis (Grievants' Exhibit 13; State's Exhibit 14, p.124-130).

39. On April 14, 2005, DOC submitted a conflict of interest waiver request to the Department of Human Resources to promote Heather Simons to the newly created position of Corrections PREA (Prison Rape Elimination Act) Grant Project Manager. Heather Simons' husband is Jay Simons, the CRCF Superintendent. The PREA Grant Project Manager position is a two-year limited service position reporting directly to the DOC Deputy Commissioner. The PREA Grant is a federal initiative in which the key objective is the promotion of zero tolerance for sexual abuse in prisons. Heather Simons was instrumental in the development of the grant. In submitting the waiver request, DOC indicated that Heather Simons was the only person within DOC possessing the required expertise for the position (Grievants' Exhibits 11, 14).

40. On April 19, 2005, the Department of Human Resources approved this waiver request with the condition that "(t)here is no direct work contact with these individuals as they are employed in different departments, have disparate work functions and different supervisors" (Grievants' Exhibit 14; State's Exhibit 14, p.141-46).

41. Tara Clarke was hired as a COI at NWSCF in November of 2000. Clarke began dating Michael Williams, a COII at NWSCF, in August 2001. When they started dating, they were both assigned to second shift.

42. Clarke and Williams began living together in early 2002. Prior to this, Clarke had moved from working second shift to working first shift. Williams continued working second shift. There were occasions after they began living together that Clarke and Williams worked together when Williams came into work early to work the end of first shift due to staffing needs. Clarke never told the NWSCF Superintendent that she and Williams were domestic partners. She assumed that facility managers knew that they

were domestic partners because she believed that it was common knowledge that she and Williams were living together.

43. In September of 2003, Clarke was promoted to a Corrections Services Specialist (“CSS”) position and assigned to work in an inmate living unit. She has remained a CSS to the present. She performs professional casework and counseling services to inmates. In this position, Clarke is not supervised by Williams (Grievants’ Exhibits 10, 16).

44. Prior to 2004, CSS Gregory Paradis shared an office at NWSCF with his brother-in-law, CSS Michael O’Dell, for an unspecified period of time. Neither one supervised the other (Grievants’ Exhibit 19, p.156-58).

45. Jim Honsinger is the second shift CFSS at NWSCF. He generally works between 2 p.m. and 10 p.m. His wife, Tracy Honsinger, is an administrative assistant. Jim Honsinger works in the secure area of the facility. He reports to the SOS. Tracy Honsinger works in the facility administrative offices outside of the secure area of the facility. She works from 7 a.m. to 3:30 p.m. She reports to the superintendent. She performs various personnel administrative tasks. She is one of three employees who process time reports and leave requests. The shifts worked by the Honsingers overlap by two hours in the afternoon on days they both are working. The DOC hired Jim Honsinger as a CFSS in 2002 after the Department of Human Resources approved DOC’s request for an “employment of relatives waiver” to hire him even though his wife worked at the CFSS (Grievants’ Exhibits 15, 16).

## OPINION

Grievants contend that the State violated Articles 15, 20 and 28 of the collective bargaining agreements for the Corrections Unit and the Supervisory Unit by: a) not granting Grievant Cole's bid to work on the first shift at the Northwest State Correctional Facility, even though she has sufficient seniority to do so; b) denying Grievants Cole and Cross the ability to work overtime on the same shift; c) failing to discuss the Step II grievance filed in this matter with Grievant Cole within ten workdays of receipt of the grievance, and d) not rendering a Step III decision on the grievance.

There is a threshold issue on the timeliness of this grievance pursuant to the provisions of the Corrections and Supervisory Contracts that employees are required to file grievances "within fifteen workdays of the date upon which the employee could have been reasonably aware of the occurrence of the matter which gave rise to the complaint." The State contends that Grievant Cole did not adhere to these provisions concerning the denial of her bid to work first shift because this denial dated back to October 2003, yet Cole did not file a grievance over this matter until nearly two years later in August 2005. Likewise, the State maintains that Grievants Cole and Cross untimely grieved not being allowed to work overtime on the same shift because such denial dated back to September 2003, and the grievance before us was not filed until August 2005.

Grievants contend to the contrary that both components of the grievance are timely. They contend that denial of Cole's shift bidding rights was timely challenged by the immediate filing of a grievance after Cole was denied her shift bidding rights during the shift bidding cycle in August 2005 that immediately followed the decision of the Department of Human Resources in June 2005 that Cole and Cross could not work the

same shift. Alternatively, Grievants contend that Cole has a continuing grievance on denial of shift-bidding rights. Grievants further assert that they have a continuing grievance on the issue of not being allowed to work overtime on the same shift. They contend that there is a new violation of their contractual rights which they can grieve each time they are prohibited from working overtime on the same shift.

In determining the timeliness of this grievance, we look to precedents established by the Board and the Vermont Supreme Court. The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). A leading area where the Board has dismissed grievances on procedural grounds has been if grievances were not timely filed at earlier steps of the grievance procedure. Under State-VSEA contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996).

The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. The Board held that grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new occurrence of the alleged violation every time a

paycheck was issued, with the restriction that the grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievances. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). To render a grievance timely, the aggrieved employee must demonstrate that at least one alleged violation occurred within the specified timeframe for filing grievances. Id. Miller, 23 VLRB at 212. Grievance of Boyde, 165 Vt. 624, 626 (1996). The Supreme Court has indicated that continuing grievances are not recognized when completed acts are involved such as termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment. Grievance of Boyde, 165 Vt. 624 (1996).

In applying these standards here, we first discuss the timeliness of grieving the denial of shift bidding rights. Under the circumstances, we conclude that the timeliness provisions of the collective bargaining contract do not require the dismissal of this portion of the grievance on procedural grounds.

The Department of Human Resources is the entity in State government charged with administering the conflict of interest policies of the State. The evidence indicates that the Department of Human Resources did not issue a formal completed action on a conflict of interest waiver on Cole and Cross until June 2005. The filing of a grievance by Cole after she was denied her bid to work first shift during the shift bidding cycle that immediately followed this decision of the Department of Human Resources was timely. In another context, the Board has concluded that the clock for filing unfair labor practice charges does not begin running until the employer actually implements the action that is at issue. Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA



v. Cavendish Town Board of School Directors, 16 VLRB 378, 385-86 (1993). Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 228-29 (1981). Similarly here, the clock for filing a grievance on denial of shift bidding rights did not begin running until the Department of Corrections implemented the Department of Human Resources decision by denying Cole's bid to work on the same shift as Cross.

We next address the timeliness of Cole and Cross grieving not being allowed to work overtime on the same shift. We agree with Grievants that this is a continuing grievance that was timely filed. The prohibition of Cole and Cross working overtime on the same shift is not a completed act for which a continuing grievance would not be recognized. Instead, it involves a pay practice with a new occurrence of the alleged violation every time a paycheck was issued for a pay period where overtime was denied, with the restriction that Grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievance.

The timeliness of the grievance having been established, we turn to addressing the merits. Grievants contend that the State's reliance on Personnel Policy 5.2, "Conflicts of Interest Arising from Employment", to deny Grievant Cole's bid to work first shift and Grievants Cole and Cross's right to work overtime together inappropriately gives the personnel policy precedence over the provisions of the Corrections and Supervisory Contracts relating to shift bidding and working overtime.

Article 20, Section 5, of the Corrections Contract provides in pertinent part that correctional officers "with more than three (3) years seniority . . . shall receive shift assignments based on seniority". Article 28, Section 2, of the Corrections and

Supervisory Contracts provides that “(a)ppointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees”.

Grievants contend that these contractual provisions are in direct conflict with Personnel Policy 5.2 and the State’s actions herein. Grievants assert that where there is a conflict between a collective bargaining contract and a personnel policy, the contract takes precedence over the policy. Grievants submit that, since that is the case here, their rights to shift bidding by seniority and equitable distribution of overtime supersedes the State’s conflict of interest policy and warrants sustaining this grievance.

The State contends that the collective bargaining contracts did not divest the State of its longstanding, customary authority to regulate conflicts of interest in State government. The State asserts that it has regulated conflicts of interest by policy since 1966 and, if the parties had intended to divest the State of that authority, they would have stated that fact in the collective bargaining contracts. Since the parties did not so state, the State contends that it has retained the right to regulate conflicts of interest in the workplace. Moreover, the State contends that this conclusion is reinforced by there being no discussion during negotiations over the years between VSEA and the State that the shift-bidding and overtime articles of the contracts restricted the State’s authority to regulate conflicts of interest.

Employment rules and regulations promulgated by the employer concerning a particular condition of employment are superseded by the collective bargaining agreement where the agreement addresses the same issue that is covered by the employer policy. Grievance of Graves, 147 Vt. 519, 522-523 (1986). In re Muzzy, 141 Vt. 463, 476 (1982). Grievance of Nottingham, 25 VLRB 185, 192 (2002). However, the Board has

concluded that personnel rules and regulations unilaterally promulgated by the employer were a past practice implicitly embedded in the contract, where the parties bargained with the knowledge that the personnel rules were applicable and no contract provision addressed the applicable personnel rule. Grievance of Cronin, 6 VLRB 37, 69-70 (1983).

In applying these precedents here, we conclude that the personnel policy regulating conflicts of interest are not superseded by the provisions of the collective bargaining contracts. This is because the contracts do not address the same issue of conflicts of interest that is covered by the policy. There are no provisions of the contracts that address conflicts of interest. Given the circumstances that the parties bargained with the knowledge that the conflicts of interest policy was applicable and no contract provision addressed the policy, we conclude that the conflicts of interest policy is a past practice implicitly embedded in the contract.

We are left with seeking to determine the intent of VSEA and the State in reconciling a conflict between an important policy regulating conflicts of interest existing alongside contract provisions granting employees significant rights concerning shift-bidding and equitable distribution of overtime. If the intent of the parties is in doubt, the practical construction placed upon the instrument by the parties would be controlling in determining the meaning of the instrument. In re Cronan, 151 Vt. 576, 579 (1989). In addition, based on its evaluation of the contract language, the Board could look at the “situation and motive of the parties,” and the result “contemplated by the parties when they executed the . . . agreement.” In re Gorruso, 150 Vt. 139, at 143, 145 (1988).

In considering the result contemplated by the parties when they executed the agreement and the practical construction of the shift-bidding provisions of the

Corrections Contract, it is significant that these provisions were first introduced into the contract in 1984 and at no point during negotiations between the State and VSEA from 1984 to the present were there discussions between the parties of whether or to what extent shift-bidding rights of employees may be affected by the State's conflict of interest policy. Given the long-standing existence of the conflict of interest policy pre-dating 1984, we would expect that the parties would have discussed the impact of shift-bidding rights on the conflict of interest policy if the parties intended that shift-bidding rights would take precedence over the conflict of interest policy.

This conclusion is supported by considering the effects on correctional facilities if domestic partners and other employees covered by the conflict of interest policy were placed in situations where one supervises the other. The Department of Corrections has valid concerns that issues of perceived favoritism, inmate manipulations of security staff and other security risks would result in such circumstances. These valid concerns would be subordinated to shift preferences of employees in covered relationships. If parties intended that shift-bidding rights would have these serious effects, we would expect that specific discussions in this area would have occurred in negotiations.

The absence of such discussions leads us to conclude that the parties did not intend that the conflict of interest policy would give way to shift-bidding rights. This conclusion is reinforced by the passage of over twenty years since the shift-bidding language was first negotiated before this issue has made its way to the Board. If VSEA construed the Contract to provide that shift-bidding rights superseded the conflict of interest policy, we would have expected to have such a grievance before us for decision before now.

We conclude similarly with respect to the overtime provisions of the Corrections and Supervisory Contracts. The serious effects on correctional facilities discussed above in reference to shift-bidding rights likewise would result if the overtime provisions take precedence over the conflict of interest policy and employees covered by the conflict of interest policy were placed in situations where one supervises the other. Again, if the parties intended that the overtime provisions would have these serious effects, we would expect that specific discussions in this area would have occurred in negotiations. The absence of evidence on such discussions leads us to conclude that the parties did not intend that the conflict of interest policy would give way to overtime rights.

In sum, we conclude that the shift-bidding and overtime provisions of the Contract do not supersede the conflict of interest policy. The conflict of interest policy takes precedence over the contract provisions granting employees rights concerning shift-bidding and equitable distribution of overtime. The State is required to respect employees' shift-bidding rights pursuant to Article 20 of the Corrections Contract, but this does not extend to placing an employee on a particular shift if it will result in the employee supervising, or being supervised by, another employee with whom they have a relationship covered by the conflict of interest policy. Similarly, the State is required to "make a reasonable effort to distribute overtime as equitably as possible among classified employees" pursuant to Article 28 of the Corrections and Supervisory Contracts, but this does not extend to having employees in covered relationships working overtime on the same shift where one of the employees supervises the other.

Nonetheless, Grievants contend that they were subject to a discriminatory application of a rule or regulation in violation of Article 15, Section 2, of the Corrections

and Supervisory Contracts. Grievants assert that the “Department of Human Resources has refused to grant a nepotism waiver” allowing them to work the same shift “despite the fact that other similarly-situated employees within the Department of Corrections were granted waivers”. In cases where grievants claim a “discriminatory application of a rule or regulation”, the Board has followed the Supreme Court guidance that discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988).

Grievants have not demonstrated that they were treated unequally to other employees in the same circumstances under the conflict of interest policy. The closest situation to Grievants involved COII Michael Williams and COI Tara Clarke. There were occasions after they began living together, at which point Williams was working second shift and Clarke was working first shift, that they worked a few hours together when Williams came into work early due to staffing needs to work the last few hours of the first shift. This situation is not similar to that involving Grievants. First, Grievants are seeking to work together on a regular basis for an entire shift, not isolated instances of a few hours working together. Second, the evidence does not indicate that the facility Superintendent was aware that Williams and Clarke were living together at the time they worked a few hours together on occasion on the first shift.

The evidence does not indicate any other situations similar to Grievants’ situation. In all of the remaining situations in which evidence was presented on covered relationships in the Department of Corrections, there were no instances where one spouse or domestic partner supervised the other spouse or partner. The situations are too

different from Grievants' situation to demonstrate unequal treatment under the conflict of interest policy.

Finally, Grievants contend that the State violated Article 15 of the Corrections and Supervisory Contracts by failing to timely proceed at Step II of the grievance procedure, and failing to issue a Step III decision in this grievance. Grievants asserts that these failures on the part of the State should result in granting the remedy they request of allowing them to work the same shift. In support, they cite the wording in Article 15, Section 3(c)(7), of the Contracts which provides that failure to adhere to timeframes "shall result in the automatic granting of the contractual remedy requested by and directly applicable to the grievant."

Grievants' reliance on Section 3(c)(7) of Article 15 is misplaced. Section 3(c)(7) applies only to a "disciplinary action grievance", and the grievance before us does not involve a disciplinary action. Instead, in non-disciplinary grievances, Article 15, Section 3(c)(6) and Section 4(f) of the Contracts explicitly provide remedies for failing to timely proceed at Step II of the grievance procedure, and failing to issue a Step III decision, of allowing the grievant to proceed to the next step of the grievance procedure. Grievants having availed themselves of these remedies, there is no further remedy for us to grant with respect to the contract violations alleged by Grievants.

In sum, we dismiss this grievance. We recognize the difficult situation in which Grievants find themselves due to the conflict of interest policy. They are working completely different hours, thereby substantially impacting their time together as domestic partners. Nonetheless, short of one of them moving to a different job in the

facility where a conflict of interests does not exist or transferring to a different workplace, we do not see a remedy for their situation.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Mary Ellen Cole and Charles Cross is dismissed.

Dated this 5th day of October, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Acting Chairperson

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John J. Zampieri

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Joan B. Wilson