VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 88-23
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION (re: Post Assignments)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 21, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on its own behalf, alleging that the State of Vermont, Department of Corrections ("Employer") violated the collective bargaining contract between the State and the VSEA by unilaterally changing a past practice at the Rutland Community Correctional Center ("RCCC") concerning post assignments.

A hearing was held on June 16, 1988, in the Labor Relations Board hearing room before Board Members Dinah Yessne, Acting Chair; William Kemsley, Sr.; and Louis Toepfer. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Grievant filed a Memorandum of Law on June 23. The Employer filed Proposed Findings of Fact and Memorandum of Law on June 23.

FINDINGS OF FACT

1. Shortly after Michael O'Malley became the Superintendent of the RCCC in 1982, he recognized a need to restructure the manner in which correctional officers were assigned by management to the various work stations, or "posts," throughout the facility.

2. At that time there was no set procedure by which posts were assigned and the system then in place did not distinguish between job

assignments which should be given only to senior officers and those which could be given to junior officers. Correctional Officers "A" (COA), "B" (COB), and "C" (COC), (COCs being the most senior officers) were rotated by management among the various "posts" in RCCC several times during the day.

3. O'Malley saw a need to identify the more critical job assignments and insure only COCs manned those posts, and to stabilize the work assignments by allowing each officer to have a regular post assignment. VSEA also had a concern about the system, or lack of a system, for assigning posts.

4. O'Malley discussed the situation with Steven Janson, then a VSEA Field Representative, in late 1982 or early 1983. Janson and O'Malley agreed to a system whereby officers would bid to fill vacant posts within RCCC in which they had an interest.

5. When O'Malley and Janson agreed to establishing the bidding system, there was a misunderstanding as to how long an officer would remain on a post assignment once he or she received it through the bidding system. Janson understood that there was an agreement that officers would remain on their post until they bid for another post assignment. O'Malley did not understand there was any agreement with respect to how long an officer would remain on a post assignment once he or she received it through the bidding system.

6. The agreement between Janson and O'Malley was handled locally at the RCCC level. The Department of Personnel's Director of Employee Relations, Thomas Ball, knew nothing about and took no part in such discussions. VSEA did not submit a request to the Secretary

of Administration for bargaining over the issue. Also, the agreement was not reduced to writing.

7. On September 12, 1985, O'Malley issued a "Procedural Directive" which reflected his understanding of the bidding system by which post assignments were advertised and filled. The "Procedural Directive" provided in pertinent part:

> I. PURPOSE:
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> To describe the bidding system used to fill job positions within the facility.
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> II. RESPONSIBLE STAFF:
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> All correctional facility staff.
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> III. DEFINITION:
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> 1. Bidding system - the process whereby vacant job positions within the facility are awarded to qualified applicants. This process is primarily used for awarding positions to those staff members of the same rank and seniority.
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> IV. PROCEDURE:
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> 1. Upon a job position within the facility becoming vacant, the security and operations supervisor or other appropriate staff members shall post a memorandum in the "read & sign" manuals located at the admissions control desk. The memorandum shall include the following information:
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> A. Position and shift vacancy (i.e. Medium Security, Second Shift).
>
> B. Minimum qualifications of applicants if appropriate.
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> C. Application deadline - shall be at least seven (7) days except in emergency situations.
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> 2. Any qualified staff member may submit a memorandum to the appropriate supervisor stating his desire to be considered for the position. Staff are encouraged to submit a statement indicating their qualifications and specialized training in areas relevant to the position and a brief statement of why they feel they should be selected for the position.

3. Upon receipt of all applications, the appropriate supervisor(s) shall consider the following information in making his selection:

A. Nature of the residents in the unit.

B. Tasks to be performed by the person holding that position.

C. Personality, training, and performance record of staff members being considered.

D. Interest and enthusiasm of staff members being considered.

4. The appropriate supervisor(s) may administer tests to any or all applicants to determine and rate knowledge of and/or the ability to perform the job.

5. Upon selecting an applicant to fill the position, the appropriate supervisor shall inform that staff member and shall post a memorandum in the "read & sign" manuals indicating the awarding of the vacant position.

...VI. REVIEW DATE:

This procedure shall be reviewed annually from the effective date by the superintendent or his/her designee. A memorandum shall be developed noting any deletions or revisions. (Grievant's Exhibit 2).

8. Between early 1983, when the bidding system was established, and late 1987, once employees were assigned to posts they remained on that post indefinitely unless they bid for another post assignment; except that if no one bid for a vacant post, O'Malley would draft an officer to fill the post.

9. However, several events convinced O'Malley that it was in the interests of RCCC to take steps to insure that rotation of jobs occurred predictably. O'Malley concluded that two officers, one whom had worked "work crews" for 6 years and one whom only worked one post in RCCC for many years, needed cross training to remain competent to carry out the various duties expected of their class. O'Malley became

concerned that officers assigned to work overtime on other than their regular post, a predictable occurrence at RCCC, may not be sufficiently familiar with all posts so as to insure the security of the facility. O'Malley was also concerned that officers who worked in the high security area of RCCC needed to be relieved of that duty more frequently to avoid "burn-out" from the high security work.

10. In the Fall of 1987, O'Malley informally notified Gail Rushford, a VSEA Field Representative, of his concerns relating to the officers who worked high security and work crews. By that time, O'Malley had not formed a plan of action, and did not tell Rushford what he would do about those concerns.

11. As a result of such concerns, and without any further discussion with VSEA, O'Malley caused to have issued a memorandum, dated December 24, 1987, which established a maximum length of time an officer could be assigned to posts. The memorandum, which was signed by Robert Wallett, RCCC Security and Operations Supervisor, and sent to all RCCC staff, provided in pertinent part:

> In an effort to reduce staff burn-out, staff who have been assigned to the same post for 24 months or more will be moved to a new post for a minimum of three (3) months and probably no more than six (6) months. All efforts will be made to accommodate staff needs, if possible.
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> Officers assigned to the post of High Security Officer for the 1st and 2nd Shift will work said post for a maximum of six (6) months. After six (6) months, the posts will be open for bid for a new officer assignment. Again, all efforts will be made to accommodate staff needs if at all possible. (Grievant's Exhibit 4).

12. At the time the memorandum was issued, 3-4 of approximately 50 correctional officers had been assigned to the same post for at least 24 months.

OPINION

We first address two jurisdictional issues raised by the State at the hearing in this matter. The State contends: 1) that VSEA is not a proper party grievant; and 2) that this matter would be more properly brought as an unfair labor practice charge, not as a grievance.

The State contends that under Grievance of Beyor, 5 VLRB 222 (1982), only named employees may bring a grievance. In Beyor, the named grievant brought the grievance on behalf of himself and unnamed "similarly situated" employees. The Board, interpreting 3 VSA §1002(d), held that only the named grievant had standing to bring the grievance. Id, at 231-232.

However, this case is distinguishable from Beyor since the only named grievant - VSEA - is authorized by the statutory definition of "grievance" to grieve in its own name. 3 VSA §902(14) specifically allows "the employee's collective bargaining representative" to bring a grievance if dissatisfied with aspects of employment or working conditions under a contract or the discriminatory application of a rule or regulation. The allegation made here, that a past practice developed with the agreement of VSEA was violated, was appropriately brought by VSEA.

We also conclude that the State's argument that this matter should have been brought as an unfair labor practice charge, not as a grievance, is without merit.

In the past, we have recognized that past practices may attain the status of contractual rights and duties. Grievance of Cronin, 6 VLRB 37, 67 (1983). Alleged violations of a binding past practice are resolved through the contractual grievance procedure just as are

grievances over specific contractual provisions. Grievance of Debevec, 10 VLRB 159, 165-166 (1987). Thus, VSEA proceeded correctly in pursuing this alleged violation of a binding past practice as a grievance.

We turn to discussing the merits of the grievance. VSEA contends that the State unilaterally changed a mutually-accepted past practice in violation of the Contract by providing that staff who had been assigned to a post for a certain period of time would be assigned to a new post.

The State asserts that assigning work is one of the most basic and important management rights and, in support of its position, cites Article 2, Management Rights, of the applicable Corrections Unit Contract, which provides in pertinent part:

> 1. Subject to law, rules and regulations, or 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 ...

The State contends that such provision guarantees management the right to assign work, and that such rights are not forfeited by informal and unwritten agreements with managers not authorized to represent the State in collective bargaining, nor are they compromised by the conduct of such managers. The State contends that such rights can be forfeited only through the clear terms of either statute or the formal and written collective bargaining contract. In any event, the State contends that no enforceable past practice exists here.

The Board has recognized that day to day practices mutually

accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, supra. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, supra, at 238-239. If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Cronin, supra 68-69. An employer is required to negotiate before changing an established practice. VSEA v. State of Vermont (re: Involuntary Transfer of Gonyaw), 7 VLRB 8, 31-32 (1984).

We reject the State's argument that management rights granted by Article 2 of the Contract can only be forfeited through the clear terms of either statute or the formal and written collective bargaining contract. As stated above, past practices mutually accepted by the parties may attain the status of contractual rights and duties and, thus, override management rights provided for in Article 2.

We conclude the Employer unilaterally changed a past practice here which had attained the status of contractual rights and duties. Superintendent O'Malley having established a bidding system with the agreement of VSEA, he was not permitted to change a significant component of the bidding system without negotiating with VSEA. We recognize that a misunderstanding existed between Superintendent O'Malley and Steven Janson, the VSEA representative, as to whether the agreement concerning the bidding system included a provision that officers would remain on their assigned post indefinitely unless they were selected by O'Malley to fill a vacant post for which there were

no bids. Regardless, it is apparent that, at the very least, a mutually accepted past practice developed since between early 1983, when the bidding system was established, and late 1987, once employees were assigned to a post they remained on that post indefinitely unless they bid for another post assignment or were selected to fill a vacant post for which there were no bids. This was a significant, long-standing and mutually accepted past practice at RCCC which could not be changed by the Superintendent without negotiating with VSEA. Thus, Superintendent O'Malley unilaterally changed a binding past practice at the facility in violation of the Contract by establishing a policy where employees would be shifted from their post assignments after a certain period of time.

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 is SUSTAINED and the Employer forthwith shall rescind the policy set forth in Findings of Fact #11 herein.

Dated the 2nd day of September, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Dinah Yessne

Dinah Yessne, Acting Chair

William G. Kemsley, Sr.

Louis A. Toepfer