VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-65
COURTNEY LILLY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 6, 2000, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Courtney Lilly ("Grievant"), alleging that the State Department of Corrections ("Employer") violated Article 5, sections 1 and 3(a), and Article 28, sections 1 – 7, of the collective bargaining agreement between the State of Vermont and the VSEA for the Corrections Bargaining Unit, effective July 1, 1999 – June 30, 2001 ("Contract"), by refusing to schedule Grievant for overtime work upon his reinstatement to work until he completed on-the-job training, and/or delaying in scheduling him for on-the-job training.

A hearing was held on August 9, 2001, in the Labor Relations Board hearing room before Board Members Catherine Frank, Chairperson; John Zampieri and Edward Zuccaro. Assistant Attorney General William Reynolds represented the Employer. Michael Casey, VSEA Deputy Counsel, represented Grievant. The parties filed post-hearing briefs on September 10, 2001.

FINDINGS OF FACT

1. Article 5 of the Contract provides in pertinent part as follows:

> 1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**
>
> In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin,

handicap, sexual orientation, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . .

3. **ENFORCEMENT RESPONSIBILITIES**

(a) By the Employer – The State acknowledges its duty to practice good faith implementation of the goals contained in this Article. The employer further acknowledges its duty to inform employees of their obligation not to discriminate, intimidate or harass employees under applicable law, policy or this Agreement . . .

2. Article 28 of the Contract provides in pertinent part as follows:

1. **INTRODUCTION**

. . .

(c) It is understood and agreed that determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights.

2. **DISTRIBUTION OF OVERTIME**

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

(b) Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the concept of equitable distribution of overtime.

. . .

3. **CORRECTIONAL FACILITY OVERTIME DISTRIBUTION**

(a) Each correctional facility shall maintain the following lists for the purpose of distributing overtime:

List 1: Permanent classified CO I's listed alphabetically.

List 2: Permanent classified CO II's listed alphabetically.

(b) Overtime created by the absence of a CO II whose experience is required by policy or procedure to perform duty shall be filled only from List 2.

(c) SCHEDULED OVERTIME AND MEDIUM NOTICE OVERTIME

(1) DEFINITIONS

(i) Scheduled overtime is defined as overtime which is scheduled at least two weeks in advance.

(ii) Medium-notice overtime is defined as overtime for which notice is given, less than two weeks but at least 24 hours in advance.

(2) DISTRIBUTION

(i) Scheduled overtime or medium-notice overtime created by the need to fill a vacancy in the position of CO I, or CO II (whose experience is not required by policy or procedure to perform duty) may be offered first to temporaries who are not normally scheduled to work 40 hours in a week, or eight hours in a day. Next it may be offered to the employees on List 1 in descending alphabetical order, and then to employees on List 2.

(ii) Medium-notice overtime created other than by reason of a position vacancy, by the absence of a CO I or by the absence of a CO II (whose experience is not required by policy or procedure to perform duty), may be offered first to employees on List 1 in descending alphabetical order, then to employees on List 2, after which it may be offered to temporaries who are not normally scheduled to work 40 hours in a week or 8 hours in a day.

(d) SHORT-NOTICE OVERTIME

(1) DEFINITION

Short-notice overtime is defined as overtime for which notice is given, less than 24 hours but at least two hours in advance.

(2) DISTRIBUTION

Short-notice overtime created by the absence of a CO I or CO II whose experience is not required by policy or procedure to perform duty shall be offered first to employees on List 1 in descending alphabetical order, and then to employees on List 2.

(e) VERY SHORT-NOTICE OVERTIME

(1) DEFINITION

Very short-notice overtime is defined as overtime for which less than two hours' notice is given.

(2) DISTRIBUTION

Very short-notice overtime created by the absence of a CO 1, or CO II (whose experience is not required by policy or procedure to perform duty) shall be offered first to all on-shift CO I's and CO II's who are on List 1 and 2 in descending alphabetical order.

3. Grievant began his employment with the State of Vermont in 1976, initially working at the Weeks School and later in the Employer's Probation and Parole division. He subsequently became a correctional officer at the St. Johnsbury Correctional Facility. The Northern State Correctional Facility ("NSCF") opened in 1993 and Grievant transferred to that facility, initially holding the position of acting security and operations

supervisor for four months. He then served as a Correctional Officer II and Correctional Officer I.

4. On November 13, 1998, the Employer relieved Grievant from duty with pay pending an investigation of allegations made against him. Subsequently, effective March 19, 1999, the Employer dismissed Grievant from his position as a Correctional Officer I. The Employer charged Grievant with interfering with an investigation of another employee, and violating work rules and facility procedures in an incident where an inmate attempted suicide. Grievant filed a grievance with the Labor Relations Board over his dismissal. In a February 24, 2000, decision, the Board concluded that the Employer had not established that Grievant interfered with the investigation of another employee, and had established some of its charges concerning the attempted suicide incident. The Board ordered that Grievant be reinstated to his position and that his dismissal be reduced to a ten-day suspension. 23 VLRB 25.

5. At the time of Grievant's reinstatement, Harold Colleran was a NSCF shift supervisor. He was a friend of Grievant. When he became aware of the Board decision reinstating Grievant, Colleran informed some co-workers of the Board decision. NSCF Security and Operations Supervisor Russell Sumner sent Colleran a memorandum entitled "Supervisory Feedback" concerning Colleran informing employees of the Board decision. Colleran filed a grievance over the memorandum. The Employer granted the grievance at Step II of the grievance procedure and rescinded the memorandum. Shortly thereafter, Colleran received a second memorandum entitled "Supervisory Feedback" concerning his informing employees of the Board decision. Colleran filed a second grievance over this memorandum. The Employer rescinded the second memorandum

while Colleran's grievance was pending before the Board, and Colleran withdrew his grievance (Board Docket No. 00-29).

6. Grievant was scheduled to return to work at NSCF on March 13, 2000. On March 10, 2000, he met with Summer and NSCF Superintendent Kathleen Lanman to discuss his duties upon returning to work. Lanman and Sumner instructed Grievant to read and sign off on all current facility procedures set forth in the Facility Procedure Manual upon reporting to work. Grievant asked if all employees were required to do this. Sumner indicated that all employees were required to do so. At the meeting, Lanman and Sumner discussed Grievant performing on-the-job training. Grievant agreed to on-the-job training (Grievant's Exhibit 8).

7. On March 13, 2000, Grievant reported for work at NSCF and began reviewing the Facility Procedure Manual. On his first week back to work, Grievant was off work two days and spent one day at the Labor Relations Board at a back-pay hearing in his dismissal grievance. Grievant spent 3 – 4 days reviewing facility procedures. He noticed in reviewing the materials that not all employees had signed off on reviewing the facility procedures as there were not many signatures and/or no recent signatures on some post orders. Lilly approached Sumner and discussed with him what he had discovered about employees signing off on reviewing the procedures. Sumner told Grievant that he no longer had to review facility procedures. Sumner assigned Grievant to work at his usual post on first shift – Admissions and Control ("AC").

8. Grievant requested that he be allowed to take annual leave for a four-week vacation beginning April 9, 2000. Lanman approved Grievant's request. On April 9, 2000, Grievant began his four-week vacation. Grievant filled out his time reports for the

pay periods he was on vacation by indicating he would be on annual leave. However, when the Employer's payroll division processed Grievant's time sheets, the payroll computer system rejected them for errors because Grievant did not have enough annual leave balance.

9. Prior to Grievant's vacation, Grievant and the Employer had agreed as part of their partial stipulation on back pay and benefits due Grievant upon his reinstatement to restore more than sufficient annual leave hours to Grievant's annual leave balance to cover his vacation. However, the final order of the Labor Relations Board on back pay and benefits due Grievant upon his reinstatement, incorporating this agreement of the parties, had not been issued as of the time of Grievant's vacation. As a result, Grievant's annual leave balance had not been adjusted to reflect the parties' agreement, and Grievant did not have a sufficient annual leave balance when the payroll division processed Grievant's time reports. Grievant was considered off-payroll during his vacation and initially did not receive pay for that period. This interfered with Grievant's ability to meet his financial obligations (State's Exhibit 11).

10. On May 11, 2000, the Board issued the final order on back pay and benefits due Grievant on his reinstatement. 23 VLRB 129. On June 2, 2000, Grievant filed a grievance because he had not been paid during his vacation. Shortly thereafter, Grievant's annual leave balance was adjusted to reflect the parties' agreement, Grievant was credited with being on annual leave during his four-week vacation, and he received pay for that period On June 8, 2000, in response to the grievance, the Employer indicated that Grievant had been made whole with regard to the leave issues (Grievant's Exhibits 2, 3).

11. Neither Lanman nor Sumner had arranged to provide on-the-job training for Grievant between the time he returned to work on March 13 and his vacation. When Grievant returned from vacation, Sumner was on vacation and did not return to work until May 27. Upon Sumner's return to work, Grievant told Sumner that he was interested in working overtime. This was the first time Grievant had actively pursued the issue of working overtime. Sumner told Grievant that he needed to receive on-the-job training before working overtime. Sumner told Grievant that he would set up the on-the-job training. Sumner took no action to schedule on-the-job training for Grievant in June. Grievant was not permitted to work overtime pending completion of on-the-job training (Grievant's Exhibit 7, page 15).

12. On June 26, 2000, Grievant filed a Step II grievance alleging that the Employer violated the Contract by: a) by denying him overtime opportunities until he completed on-the-job training, and failing to provide such training; b) continuing to require that he perform on-the-job training; and 3) discrimination, harassment and disparate treatment of him for complaint and grievance activity (State's Exhibit 4).

13. Peter Garon, Personnel Administrator for the Employer, asked Lanman not to schedule on-the-job training for Grievant pending consideration of the grievance by the Employer. The Employer took no action to schedule on-the-job training for Grievant in July, and Grievant was not permitted to work overtime that month. In late July, 2000, the Employer denied the grievance Grievant had filed on June 26 (State's Exhibit 5).

14. On July 28, 2000, Lanman sent a letter to Grievant scheduling him for on-the-job training for five dates, concluding August 7, 2000. Grievant was assigned to

"shadow" other correctional officers during this training, observing them while they performed the daily operations of their assigned post. On August 1, 2000, Grievant missed an on-the-job training session due to use of sick leave. Lanman sent him a revised schedule, with on-the-job training concluding on August 9, to account for the day he missed. Grievant completed on-the-job training on August 9. He was placed back on the list of employees eligible to work overtime at that point, although he was not notified that he was eligible to work overtime (State's Exhibit 2, 3).

15. Grievant injured his knee during a work training session on or about June 30, 2000. Grievant's knee was sore for a few days, got better for a few weeks and then became more painful. Grievant went to see a doctor concerning his knee for the first time in early August. On August 16, 2000, Dr. James Maas prescribed that Grievant not work overtime until his next doctor's appointment. On September 18, 2000, Dr. Maas prescribed that Grievant continue to not work overtime. On October 6, 2000, Dr. Maas cleared Grievant to "work overtime at his own discretion" (Grievant's Exhibit 12; State's Exhibits 6, 7, 8 and 9).

16. There are only two situations where correctional officers generally are required to shadow other officers at NCSF. The first is the Field Training Officers program in which new correctional officers, after completing correctional academy training, follow Field Training Officers before being permitted to work alone. The second situation is where officers who have transferred from another facility will shadow a NCSF officer for their first week to become familiar with the physical layout of the facility before working alone. The newly transferred officer is not allowed to work overtime until completing the week of shadowing.

17. Correctional officers are assigned to work a specific "post" in NSCF. A post refers to an area of responsibility in the facility supervised by a correctional officer. Some posts are assigned to Correctional Officer I's, others are assigned to Correctional Officer II's. Each post is governed by a post order. Post orders are written instructions setting forth the operations of each post. It is NSCF policy for each officer to read and sign off on the post order for the post the officer is working. When post orders are changed, there is no requirement that correctional officers engage in any training, on-the-job or otherwise, to become familiar with the new post order. Officers are required to read the new version of the post order, and sign off on it during their shift. They are then presumed to know of the post order's contents, and are expected to comply with it.

18. Through a process of shift bidding, every six months officers designate the shift (1^{st}, 2^{nd} or 3^{rd}) and the post the officer desires to work. The posts are then filled according to seniority. As a result, every six months correctional officers may work new posts that they may not have worked in the past or have not worked in a long time. In these situations, officers are not required to engage in any on-the-job training before working on the post.

19. In working overtime, it is not unusual for correctional officers to work on a post he or she has not worked before or has not worked in a long time. In these situations, officers are not required to engage in any on-the-job training before working on the post.

20. Tim Simoneau, a Correctional Officer II at NSCF, was out of work for approximately 18 months from May 1998 through November 1999 due to a work-related injury. While out on workers' compensation, Simoneau engaged in some training at

NSCF. Upon his return to work, he was placed on modified duty for six weeks. He could not work overtime, and was not allowed inmate contact during this period to see if he was able to physically handle his duties. He was not required to engage in on-the-job training prior to being permitted to work overtime.

21. Doug Oliver, a Correctional Officer I at NSCF, hurt his back at work in 1999 and was out of work for six months. He was not required to engage in any on-the-job training upon returning to work. He missed another six months of work in 2000 due to an injury he sustained in work training. He was not required to engage in on-the-job training upon returning to work, and the only restriction placed on overtime was a two-week period when his doctor said he could not work overtime.

OPINION

Grievant contends that the Employer violated Article 5, sections 1 and 3(a), and Article 28, sections 1 – 7, of the Contract, by refusing to schedule Grievant for overtime work upon his reinstatement to work until he completed on-the-job training, and/or by delaying in scheduling him for on-the-job training.

We first address Grievant's contention that the Employer violated Article 28 of the Contract. Article 28 sets forth the procedure by which overtime is distributed. It provides that "(a)ppointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees", and that "overtime shall be assigned whenever practicable to volunteers". It requires each facility to maintain lists for the purpose of distributing overtime consisting of permanent classified CO I's and CO II's.

Grievant contends that the Employer violated Article 28 because the Employer refused to allow supervisors to call him to work overtime following his reinstatement, even though Article 28 did not authorize such refusal until Grievant completed on-the-job training and even though no other employees have been similarly restricted. Grievant contends that the Employer's requirement that Grievant complete on-the-job training prior to being permitted to work overtime was unreasonable, as was its four and one-half month delay in scheduling on-the-job training.

We disagree with Grievant that the Employer acted unreasonably, and in violation of Article 28, by initially not providing overtime opportunities to Grievant upon his reinstatement pending completion of on-the-job training. Grievant had agreed to on-the job training upon his reinstatement, and the evidence does not indicate that Grievant expected or sought to work overtime for more than two months after his reinstatement. He was on vacation for a month during this period and, when he returned from vacation, Sumner was on vacation. It was not until Sumner's return to work in late May that Grievant told Sumner that he was interested in working overtime. This was the first time Grievant had actively pursued the issue of working overtime. Sumner told Grievant that he needed to receive on-the-job training before working overtime.

Since Grievant did not actively pursue working overtime prior to late May, we do not fault the Employer for failing to provide Grievant with overtime opportunities up to that point. However, once Grievant made it clear that he was interested in working overtime, the Employer was required to expeditiously provide Grievant with the on-the-job overtime the Employer viewed as necessary before permitting Grievant to work

overtime. Otherwise, Grievant's entitlement under Article 28 to work overtime, as a permanent classified CO I, would not be enforced.

The Employer failed to expeditiously provide on-the job training. Instead, the Employer did not schedule training for two months. There is no reasonable excuse justifying the Employer's inaction. As a result, Grievant lost overtime opportunities for these two months. This violated the provisions of Article 28 that the Employer "shall make a reasonable effort to distribute overtime as equitably as possible among classified employees.

In determining a remedy for this violation, we are seeking to make Grievant "whole". To make an employee whole is to place the employee in the position he or she would have been in if the Contract had not been violated. Grievance of Lowell, 15 VLRB 291, 339-40 (1992). Grievance of Sherbrook, 13 VLRB 359, 361 (1990). We conclude that, based on the evidence, there is a history within the facility that on-the-job training can reasonably be accomplished in approximately one week. After Grievant expressed an interest in working overtime in late May, 2000, Grievant should have been scheduled to complete the training by approximately June 10, 2000. At that point, he would have been available to work overtime. He would have remained available to work overtime until August 16, 2000, at which point his doctor prescribed that he not work overtime due to a knee injury. This means that Grievant was improperly excluded from working overtime from June 11 to August 15, 2000, and should receive payment for overtime he would have worked during that period.

We do not believe it is necessary to prolong this matter by scheduling further remedial proceedings to determine the overtime Grievant would have worked during this

period. A reasonable estimate can be arrived at by calculating the average weekly hours of overtime Grievant worked in the twelve months immediately preceding November 13, 1998, the date that Grievant was placed on administrative leave prior to being dismissed, and providing Grievant with payment for those average weekly hours for the nine week period June 11 to August 15, 2000.

In addition to his Article 28 claim, Grievant also alleges that the Employer violated Article 5 of the Contract by refusing to schedule Grievant for overtime work upon his reinstatement to work until he completed on-the-job training, and/or by delaying in scheduling him for on-the-job training. Grievant contends that the Employer engaged in discrimination, retaliation and harassment due to Grievant's grievance activities. Grievant has not presented sufficient evidence to persuade us that his protected grievance activities were a motivating factor in the Employer's actions, and thus we reject Grievant's allegation that Article 5 of the Contract was violated.

In closing, we note that the issue before us would have been better resolved in the initial grievance by Grievant contesting his dismissal, rather than through this separate grievance. Grievant was reinstated during the period that proceedings were ongoing to determine back pay and other benefits due Grievant as a result of the Board order that Grievant be reinstated. The Board did not issue a final order in the case until May 11, 2000, approximately two months after Grievant was reinstated.

If the parties had confronted and raised the issue concerning Grievant's eligibility to work overtime prior to the Board issuing its final order, this would have provided a more direct and efficient way to resolve the issue than what occurred through this separate grievance. It would have allowed the Board to determine in the dismissal case

whether Grievant's ineligibility to work overtime made him less than "whole" as a result of his improper dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1) The grievance of Courtney Lilly is SUSTAINED with respect to his allegation that Article 28 of the Contract was violated; and

2) The Employer shall provide Grievant with payment for overtime he would have worked during the period June 11 to August 15, 2000, consistent with this decision. The Employer shall comply with this requirement by calculating the average weekly hours of overtime Grievant worked in the twelve months immediately preceding November 13, 1998, the date that Grievant was placed on administrative leave prior to being dismissed, and providing Grievant with payment for those average weekly hours for the nine week period June 11 to August 15, 2000.

Dated this 24th day of January, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Catherine L. Frank, Chairperson

_____
John J. Zampieri

_____
Edward R. Zuccaro