VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-20
COURTNEY LILLY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over back pay and other benefits due Courtney Lilly ("Grievant") as a result of his improper dismissal by the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"). On February 24, 2000, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order, concluding that Grievant was dismissed in violation of Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Corrections Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"). 23 VLRB 25. The Board reduced the dismissal to a ten day suspension and determined that Grievant was entitled to reinstatement with back pay and other benefits. Id. at 49. The Board left the case open for the purpose of determining the specific back pay and other benefits due Grievant from the date commencing 10 working days from the date of his improper discharge to the date of his reinstatement. Id.

The parties stipulated to certain benefits due Grievant but were unable to agree on whether Grievant mitigated his damages to the extent required by law with respect to his attempts to earn wages during the period his grievance was pending. The parties also did not agree on whether Grievant is entitled to be reinstated as a field training officer. Further, the parties did not agree on whether

Grievant is entitled to overtime pay for roll call duty, holidays and training sessions between the time of his relief from duty in November 1998 until the time of his reinstatement. Grievant withdrew claims for compensation for personal days and for floating holidays.

Hearings were held before Acting Board Chairperson Edward Zuccaro and Board Member Carroll Comstock on March 16 and 30, 2000. Assistant Attorney General William Reynolds represented the Employer. Attorney Sten Lium represented Grievant. On March 16, 2000, Department of Employment and Training ("DET") Legal Counsel Brooke Pearson filed a Motion to Quash two subpoenas served upon DET by the Employer. At the March 16 hearing, the Board granted the motion to quash and denied Grievant's March 3, 2000, Motion to Amend the Board's Order to provide that Grievant's back pay award include overtime compensation for the period between his temporary relief from duty and his reinstatement. Those decisions are incorporated into this Order.

On April 7, 2000, the Employer filed a Motion to Admit the Affidavit of Manon Perrault or for Leave to Reopen Hearing. Grievant filed a motion in opposition to such motion on April 15, 2000. The Employer and Grievant filed post-hearing briefs on April 12 and 13, 2000, respectively. On April 18, 2000, Grievant filed a Rebuttal to Department of Corrections' Proposed Findings of Fact and Conclusions of Law and a Motion to Submit Two Proposed Findings of Fact out of Time.

FINDINGS OF FACT

1. Grievant was relieved from duty with pay from his correctional officer position at Northern State Correctional Facility ("NSCF") on November 13, 1998, and remained on temporary relief from duty with pay until his dismissal on March 19, 1999. Pursuant to an Order of the Labor Relations Board, he was reinstated to his correctional officer position on March 12, 2000. Grievant was earning $16.41 per hour at the time he was dismissed and would have received an increase to $16.90 per hour for the payroll period commencing July 4, 1999. At the time Grievant was dismissed, the Employer paid him $2756.88 for accrued annual leave and compensatory time (State Exhibits 8, 9, 10).

2. Grievant is entitled to receive credit for 155.04 hours of annual leave and 155.04 hours of sick leave for the 24 pay periods he was unlawfully dismissed; he also is entitled to have the 71.95 hours of sick leave he lost at the time of his dismissal credited to his account. He will repay the Employer the $2756.88 that the employer paid him at the time of his dismissal for annual leave and compensatory time and the Employer will credit Grievant's annual leave and compensatory leave banks the number of hours corresponding to this amount. Grievant's full seniority is reinstated and he is entitled to have his shift bidding and post bidding status reinstated based upon this seniority, as per the Contract. Grievant is entitled to be reinstated to the CERT team as of the week of April 7, 2000 (State Exhibits 8, 9, 10; March 30, 2000, stipulation of the parties read into the record).

3. Grievant did not initially seek employment after his dismissal because he was in shock from losing his job. By May 1999, Grievant started seeking employment in the Newport, Vermont area. He also applied for and received unemployment compensation from the Department of Employment and Training ("DET") beginning on or about May 9, 1999 (Grievant Exhibit 333; State Exhibits 8, 9, 10).

4. In order to receive unemployment compensation benefits, claimants must make an average of three contacts with potential employers each week. DET performs eligibility reviews to ensure that claimants are looking for suitable employment. DET does not expect claimants to find work at or near minimum wage, if he or she has been earning $20 per hour, and does not expect a claimant to work 3rd shift if such claimant has been working 1st shift.

5. Grievant has a degree in hotel management and previously had worked as a cook at the Holiday Inn in Rutland and in the Navy. He spoke with managers or owners of local restaurants about possible employment as a chef. He also spoke to individuals at local building supply stores for possible positions. Grievant sought assistance in seeking employment from DET. DET sent Grievant one referral, a position as a cook for a private party at the Elks Club in Newport. Grievant accepted this position and earned $34.80. This is the only money Grievant earned during the time he was dismissed (State Exhibits 8, 9, 10).

6. Grievant told prospective employers about his dismissal from NSCF and his hope that he would be reinstated after his Labor Relations Board hearing. Grievant had 16 years of service with the Employer and was not seeking

a career change. He told prospective employers that he would return to NSCF if he was reinstated by the Board. Grievant also told prospective employers that he would have to take time off in order to attend his hearings before the Board. He received no job offers. At least one prospective employer told him to come back after his grievance was resolved.

7. Grievant went to Las Vegas during the summer of 1999 with his girlfriend. Grievant considered moving to Las Vegas if he was not successful in his grievance. He talked with restaurant managers about possible positions. He informed DET of these contacts, although he did not have the names of the individuals with whom he spoke.

8. Carol Godin is an employer resource consultant with DET and has worked for DET for 26 years. She has worked in the Newport area for approximately 9 years. She has never seen a better job market in Newport than the one that existed during the time Grievant was seeking employment. There was general availability of jobs in the following areas: truck driving, health care, part time retail, flagging jobs during the summer months, a social worker position with a local human services agency and numerous food preparation positions. It is not known what these positions paid. Godin did not know of any chef positions.

9. Grievant met all the requirements necessary to receive unemployment compensation and received benefits from May 9, 1999, to December 4, 1999. He met with a DET official four times from the time he applied for unemployment compensation benefits until the time his benefits were exhausted. He also had many conversations with a DET case manager assigned to

his case. He received a total of $7,414.00 in unemployment benefits (Grievant Exhibit 33; State Exhibits 8, 9, 10).

10. Grievant generally only looked for part time work after his unemployment compensation benefits were exhausted because the Board hearings on his grievance were underway and he expected a Labor Board decision before long. Grievant did apply for one full time position during this time period, that of assistant superintendent at the NSCF in February 2000.

11 Grievant held the title of field training officer ("FTO") prior to his dismissal. FTO's are role models for newly hired staff and assist in training them. Occasionally, FTO's receive a stipend for performing certain FTO duties. The FTO program was not being used prior to Grievant's relief from duty.

12. NSCF reevaluated its FTO program during 1999 and advertised for recruits prior to Grievant's reinstatement in early 2000. Successful applicants currently are expected to participate in a newly developed three week training program. Assistant Superintendent Russell Sumner will not reinstate Grievant as an FTO. Sumner does not consider Grievant a good role model because he violated procedures as the A/C Seg unit officer on November 10, 1998, and received a ten day suspension for such violations. In addition, some of the procedures at NSCF changed during Grievant's relief from duty and dismissal. 23 VLRB 25, 49 (2000).

13. Officers at NSCF are required to arrive 15 minutes prior to the beginning of their shift generally on Tuesday and Thursday of each week for "roll call". If an officer is scheduled to work on a roll call day, he or she is expected to

participate. Officers are compensated in overtime pay for roll call. Grievant's schedule is a 6 – 2 schedule, that is, he works six days and then has two days off. At a minimum, Grievant would have been expected to attend roll call at least once a week during the time he was on relief from duty and during the time of his dismissal.

14. Employees who work on designated holidays are entitled to overtime pay. There were 14 holidays between the time Grievant was relieved from duty in November 1999 and the time of his reinstatement in March 2000.

15. The Contract allows employees to attend up to 10 hours of stipend training each quarter. The Employer pays employees $35.00 per hour for attending such sessions. Grievant regularly attended 40 hours of training sessions each year. Grievant asked Superintendent Katherine Lanman if he could attend stipend trainings while he was relieved from duty, but she did not respond to his request. Grievant did not have the opportunity to attend six quarters of stipend training, or 60 hours, from November 1999 until the time of his reinstatement.

16. Prior to Grievant's return to work, Lanman sent him a letter setting forth the work schedule he was expected to follow upon his reinstatement. Beginning at approximately 9:00 a.m. on his first day back at work until he was finished, Grievant was expected to read and sign off on facility procedure manuals. Grievant was still reading procedure manuals on March 30, 2000 (Grievant Exhibit 332).

17. There have been changes in some of the procedures during Grievant's relief from duty and dismissal. However, no one else has been ordered to read and sign off on the facility procedure manuals.

OPINION

Before discussing the merits, we need to address some preliminary matters raised by the parties. The Employer seeks to have an affidavit of Grievant's former DET case manager admitted into evidence, or alternatively to have the hearing reopened to allow the person to testify. We find no basis in law to permit the Employer to introduce the affidavit of a witness after the evidence is closed and, therefore, the Employer's request is denied. The Board has the discretion to reopen a hearing upon the timely motion of a party "because of newly discovered evidence". Board Rules of Practice 12.17. We conclude that the Employer did not act with due diligence with respect to obtaining information from the former DET case manager, and we decline to reopen on the basis of newly discovered evidence. The Employer knew for many months that Grievant worked with this DET case manager while he was receiving unemployment compensation benefits. We conclude that with due diligence the Employer could have anticipated the need to have made this witness available during the course of this hearing.

Grievant requested that we allow him to submit a reply brief in this matter, and he has moved that he be allowed to submit two additional proposed findings of fact. We deny these requests. It is the practice of the Board to not allow reply briefs; Grievance of Lilly, 23 VLRB, 25 (2000); and Grievant had sufficient

opportunity between March 30 and April 13, 2000 to submit any proposed findings he wished the Board to consider in his post-hearing brief.

Mitigation

We now turn to the unresolved issues on the merits. The Employer contends that Grievant forfeited his right to back pay because he failed to make reasonable efforts to mitigate damages by obtaining suitable employment.

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). c.f., Kelley v. Day Care Center, Inc, 141 Vt. 608, at 615-616 (1982). To make employees whole is to place them in the position they would have been in had they not been improperly dismissed. Grievance of Benoir, 8 VLRB 165, 168 (1985).

An employee has a general duty to mitigate damages by making reasonable efforts to find interim work. Grievance of Hurlburt, 9 VLRB 229, 232 (1986). 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, the employer must establish any claim of lack of mitigation. Grievance of Merrill, 12 VLRB 222, 226 (1989). It is the general rule in back pay cases that an employee must make at least reasonable efforts to find new employment which is substantially equivalent to the position lost and is suitable to a person of his or her background and experience. Grievance of Gregoire, 18 VLRB 205, 209 (1995).

The Employer asks us to carve out an exception to these standards recognized by certain Federal courts, excusing an employer from the duty to establish availability of substantially equivalent employment if the employer can prove the employee did not make reasonable efforts to seek such employment. The Employer has provided no policy grounds for us to discard well-established precedent, and we decline to do so.

We conclude that the Employer did not meet its burden of showing that there was substantially equivalent employment available in the Newport, Vermont area, and that Grievant failed to make reasonable efforts to find such employment. Grievant made efforts to find employment and the Employer has not presented evidence demonstrating availability of substantially equivalent employment to Grievant's correctional officer position.

This does not mean we conclude that Grievant is entitled to full back pay. With the exception of his applying for the NSCF assistant superintendent position, Grievant only sought part time employment after his unemployment compensation ran out on December 4, 1999. We do not believe that only seeking part time employment for nearly three months was a reasonable course for Grievant to follow. We conclude that it would be appropriate to award Grievant only half of his regular pay for that period of time, given that he only sought part time positions.

Holiday pay

Grievant contends that he is entitled to receive overtime pay for the 14 holidays that occurred between the time he was relieved from duty until his

reinstatement. In interpreting Contract language on holidays substantially identical to the present Contract language on holidays, the Board previously determined that a State employee was not entitled to holiday pay during the time he was unlawfully dismissed. Grievance of Carosella, 8 VLRB 178, 180 (1985). The Board noted that the Contract language was clear and that only employees who actually work the holiday are entitled to holiday pay. Id. Although it was through no fault of his own, Grievant did not work on holidays and he, therefore, is not entitled to be paid for those holidays on which he did not work. Id. Accordingly, we decline to award Grievant additional compensation for the 14 holidays.

Roll call

Grievant contends that he is entitled to a portion of his roll call pay for the period of time he was relieved from duty until his reinstatement. Correctional officers at NSCF are required, generally on Tuesdays and Thursdays of each week, to arrive 15 minutes prior to the beginning of their shift for "roll call". Officers are paid overtime for these 15 minute periods. Although back pay awards generally do not include overtime pay because it is not predictable and not part of the regular workweek; Grievance of Goddard, 4 VLRB, 189, 190 (1981); here roll call is regularly scheduled and predictable. Grievant requests overtime pay for one roll call for each of the weeks he was unlawfully dismissed. We conclude that this would be an appropriate remedy given that it was part of Grievant's regular schedule. Accordingly, Grievant should receive 30 minutes of overtime for each

payroll period he was unlawfully dismissed. This amounts to $12.31 for six payroll periods, and $12.675 for 18 payroll periods, for a total sum of $302.01.

Stipend pay

Grievant also seeks stipend pay of 60 hours for the training he was unable to enroll in during his period of relief from duty and his dismissal period. Although it is true that Grievant's inability to participate in these training sessions occurred through no fault of his own, we conclude that it would not be appropriate to compensate Grievant for training he did not receive. This conclusion also is consistent with the Board's decision regarding holiday pay as set forth above.

Field Training Officer

Finally, Grievant contends that he should be reinstated to his field training officer ("FTO") position. The Employer contends that such positions are role model positions and Grievant currently is not a good role model because he violated certain procedures as an A/C seg officer and received a ten day suspension for such violations. 23 VLRB 49. We agree that the Employer has the right to screen its FTO candidates and to reject an officer who has violated facility procedure. It is reasonable for the Employer to require Grievant to earn the trust of the Employer before serving as a training officer.

ORDER

Now therefore, based on the foregoing findings of fact and the foregoing reasons, and consistent with the Board Order of February 24, 2000, it is hereby ORDERED as a final order in this matter:

1. The Employer shall pay Grievant the sum of $18,364.81, plus interest at the rate of 12 per cent. This represents gross back pay of $33,000.48 for the period April 12, 1999 through March 11, 2000, plus roll call pay of $302.01, minus $2756.88 for annual leave and compensatory time paid Grievant at the time of his dismissal, minus unemployment compensation of $7,414.00, minus interim wages of $34.80, and minus deduction of wages from December 4, 1999, to March 11, 2000, of $4732.00. Interest at the rate of 12 per cent computed from the amount of each pay check minus income received by Grievant during the payroll period shall be added to the sum of $18,364.81; and

2. The parties' stipulation set forth in Finding of Fact No. 2 is incorporated into this Order.

Dated this 11th day of May, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward Zuccaro
Edward Zuccaro, Acting Chairperson

/s/ Carroll P. Comstock
Carroll P. Comstock