

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 98-74
ALLEN MATTEN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 13, 1998, the Vermont State Employees' Association ("Association") filed a grievance on behalf of Allen Matten ("Grievant") against the State of Vermont, Agency of Transportation ("Employer"). Grievant alleged that the Employer violated Articles 15 and 17 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Non-Management Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"), when it failed to grant a waiver request which would permit Grievant to work in the same district as his brother.

A hearing was held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Leslie Seaver and Carroll Comstock on February 11, 1999. David Herlihy, Legal Counsel for the State Department of Personnel, represented the State. VSEA Deputy Legal Counsel Mark Heyman represented Grievant. The State filed a post-hearing brief on February 25, 1999; Grievant filed a post-hearing brief on February 26, 1999.

FINDINGS OF FACT

1. Article 15, Section 2 (b) of the Contract provides in pertinent part that a "(g)rievance" is . . . the discriminatory application of a rule or regulation".
2. Article 17 of the Contract, entitled "Agency, Department and

Institution Work Rules", provides in pertinent part as follows:

1. ESTABLISHMENT OF RULES

(a) Each agency, department or institution shall put into writing those rules of conduct and procedure it deems necessary for its efficient operation . . .

(c) Work rules shall relate to aspects of employment (such as Public Safety work rules outlining proper maintenance schedules for cruisers, AOT rules for use of State-owned property and equipment), and not to fundamental conditions of work which give rise to a statutory bargaining obligation.

. . .

3. REASONABLENESS AND APPLICATION OF RULES

(a) An employee or the VSEA may grieve the reasonableness of any rule promulgated under this Article and, further, may grieve any action taken against an employee based upon any such rule. In either case, the grievance may include a claim that the rule is unreasonable in its application to the employee or group of employees so aggrieved . . .

3. Since at least 1966, the State Agency of Administration has had a published policy regarding the employment of relatives. The current policy was published in 1996 as part of the State Personnel Policies and Procedures. It is Policy 5.2, entitled "*Conflicts of Interest Arising From Employment*". It provides in pertinent part as follows:

POLICY STATEMENT

It is the State's responsibility to conduct employment matters in a manner which avoids not only conflicts of interest, but also any appearance of a conflict of interest. Conflicts of interest may arise in: hiring employees . . . This policy is intended as a guide to promote avoidance of conflicts of interest.

It is the general policy of the State that no relatives, domestic partners, or persons residing with employees will be employed in the same department, institution or organizational unit.

This policy applies to any hiring decisions, whether new hires, promotions, demotions, or transfers within State government . . . Hiring managers must ask prospective candidates if they have any relatives or domestic partners currently working for the State of Vermont.

#### DEFINITIONS

RELATIVE - includes parent, grandparent, spouse, child, brother, sister, grandchild, aunt, uncle, niece, nephew, parent-in-law, brother-in-law, sister-in-law, step-parent, step-child, and any other person closely related through marriage.

#### PROCEDURES FOR REQUESTING WAIVER

A request for a waiver of the general policy may be sought from the Commissioner of Personnel. However, under no circumstances will a waiver be approved to employ relatives, domestic partners, or other persons residing with any management employees of the department.

A waiver request will be evaluated to determine the extent of the current and/or potential conflict of interest, or the appearance thereof, which proposed employment may present. The Commissioner's consideration will include, but not be limited to the following:

- the size of the employer;
- the reporting relationships within the organization;
- the level, status, and geographic location of the positions;
- the extent to which the proposed employment may reduce management's flexibility with respect to future transfer or promotion of such person;
- the availability of other qualified applicants for the position.

A request for waiver shall be submitted to the Commissioner of Personnel prior to making a hiring decision . . .

No promise or offer of employment made to a person covered under

this general policy shall be valid, effective and enforceable unless previously approved by the Commissioner of Personnel.

Any waiver which is approved applies only to the circumstances identified in the request. A further waiver must be requested for any change in employment status including promotion of the person subject to a waiver.

If a waiver is granted, the employees will be required to sign a *Conditional Approval to Hire a Relative* form . . . which acknowledges that they are aware that future duty assignments and/or employment opportunities may be denied based on this policy.

. . .

(Grievant Exhibit 3)

4. Brian Searles was Commissioner of Personnel in 1996. At some point during his tenure as Commissioner, Searles became aware that there was a high volume of waiver requests from the Agency of Transportation. He sent a memorandum to Secretary of the Agency of Transportation Glenn Gershaneck which provided in pertinent part:

I am increasingly concerned that there have been so many requests to grant waivers to the Agency of Transportation to hire relatives of current employees. The level of requests is much higher than in other areas of state government.

. . .

Historically, waivers to this policy have been requested and approved. In fact, the practice of hiring relatives in AOT pre-dates both of us which is why I hope you'll join me in bringing the problem under control. I can no longer approve requests that allow relatives to work within the same division in the Agency of Transportation, regardless of how far apart or disparate the jobs may be, including those that may have been approved in previous years . . . (State Exhibit 2).

5. The current Commissioner of Personnel, Eileen Boland, or her designee, makes the final determination whether to grant a waiver under Policy 5.2.

6. Due to the large size of the Agency of Transportation, the Department of Personnel treats it differently than other agencies and departments within the State for purposes of determining whether a waiver should be granted. Generally, waivers only need to be requested if relatives wish to work within the same division within the Agency of Transportation. One division within the agency is the maintenance division.

7. There are nine separate maintenance districts within the maintenance division. A district transportation administrator ("DTA") is responsible for each district. Under each DTA is a transportation general maintenance supervisor (general foreman), area maintenance supervisors (area foremen), senior maintenance workers and transportation maintenance workers ("TMW"). Within each district there are several maintenance garages (Grievant Exhibit 6).

8. Grievant lives in Newport Center, Vermont. Grievant's brother, Doug Matten, works for the Employer as a senior maintenance worker in the Irasburg garage. Senior maintenance workers often supervise TMW's. The Irasburg garage is in District 9, which is in the northeastern section of the State and in the area of the State in which Grievant resides. Dale Perron is the District 9 DTA. The District 9 general foreman is Jerry Waterman. District 9 area foremen include Thomas Tetreault, Pat Donovan and Peter Currier. Tetreault is Doug Matten's area foreman. There are approximately 48 employees in District 9 (Grievant Exhibit 6).

9. On or about August 29, 1997, Grievant applied for a position as a Transportation Maintenance Worker III ("TMW III") in the Eden garage, which is in District 8. District 8 is in the northwestern section of the State. District 8 DTA

John Bushey interviewed Grievant and recommended his hire. Since Grievant was applying for a job in the same division in which his brother worked, he and his brother were required to request a waiver pursuant to Personnel Policy 5.2 (Grievant Exhibit 1).

10. Bushey and Perron discussed the waiver with Grievant and his brother. Grievant and his brother both signed a waiver request on October 21, 1997. In signing such request, Grievant and his brother both acknowledged that they were "aware that future duty assignments and/or employment opportunities may be denied as a result of the policy regarding the Conflicts of Interest Arising from Employment policy" (State Exhibit 3).

11. Pamela Gandin Ankuda, the Employer's Human Resources Chief, sent a memorandum to Personnel Commissioner Boland requesting a waiver pursuant to Personnel Policy 5.2. Ultimately, the Employer was permitted to hire Grievant for the District 8 TMW III position and assigned him to the Eden garage. Grievant's regular commute from his home to the Eden garage is approximately 20 miles. TMW's and other maintenance employees occasionally work at garages other than their assigned garage (State Exhibit 4).

12. During the Summer of 1998, there was a TMW III opening in the Derby garage which is located in District 9 and only nine miles from Grievant's home. The area foreman for the Derby garage is Peter Currier. Grievant applied for the position because of the shorter commute and because the Derby position would enable him to have his own snowplow route, making him eligible for more overtime work.

13. District 9 DTA Perron initiated the hiring process. At some point the Employer's human resources division sent Perron a list of 14 names of individuals determined by the Department of Personnel to have met the minimum qualifications for a TMW III position. Such list is called an open competitive hiring certificate and may include both currently employed State employees and people not presently working for the State. It has been the experience of District 9 management that candidates on an open competitive hiring certificate may be unwilling to move to that area of the State when given the opportunity.

14. Perron only was interested in in-house candidates; that is, employees who already worked for the agency. The Employer's human resources division sent him an in-house hiring certificate. Grievant was the only name on that list (Grievant Exhibit 7).

15. A hiring panel, which included DTA Perron, and Area Foremen Currier and Donovan, interviewed Grievant for the position. The hiring panel recommended his hire. On August 10, 1998, Perron sent a memorandum to the Employer's human resources division requesting permission to hire Grievant for the position. He stated in the memorandum that Grievant and his brother "would be working for different Area Foreman in different garages and no one (them, me or the foremen) sees this as a problem." Perron further stated that Grievant "was the only applicant on the certificate of eligible candidates" (Grievant Exhibits 2, 7).

16. Agency of Transportation Personnel Administrator Rick Carey supported Perron's decision and sent a memorandum to Personnel Commissioner Boland requesting a waiver from the "general policy prohibition of hiring relatives"

in Policy 5.2. Carey indicated in the memorandum that Perron supported Grievant's candidacy and that there would be "minimal impact on management flexibility. [Grievant and his brother] are in the same maintenance district, but have separate immediate supervisors, and they will not be located in the same garage" (Grievant Exhibit 5).

17. Although DTA Perron did not believe that there would be a conflict for the two brothers to work in the same district in different garages, it is not uncommon for employees in the same district to be temporarily assigned to work at a garage other than their assigned garage. As a senior maintenance worker, Grievant's brother could be asked to supervise TMW's from other garages in his district, although this does not occur with regularity.

18. Personnel Commissioner Boland designated Personnel Administrator Specialist IV Kari Hutchins to make the final determination on Grievant's waiver request. Hutchins weighed all the factors set forth in Finding of Fact No. 3, with respect to considering waiver requests under Policy 5.2, and concluded that it would not be in the best interest of the Employer to approve the waiver request. Specifically, Hutchins concluded that the district employs a relatively small number of employees and there could be situations in which Grievant's brother could supervise him. She concluded that management's flexibility would be limited because future transfer and/or promotional opportunities for either brother also would be limited. Hutchins concluded that there was an ample supply of qualified applicants for the TMW III position in that there were 14 names on the open competitive hiring certificate (Grievant Exhibit 4; State Exhibit 5).



19. There are two sets of brothers who presently work in District 9. One of these brothers is a senior maintenance worker and his brother is a TMW III. The other two brothers are both TMW III's. The brothers occasionally work together on projects and this has not presented a problem for Area Foreman Waterman. Both sets of brothers are long term employees. There is no record that waivers were requested with respect to either set of brothers.

20. Hutchins has granted waiver requests acting as a designee of the Commissioner of Personnel. She processed approximately 25 requests in 1998 and granted a majority of those requests.

21. Hutchins approved the hire of an individual whose brother worked in the same division of the Agency of Transportation, the technical services division. She approved the waiver request made in such case because the brothers worked in different operating units within the division. There was no reporting relationship between them and there were two reporting layers between the brothers and the division director. The division employs approximately 125 employees (Grievant Exhibit 8).

22. Hutchins approved a Department of Labor and Industry request to hire the spouse and sister-in-law of two permanent Department of Labor and Industry employees for a four month temporary position. The waiver resulted in all three individuals reporting to the same supervisor. Hutchins would not have approved the request if the position had not been a temporary one, and she stated in approving the request that "much closer scrutiny would be required should" the individual apply for a permanent position (Grievant Exhibit 9).

23. Hutchins approved a request to hire an individual whose mother worked in the same department, the Department of Taxes. Hutchins approved such request because the mother and son worked in different divisions of the same department, compliance and taxpayer services. They did not have the same supervisor. The Department of Taxes employs approximately 150 employees. Hutchins granted the request with certain conditions, including that there be no work contact between the mother and son (Grievant Exhibit 10).

24. A waiver request was granted for an Agency of Transportation employee to transfer into the same unit in which his father worked, maintenance - traffic shop. They had different areas of responsibility, sign crew and dispatcher, and worked under separate chains of command. There are approximately 60 employees in the maintenance - traffic shop unit (Grievant Exhibit 11).

### OPINION

Grievant contends that the State violated Articles 15 and 17 of the Contract when the Commissioner of Personnel failed to grant a waiver request which would have permitted him to work in the same district as his brother. Specifically, Grievant contends that the State violated Article 15 in that the denial of his waiver request, pursuant to Policy 5.2 of State Personnel Policies and Procedures, constituted a violation of past practice and the discriminatory application of a rule or regulation. Grievant contends that the State violated Article 17 because the denial of a waiver request was an unreasonable application of a workrule.

The State contends that Article 15 is not applicable because Personnel Policy

5.2 is not a binding rule. Alternatively, the State contends that even if Personnel Policy 5.2 is found to be a binding rule, Grievant failed to establish that it was applied in a discriminatory manner. The State also contends that Article 17 is not applicable because Personnel Policy 5.2 is not a workrule, as defined in that article. The State makes the alternative argument that, even if Article 17 is applicable, it was not unreasonably applied.

We first consider Grievant's contention that Article 15 was violated. Article 15 includes within the definition of grievance "the discriminatory application or a rule or regulation". The Vermont Supreme Court has held that the "discriminatory application of a rule or regulation" simply means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Failure to follow a binding rule constitutes an actionable grievance. *Id.* Employer guidelines which mandate procedures for management constitute binding rules or regulations. Grievance of Gobin, 158 Vt. 432, 435 (1992).

We conclude that Personnel Policy 5.2 is a binding rule. It applies to "any hiring decision . . . within State government" and requires that "managers must ask prospective candidates if they have any relatives or domestic partners working for the State". It sets forth specific procedures which must be followed if managers learn that prospective candidates do have a relative or domestic partner working for the State. A hiring manager must request the Commissioner of Personnel for a waiver pursuant to Personnel Policy 5.2 prior to making a hiring decision, and the Commissioner of Personnel or designee must consider specific factors in ruling on a waiver request.

These mandated procedures which must be followed in any hiring decision involving a potential conflict of interest make Personnel Policy 5.2 a binding rule, and a grievance may be filed claiming a discriminatory application of Policy 5.2.

Grievant contends that the denial of his waiver request was clearly erroneous and constituted an abuse of discretion in applying the factors set forth in Policy 5.2 to evaluate waiver requests. We disagree. Personnel Policy 5.2 requires the Commissioner of Personnel or designee to consider the following factors in denying or granting a waiver request: size of the employer; reporting relationships; level, status and geographic locations of the positions; managements's ability to be flexible with respect to future promotions or transfers; and the availability of other qualified applicants.

The Commissioner's designee weighed all these factors in making her decision. She concluded that the district employs a relatively small number of employees, and there could be situations in which Grievant's brother could supervise him. She further concluded that management's flexibility would be limited with respect to future transfers or promotions given the limited opportunities for either brother to be transferred or promoted. She also considered that there was an ample supply of qualified applicants for the position sought by Grievant in that there were 14 names on the open competitive hiring certificate. Standing by themselves, these conclusions by the Commissioner's designee do not lead us to conclude that the denial of the waiver request was clearly erroneous or constituted an abuse of discretion in applying the factors set forth in Policy 5.2 to evaluate waiver requests.

Nonetheless, Grievant contends that the application of these factors in his

case was inconsistent with past and present hiring decisions. We disagree. We have compared Grievant's circumstances to the evidence presented on other State employees who were granted Personnel Policy 5.2 waivers, and have concluded that Grievant was not in similar circumstances to those employees.

Two of the three permanent employees who were granted waivers worked in separate operating units from those in which their relatives worked, and there was no likelihood that one relative would supervise another. Also, the three permanent employees granted waivers either were in separate chains of command from their relatives, or a superior to whom the employee and the relative both reported was at least two reporting levels away. The other employee granted a waiver was a temporary employee who was granted a conditional waiver because of the temporary nature of her position.

Grievant's circumstances were dissimilar to these employees. Grievant requested a waiver to work in the same district as his brother and there was a possibility that his brother could supervise him at times. Also, Grievant and his brother were only one supervisory level away from a superior to whom they both reported. In addition, the other three permanent employees who were granted waivers were in larger employing units than the district in which Grievant was seeking to work with his brother. The fact that Grievant sought a permanent position distinguishes his case from the temporary employee given the significantly shorter duration of any conflict of interest issues involving the temporary employee. We also conclude that the denial of Grievant's waiver request cannot be appropriately compared to the two sets of brothers presently working together in the same district

of the Agency of Transportation because there was no evidence that waivers had ever been requested concerning those employees.

Thus, we conclude that the State did not violate Article 15 in denying Grievant's waiver request pursuant to Policy 5.2 of State Personnel Policies and Procedures. Grievant has not established his contention that there was a violation of past practice and the discriminatory application of a rule or regulation.

We turn to Grievant's claim that Article 17 of the Contract was violated. Article 17 provides that "(e)ach agency, department or institution shall put into writing those rules of conduct and procedure it deems necessary for its efficient operation". "Work rules" instituted under Article 17 "relate to aspects of employment . . . and not to fundamental conditions of work which give rise to a statutory bargaining obligation . . . A grievance may be filed over a claimed unreasonable application of the rule to an employee.

We conclude that Article 17 is not applicable to this matter. Article 17 is limited to rules of conduct and procedure established by an agency, department or institution to govern its own internal operations. It does not extend to a rule such as Policy 5.2, which sets forth a statewide policy administered by the Department of Personnel applying to all agencies and departments of State government regulating the hiring of employees. We decline to hold that "rules . . . of procedure" contemplated by Article 17 go to such a fundamental work condition as standards applying across State government concerning the hiring of employees in situations where there may be conflicts of interest. Vermont State Employees' Association v. State of Vermont (Re: Transfer of Ronald Gonyaw), 7 VLRB 8, 30 (1984).

ORDER


NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Allen Matten is DISMISSED.

Dated this 11<sup>th</sup> day of May, 1999 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Richard W. Park, Acting Chairperson

/s/ Leslie G. Seaver  
Leslie G. Seaver

  
Carroll P. Comstock