VERMONT LABOR RELATIONS BOARD

LOCAL 2413, AFSCME	)	
	)	
v.	)	DOCKET NO. 89-40
	)	
TOWN OF ST. JOHNSBURY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 11, 1989, the St. Johnsbury Police Chapter of Local 2413, AFSCME ("Union") filed an unfair labor practice charge against the Town of St. Johnsbury. The Union alleged that the Town made a unilateral change in conditions of employment upon issuance of a general order on April 24, 1989, directing that police officers may not accept employment as deputy sheriffs with the Caledonia County Sheriff's Department.

On July 18, 1989, after investigation of the charge, the Board issued an unfair labor practice complaint against the Town. On November 7, 1989, the parties met and stipulated that the general order of April 24 be rescinded. The remaining issues before the Board are whether the general order constituted an unfair labor practice, and, if so, whether to award a monetary remedy to Sergeant Philip Ciotti and Officer Michael Grant for the loss of secondary income on account of the general order. A hearing was held before Board members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver on January 11, 1990. Attorney Alan Biederman represented the Union. Attorney Anthony Lamb represented the Town. Requested Findings of Fact and Memoranda of Law were filed by the Union on January 22, 1990, and by the Town on January 24, 1990.

FINDINGS OF FACT

1. The St. Johnsbury Police Department is a department of the Town of St. Johnsbury, which Town is governed by a Board of Selectmen.

2. The Union is the exclusive bargaining agent for all sergeants, patrol officers, dispatchers and meter enforcement officers of the Police Department (Town's Exhibit 3).

3. The Town and the Union are parties to a collective bargaining agreement ("Contract") which covers the period January 1, 1989 to December 31, 1991. The Contract provides, in relevant part:

> ARTICLE I. Recognition
>
> The Town recognizes the Union as the sole and exclusive bargaining agent for purposes of negotiating with respect to wages, hours and conditions of employment for all regular members of the St. Johnsbury Police Department...
>
> ARTICLE IV. Management Rights Clause and Employee Obligations
>
> Section 1. Except as specifically limited by express provisions of this Agreement, the Town, its Manager, and Board of Selectmen and all other Town Executives reserve and retain all rights granted to it by law and customarily belonging to or exercised by public management...
>
> ARTICLE XXI. Entire Agreement Clause
>
> This Agreement constitutes the entire agreement between the parties and includes all collective bargaining negotiations, except as may be agreed upon by the parties, for the term of this Agreement.

4. Since 1982, the Town of St. Johnsbury has promulgated Rules and Regulations adopted by the St. Johnsbury Selectmen, and which apply to the St. Johnsbury Police Department.

5. Section 560.80 of the Rules and Regulations prescribes the conditions by which an employee of the Police Department may engage in secondary employment:

> Prior to accepting or engaging in secondary employment, employees shall submit in writing a request for permission to do so to the chief. The request shall be approved if the chief in his judgment determines that such secondary employment does not render the individual unavailable in an emergency; physically or mentally exhaust the individual to the point where his/her on-duty performance may be affected; require any special consideration to be given to scheduling of the employee's regular duty hours; or bring the Department into disrepute or impair the operation or efficiency of the Department or individual (Town Exhibit 1).

6. Phillip Ciotti has been a sergeant of the Town of St. Johnsbury and a member of the Union at all times relevant herein.

7. Michael Grant has been an officer of the Town of St. Johnsbury and a member of the Union at all times relevant herein.

8. W. Bruce Pratt is and has been the chief of police of the Town of St. Johnsbury at all times relevant herein. As a managerial employee, Chief Pratt is not a member of the Union.

9. Jeffrey Bitcom is and has been the Sheriff of Caledonia County (encompassing the Town of St. Johnsbury) at all times relevant herein.

10. Prior to March, 1989, Sergeant Ciotti and Officer Grant had held second jobs as Deputy Sheriffs with the Caledonia Sheriff's Department. Ciotti had done so periodically since 1985. Grant had done so periodically at least since 1986.

11. It was the practice of Ciotti and Grant to work for the Sheriff's Department during some of the hours and days when they were not on duty with the St. Johnsbury Police Department. It was also their practice to work for the Sheriff's Department during some of

the time of their annual vacations. The work was done pursuant to permission by Chief Pratt.

12. When accepting work from the Sheriff's Department, Ciotti and Grant were each permitted to make their own schedules. The normal procedure at the Sheriff's office was to post listings of work available. Ciotti and Grant would examine the listings and select the assignments they wished to work. It was the practice of Sheriff Bitcom to permit Ciotti and Grant to work as many hours and assignments as they chose.

13. Frequent work assignments selected by Ciotti and Grant included drug law enforcement, work on the Caledonia Alcohol Patrol ("CAP") and on a similar program called ("CRASH"), security and patrol work, and extradition and general transportation of prisoners. Pay rates varied for each assignment, depending on the nature of the work. The rate of pay for each assignment was included on the job listing sheets.

14. During 1988, Ciotti earned approximately $1,400 - $1,500 from secondary employment with the Sheriff's Department.

15. During the years of 1987 and 1988, Grant averaged approximately $4,000 annually from secondary employment with the Sheriff's Department.

16. Prior to the events which are at issue herein, Chief Pratt had considered any requests for employment pursuant to Section 506.80 of the Police Department Rules and Regulations. Chief Pratt had never denied any employee's request for permission to work a second job pursuant to Section 506.80, and had never issued any order, general or specific, prohibiting or otherwise limiting secondary employment.

17. Prior to the events which are at issue herein, Ciotti and Grant also worked overtime hours for the St. Johnsbury Police Department. Some of this overtime work was on a voluntary basis.

18. On March 28, 1989, Chief Pratt issued an order to Ciotti ("Ciotti Order") pursuant to Section 560.80 of the Police Department Rules and Regulations, directing him to discontinue his employment with the Sheriff's Department (Union's Exhibit B).

19. On April 17, 1989, Chief Pratt issued an order to Grant ("Grant Order") pursuant to Section 560.80 of the Police Department Rules and Regulations, directing him to discontinue his employment with the Sheriff's Department (Union's Exhibit A).

20. On April 17, 1989, the Town Manager of St. Johnsbury issued a written communication to Chief Pratt, directing that Chief Pratt implement an order, effective immediately, that no officer may work for the Caledonia Sheriff's Department. Subsequent to this directive, Chief Pratt no longer had discretion to approve any secondary employment with the Sheriff's Department.

21. In accordance with this directive, on April 24, 1989, Chief Pratt issued a general order to all Police Department personnel, providing: "No one working as a St. Johnsbury Police Department officer may work as a Deputy Sheriff". The general order of April 24, 1989, superseded the previous specific Ciotti and Grant orders, which were merged into the April 24 order. The April 24 order was a general order under Section 130.12 of the Town's Police Manual. Neither the general order nor the Ciotti and Grant orders were the subject of collective bargaining between the Town and the Union.

22. As a result of this series of orders, both Ciotti and Grant suspended their secondary employment with the Sheriff's Department.

23. Both Ciotti and Grant had vacation time during the summer of 1989, during which they could have worked extensive hours for the Sheriff's Department but for the existence of the general order.

24. From September 11 to November 7, 1989, both Ciotti and Grant were suspended with pay from active duty with the St. Johnsbury Police Department. The suspension centered around a letter to the editor written by Grant and Ciotti. Grant and Ciotti subsequently brought a civil action against the Town, which has been resolved.

25. On November 7, 1989, the parties met and stipulated that the general order of April 24, 1989, was rescinded. As a result, the Town permitted members of the Police Department to re-apply for authorization to work for the Caledonia Sheriff's Department under Section 560.80 of Police Department's Rules and Regulations.

26. During the period for which the general order was in effect, Ciotti and Grant regularly checked with the Sheriff's Department to determine what work was available. They each maintained a list of possible assignments they could have worked, together with the dates and rates of pay for each assignment. The Sheriff would have permitted them to work these assignments. Grant stopped keeping his list on September 10 when he was suspended from the Police Department. The lists of possible assignments are consistent with work that Ciotti and Grant have performed in the past.

27. The hourly sum of assignments available to Ciotti was greater than the sum available to him in previous years. During the effective period of the general order, there was a strike at the

telephone company, as a result of which extensive hours would have been available to Ciotti. There was no such strike in 1987 or 1988. Additional work opportunities would have been available by virtue of the transfer of the CAP and CRASH programs from the St. Johnsbury Police Department to the Sheriff's Department. The remainder of the possible assignments were consistent with work Ciotti had performed in the past.

28. For the period the general order was in effect, we find that a reasonable estimate of assignments (with accompanying wages) which Ciotti would have worked at the Sheriff's Department is as follows:

Kennedy case (actually worked)	May	3	$ 18.00	
	June	1	30.00	
				$ 48.00
CAP	May	10	72.00	
	July	14-15	144.00	
				$ 216.00
CRASH	August	18-19	230.72	
				$ 230.72
Telephone Company Strike Duty	August	2	48.00	
	August	3	48.00	
	August	10-11	96.00	
	August	20	96.00	
	August	21-23	144.00	
	August	28	48.00	
	September	5- 6	96.00	
	September	13-14	96.00	
	September	21-22	96.00	
	September	29-30	96.00	
	October	7	48.00	
	October	7- 9	144.00	
	October	16-17	96.00	
	October	24-25	96.00	
	November	1- 2	120.00	
				1,368.00
Caledonia Fair	August	24-27	168.00	
				168.00
Bear Ridge Speedway	July	?	65.00	
				65.00
				$2,095.72

(Union's Exhibit D)

29. In addition, Ciotti would have had available drug law enforcement work. He had earned approximately $1,000 annually at this work in previous years, and we find that a reasonable estimate of what he would have earned is this amount pro-rated for the percentage of the year the general order was in effect. The general order was in effect for 54 percent of the year, and we find that it is estimated that Ciotti would have earned $540.00 in drug law enforcement work. Because the work was regularly available to Ciotti, and because no other officer regularly employed by the Sheriff's Department performed this type of work, except Grant, the work was not included in the posted job listings and was consequently not itemized on Ciotti's list.

30. In sum, we find that a reasonable estimate of the amount of money Ciotti would have earned working for the Caledonia County Sheriff's Department, but for the April 24, 1989, general order, was $2,635.72.

31. During the period the general order was in effect, Ciotti worked some overtime hours for the St. Johnsbury Police Department. He did not attempt to work all the voluntary overtime hours that were available, and he worked less overtime than he had worked for the Police Department in the past. Ciotti did not refuse to work overtime during the period.

32. Ciotti did not seek other secondary employment. He did not want to work at a job outside of law enforcement, and believed that a request for other secondary employment in law enforcement would be denied.

33. For the period April 24 to September 10, 1989, we find that a reasonable estimate of assignments (with accompanying wages) which Grant would have worked at the Sheriff's Department is as follows:

Prisoner Transportation	April 24 - August 24		$1,602.25	
				$1,602.25
Telephone Company Strike Duty	April	24	40.00	
	April	27	56.00	
	August	18-20	144.00	
	August	23	48.00	
	August 28- September	10	384.00	
				672.00
CVPS Duty	July 24-25		90.00	
				90.00
				$2,364.25

(Union's Exhibit E)

34. The average per diem of these work assignments for the period April 24 to September 10 is $16.89 ($2,364.25 divided by 140 days). Approximately the same extent of work opportunities at the Sheriff's Department would have been available to Grant for the period September 11 to November 7. By extrapolation, the value of that work would have been $962.73, which represents $16.89 per diem for 57 days. We find that this is a reasonable estimate of the amount of money Grant would have earned for work at the Sheriff's Department during this period.

35. Additionally, an estimated $400.00 in wages would have been available to Grant at the Sheriff's Department for drug law enforcement work, and $300.00 would have been available for CAP and CRASH work. We find that these are reasonable estimates of the amount of money Grant would have earned in these areas for work at the Sheriff's Department during the period the general order was in effect. Because the drug enforcement work was regularly available to Grant, and because no other officers regularly employed by the Sheriff's Department performed this type of work, except Ciotti, the

work was not included in the posted job listings and was consequently not itemized on Grant's list.

36. In sum, we find that a reasonable estimate of the amount of wages Grant would have earned working for the Caledonia County Sheriff's Department, but for the April 24, 1989, general order, was $4,026.98.

37. During the period in question, Grant followed his normal procedure in working overtime at the St. Johnsbury Police Department, consistent with his earlier overtime work. He did not attempt to work all the voluntary overtime hours that were available. Some overtime was offered at times when he was not available.

38. Grant did not seek other secondary employment during the period that the general order was in effect. Grant believed that Chief Pratt would deny any request for secondary employment.

39. Subsequent to the November 7 stipulation lifting the general order, both Ciotti and Grant requested permission to resume secondary employment with the Sheriff's Department. Chief Pratt has withheld approval pending submission of additional information on the exact nature of the work to be done on specific days. Neither Ciotti nor Grant have been able to comply with this request to Chief Pratt's satisfaction. At the time of the hearing, Chief Pratt had not approved the request. Ciotti and Grant have not resumed secondary employment with the Sheriff's Department.

OPINION

At issue is whether the issuance by the Town of the April 24, 1989, general order, providing that no police offer of the Town Police Department may work as a deputy sheriff for the Caledonia County Sheriff's Department, was an unfair labor practice. The Union contends that this constituted a unilateral change in conditions of employment in violation of the Town's duty to bargain in good faith pursuant to 21 VSA §1726(a)(5).

The unilateral imposition of terms of employment during the time an employer is under a legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. Burlington Firefighters Association v. City of Burlington, 142 Vt. 433, 435-436 (1983). Absent a waiver of bargaining rights, an employer is required to bargain if the employer seeks any changes in mandatory bargaining subjects during the term of an agreement even if contract negotiations are not ongoing. Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231 (1981).

Under the Municipal Employee Relations Act, "wages, hours and other conditions of employment" are mandatory bargaining subjects. 21 VSA §1722(4); §1725(a). "Wages, hours and other conditions of employment" means "any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative." 21 VSA §1722(17). Matters of "managerial prerogative" are defined as "any non-bargainable matter of inherent managerial policy." 21 VSA §1722(11).

We conclude that the restriction on secondary employment contained in the August 24, 1989, general order involves a mandatory subject of bargaining. It constitutes a "condition of employment directly affecting the economic circumstances" of employees. The ban on working for the Sheriff's Department extended the employment relationship to the employees' off duty time, and directly affected the economic circumstances of employees by eliminating an available source of outside income. Such a restriction on secondary employment is not a matter of inherent managerial policy which an employer is free to unilaterally impose without bargaining.

Here, there is no question that the general order was not bargained. However, the Town contends that there has been no unilateral change in a condition of employment; that the Town continues to regulate secondary employment as it has before.

We disagree. While it is true that the Town has regulated secondary employment before, the manner in which secondary employment was regulated differed from what occurred in this case. In the past, secondary employment was regulated through the operation of Section 506.80 of the Police Department Rules and Regulations. Under Section 506.80, the Chief of Police determines on a case-by-case basis whether secondary employment will be approved, and the grounds for denying approval are limited. The general order issued on April 24, 1989, clearly alters Section 506.80 with respect to work for the Sheriff's Department. It eliminates the Chief's authority under Section 506.80 to approve or deny such secondary employment on a case-by-case basis by applying specific criteria. Instead, the chief had no discretion under the general order, and was required to deny any request for employment with the Sheriff's Department.

In sum, the April 24, 1989, general order was a unilateral change in conditions of employment which was not bargained with the Union. Thus, the Town committed an unfair labor practice in violation of 21 VSA §1726(a)(5).

We turn to deciding what remedy to apply for this unfair labor practice. 21 VSA §1727 (d) provides that, if the Board decides that an employer is engaging in any unfair labor practice, then the Board "shall issue and cause to be served on that person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action as the board shall order." The Union does not seek a cease and desist order or a bargaining order because the April 24, 1989, general order has been rescinded. The sole remedy sought is a "make whole" order requiring the Town of pay to Sergeant Ciotti and Officer Grant the sums lost to them on account of the general order.

In calculating a back pay award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole". Grievance of Goddard, 4 VLRB 189 at 190-191 (1981). To make Ciotti and Grant "whole" in this case is to place them in the position they would have been in had the Town not committed an unfair labor practice. Grievance of Benoir, 8 VLRB 165, 168.

As a result of the April 24, 1989, general order issued by the Town in this matter, which superseded the prior individual orders pertaining to Ciotti and Grant, Ciotti and Grant lost the ability to earn secondary income which, up to that point, they had received from the Caledonia County Sheriff's Department. In this case, unlike the general case where we are determining backpay due improperly discharged employees, it is difficult at best to determine the

specific monetary losses suffered. The amount of work for which Ciotti and Grant would have been scheduled at the Sheriff's Department was not fixed and depended on the work available and Ciotti's and Grant's availability. Under the circumstances, the best evidence available to us of specific monetary losses suffered are the documents prepared by Ciotti and Grant, based on their regular visits to the Sheriff's Department to determine what work would have been available to them, detailing the date, description and number of hours which they believe they would have worked at the Sheriff's Department had they not been subject to the general order. We have concluded that these documents, taken together with Ciotti's and Grant's estimates on other work which could be estimated only for a general period, constitute a reasonable estimate of the specific monetary losses suffered by Ciotti and Grant due to the general order.

However, the Town contends that Ciotti and Grant failed to mitigate damages. In making an employee whole, interim sums of money earned or that without excuse should have been earned are generally deducted from the gross amount of back pay to which the employee is entitled. Grievance of Brooks, 135 Vt. 563, 570 (1977). Grievance of Hurlburt, 9 VLRB 229 (1986).

An employee has a general duty to mitigate damages by making reasonable efforts to find interim work. Grievance of Hurlburt, supra. Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. Liability for back pay arises out of the employer's improper action, and, accordingly, an employer must establish any claim of lack of mitigation. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 10 VLRB 106, 119 (1987).

This case does not involve the typical scenario in back pay determinations where the unfair labor practice results in a complete loss of earnings to employees, enabling them to seek full-time substitute employment. Rather, this case concerns employees who have maintained their primary job, and have lost secondary income in their chosen field of law enforcement with another employer who permitted them to work whenever work was available and they wished to work.

The Town has failed to sustain its burden of proving that, under these circumstances, Ciotti and Grant did not properly mitigate damages. The Town presented insufficient evidence indicating that any substitute law enforcement employment may have been available to Ciotti and Grant which they failed to pursue. Also, the Town has presented insufficient evidence for us to conclude that Ciotti and Grant declined specific overtime opportunities which may have mitigated damages.

The final issue we need address is whether we should award interest on the backpay award. In the past, the Board generally has held that adding interest, at the legal rate of 12 percent, to the backpay award is necessary to make an employee "whole" for income losses suffered. Grievance of Warren, 10 VLRB 154, 155 (1987). Interest liability generally commences on the date the employee would have received wages from the employment lost and continues to run until the employee receives the back pay. Id, at 156-157. However, given the circumstances herein of the monetary losses suffered being a reasonable estimate, rather than a readily ascertained set figure, and the Union not having requested the payment of interest, we conclude that interest liability should not commence until the date of this decision.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Town of St. Johnsbury forthwith shall pay Sergeant Philip Ciotti the sum of $2,635.72;

2. The Town of St. Johnsbury forthwith shall pay Police Officer Michael Grant the sum of $4,026.98; and

3. The interest due Ciotti and Grant on these sums shall be 12 percent per annum and shall run from the date of this Order until the sums are actually paid to Ciotti and Grant.

Dated this 30th day of March, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver