

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
MARK BORNSTEIN, WILLIAM)	DOCKET NO. 80-77
ROWE, AND SUE LAGASSE)	
GRIEVANCE OF:)	
)	
WILLIAM HERRINGTON)	DOCKET NO. 80-78
AND MARK SCHROETER)	

FINDINGS OF FACT, OPINION, ORDER

Statement of Case

On October 15, 1980, the Vermont State Employees' Association (hereinafter "VSEA") filed these grievances with the Vermont Labor Relations Board. The two grievances were, with the concurrence of the parties, consolidated for hearing. VSEA alleges that the failure of the State to pay Grievants, Social Workers with the Department of Social and Rehabilitation Services (hereinafter "SRS"), overtime for their "availability" under the April 7, 1980, Department Policy (hereinafter "April 7th Policy") regarding after-hours emergency services violated Article XXI(a) of the collective bargaining agreement (hereinafter "Agreement") as Grievants were, in fact, "on call" when on "availability" duty.

Hearings were held January 29, 1981, and June 11, 1981, at the Board hearing room in Montpelier. At the January 29 hearing, Chairman Kimberly B. Cheney and William G. Kemsley, Sr., were present for the Board. Cheney, Kemsley, and James S. Gilson were present at the June 11 hearing. The State was represented by Assistant Attorney General Bennett E. Greene. Michael R. Zimmerman, counsel for VSEA, represented Grievants.

The record of the January 29th hearing was inadvertently destroyed. Subsequently, the parties stipulated to the testimony presented at such hearing and various facts.

At the June 11th hearing, the State withdrew its prior objection to Sue LaGasse as a proper party to the grievance, and further waived its contention that the grievances in both cases were not timely filed.

Requests for Findings of Fact and Memoranda of Law were filed by the State and VSEA on June 30, 1981, and July 2, 1981, respectively.

FINDINGS OF FACT

1. Grievants are Mark Bornstein, William Rowe, and Susan LaGasse working out of the Burlington SRS District Office; and William Herrington and Mark Schroeter working out of the Rutland SRS District Office.

2. All Grievants are permanent-status employees and are members of the Non-Management Bargaining Unit represented by VSEA. As such, Grievants are governed by the terms and conditions of employment set forth in the Agreement between State of Vermont and VSEA, Non-Management Unit, effective July 1, 1979, through June 30, 1981.

3. In April of 1979, SRS implemented a policy for the provision of after-hours emergency services in the areas of child abuse, child neglect, unmanageables, and delinquents. That policy required employees to be "available" during non-working hours, and to "deliver child abuse or other services during off-duty hours in a manner and in a time-frame considered appropriate for services rendered during duty hours" (Grievants' Exhibit #2).

4. After that policy was implemented, VSEA filed a grievance, which reached the Vermont Labor Relations Board, involving the claim that workers "available" under that policy were, in fact, "on call" under

the Agreement and were thereby entitled to overtime pay for periods they were subject to the policy. On January 10, 1980, the VLRB issued its decision wherein it held that the "available" workers were not "on call". In its decision, the VLRB stated:

Generally, the evidence shows 'emergencies' are the result of long-term family disintegrations taking years to evolve into crises so that intervention by telephone or even personal contact can be done responsibly within two hours after the event. Grievance of Brady, et al., 3 VLRB 22, at 31 (1980).

5. As a result of that decision, Grievants in the case before us assumed that under the so-called "Brady Policy" (implemented April 1979) they had two hours to respond to emergency telephone calls.

6. Before November of 1979, SRS had received complaints from judges and police departments around the state regarding social worker response time to non-working hours emergency calls. In response to those complaints, then-Commissioner Kent Stoneman assigned Marion Cummings, then employed by the Department as a consultant, to draft a policy clearing up social workers' "response time". She worked on that assignment during November and December of 1979, then laid it aside until mid-March of 1980. At that time, she and then-Commissioner Stoneman worked on a policy together, and gave a draft to Lee Mirasco, SRS Personnel and Training Officer, for his review. The policy was then put in final form, and promulgated on April 7, 1980 (Grievants' Exhibit 1). When the policy became effective it superseded the "Brady Policy".

7. The so-called "April 7th Policy" provided, in pertinent part, as follows:

An employee assigned to 'available' duty shall be reachable by phone or otherwise within one half hour and shall be prepared to report to the office for duty, if necessary, within an hour from the time

of contact. However, at those hours of the day when the available employee is driving to and from work and his driving time between work and home is more than one-half hour, he will be reachable by phone in no less than the driving time between work and home...Employees shall be eligible for one day of compensatory time off with pay for each seven days of 'availability'.

(Grievant's Exhibit #1)

8. The last effective date of the April 7th Policy was August 19, 1980.

MARK BORNSTEIN

9. Since July 1978 Bornstein has been continuously employed by the State of Vermont, Department of SRS. He was, during the month of June 1980, employed in the position of Social Worker, a Pay Scale 14 position, at the Burlington SRS District Office. The District Director was Marion Parris.

10. His work is in the field of child protective services, which is to say that he works with families who have difficulty managing their children. He conducts family counseling, investigations, and, in general, is involved in the removal of children from their own homes, and their placement in foster homes.

11. On July 1, 1980, he moved his residence from Essex Junction to 570 South Willard Street, Burlington, Vermont, which is about one mile from the Burlington District Office. It takes him from three to seven minutes to drive from his home to his office. In June of 1980 he was unmarried.

12. Under both the "Brady Policy" and the "April 7th Policy", he was assigned to be "available" every seven to 10 weeks. He served "availability" duty two to five times under the "Brady Policy", but served "availability" duty only once under the "April 7th Policy".

13. In the Burlington District Office, social workers under both the "Brady Policy" and "April 7th Policy" were assigned to be "available" during non-working hours for seven days at a time, with two workers sharing responsibility for each one-week period. During any given time during the seven days, one worker would be on primary duty, with the other serving as "backup" to the worker on primary "availability". These two workers would decide, between themselves, who would have primary responsibility to be "available" for any given day. Even though two workers shared each seven-day period of "availability", each worker received one day of compensatory time off.

14. He was aware that the "Brady Policy" had been the subject of a grievance, and was aware of the Vermont Labor Relations Board's decision in that matter. The Board's decision affected the way in which he complied with the "Brady Policy". When he was "available" under the "Brady Policy", especially after the VLRB issued its decision, he felt he had some freedom to move about and use the time for himself. However, when he was "available" under the "April 7th Policy", he believed that he had less latitude to move about because of the time constraints set forth under that policy.

15. He was assigned to "availability" duty under the "April 7th Policy" on Saturday, June 7, 1980; Sunday, June 8, 1980; Wednesday, June 11, 1980; Thursday, June 12, 1980; and Friday, June 13, 1980. He understood the "April 7th Policy" to have two aspects: first, that he had to respond to a telephone call within one-half hour; and, second, that he had to be able to get to his office within an hour from his response to the call.

16. During the period he was "available" under the "April 7th Policy", he went straight home after work. Normally, he might go to Lake Champlain,

go out to dinner, play volleyball, or go sailing. Due to his lack of skill as a sailor, he doubted he could reach a telephone if he had been "beeped" while sailing on Lake Champlain. The Burlington Office provided beepers to "available" workers.

17. Under the "April 7th Policy", he did not feel comfortable drinking alcohol beverages at dinner.

18. On one occasion while he was "available" under the "April 7th Policy" he was in a theater and missed a call. There is no evidence that he would or would not have been disciplined for that had SRS known he had missed the call.

19. On Saturday, June 7, 1980, he logged in five telephone calls (Grievants' Exhibit 18, Page 4) and was called out (i.e., left his home) twice on the same case—once to visit the client's home, and once to go to the office in order to arrange a detention hearing. He was paid for the times he was called out pursuant to Article XX, Agreement.

20. One characteristic, in his experience, of being subject to "availability" is that the "available" worker cannot predict, or plan on, either the number of telephone calls that he will receive, or the number of times he will be called out.

21. On each of the days of Sunday, June 8, 1980; Wednesday, June 11, 1980; Thursday, June 12, 1980; and Friday, June 13, 1980, he received one phone call while on "available" status. (Grievants' Exhibit 18, Page 4) On none of those dates was he called out.

22. When he was subject to the "April 7th Policy", he decided that he would not go out to dinner at a restaurant. Even though he could, theoretically, finish a meal within one-half hour of being "beeped" or otherwise paged for an incoming call, he, being conscientious, would not

do that, but would instead go to the phone to answer the call. It was for that reason (i.e., his awareness of his conscientiousness) that he decided he would not dine out.

23. As a result of his assignment to "availability" under the "April 7th Policy", he submitted a request for cash overtime. By memo dated June 23, 1980, District Director Marion Parris denied his request (Grievants' Exhibit #3).

WILLIAM ROWE

24. Rowe has been employed by Department of SRS as a Social Worker, Pay Scale 14, since April 4, 1978. In June, 1980, his workplace was the Burlington SRS District Office. The duties of his position are the same as Bornstein's.

25. As a Pay Scale 14 employee, he is entitled only to straight time for overtime. His hourly rate of pay is \$6.54.

26. In June of 1980, he resided at 73 Caroline Street, Burlington, Vermont, a distance of approximately .4 miles from his office. It took between three and five minutes to drive from home to office.

27. He is married with one child. In June 1980, his child was 14 months old. In June 1980, his wife worked full-time at the University of Vermont in Burlington, Vermont, and her normal working hours were from 8:00 a.m. to 4:30 p.m. Occasionally, his wife worked in the evenings, while he babysat with their child.

28. From the beginning of the effectiveness of the "Brady Policy" to the end of the effectiveness of the "April 7th Policy", he was assigned to be "available" twice.

29. The beeper provided to "available" workers in the Burlington Office operates this way: once activated, it beeps three times, then

speaks, saying, "Call your office" (or words to that effect). If it is not then manually turned off by the bearer, the beeper begins to hiss, and continues to do so until it is manually turned off. The beeper does allow the bearer a certain degree of freedom, in the sense that he must only be within 30 minutes of a telephone.

30. In June of 1980, he was assigned to be "available" for the seven-day period beginning on Friday, June 6, 1980. During a portion of that period he shared the duty with Mark Bornstein. He was actually "available" on Friday, June 6, 1980; Sunday, June 8, 1980; Monday, June 9, 1980; and Tuesday, June 10, 1980 (Grievants' Exhibit #18, Page 1).

31. During the period he was actually "available", he kept a log of telephone calls, as required by office policy (Grievants' Exhibit 18, Page 1).

32. On Friday, June 6, 1980, when he left work he went to the University to pick up his wife, went from there to pick up his daughter, then went home and remained there for the rest of the evening. Sometimes he and his wife go out for social engagements on Friday nights, but they did not on June 6, 1980. On that date, he logged in four calls which totalled 45 minutes in duration (Grievants' Exhibit #18, Page 1).

33. Usually on summer weekends he and his wife engage in outside recreation (for example: biking, walking, swimming). On Sunday, June 8, 1980, his wife was not feeling well, so he took his 14-month old child (and his beeper) to Cliffside Park in Burlington in order to go swimming. Evidently, while he was swimming, the beeper went off, because when he came out of the water it was hissing. Because he was not familiar with Cliffside Park, and did not know the whereabouts of the nearest telephone, he decided to go to his office in order to answer

the telephone call. He immediately set about putting a diaper on his daughter, and loading the car with his belongings, but, even so, it took him more than 30 minutes from the time he noticed the hissing beeper to get to his office telephone and respond to the call. Because the beeper will hiss indefinitely, there is no way of knowing how much time elapsed between the time the beeper was activated and the time he returned the call from his office. After he answered the call, he went home and remained there the rest of the day. On that day, he received four calls, totalling one hour (Grievants' Exhibit #18, Page 1).

34. On Monday, June 9, 1980, he received one call at 1:00 a.m. which he logged in mistakenly as having been received on June 8, 1980 (See call Number 40, Page 1 of Grievants' Exhibit #18).

35. On Tuesday, June 10, 1980, he received two calls totalling 11 minutes (Grievant's Exhibit #18, Page 1).

36. He submitted a request for cash overtime for being "available" during the week beginning Friday, June 6, 1980. By memo dated June 23, 1980, District Director Parris denied his request (Grievants' Exhibit #4).

37. He asked Parris if he was entitled to "call out" pay as a result of his having to leave Cliffside Park in order to respond to a call. She told him that he would not be entitled, since Article XX, Agreement, did not apply unless he had been "called out" of his home. He was told that answering telephone calls while "available" was not considered being called in.

SUE LAGASSE

38. LaGasse has been employed by SRS since June 1972. Her position is Casework Supervisor (Pay Scale 15). In June 1980, her workplace was the Burlington SRS District Office. It is her duty to supervise the work of Case Aides and Social Workers.

39. In June of 1980, she resided in South Burlington, Vermont. Her home was located about five miles from her office, and it took between 10 and 15 minutes to drive from home to office.

40. During the period the "April 7th Policy" was in effect, she was assigned to be "available" only once (i.e., for one seven-day period). She was on primary availability duty Saturday, June 21, 1980; Sunday, June 22, 1980; and Wednesday, June 25, 1980. She received 10 phone calls while on "available" status, totalling approximately four and one-half hours (Grievants' Exhibit #18, Page 5).

41. Normally she uses Saturdays for shopping, auto touring and gardening, but on Saturday, June 21, 1980, she stayed at home (with the exception of a half-hour outing) because she felt constrained to do so by the one-half hour response time requirement of the "April 7th Policy".

42. She submitted a request for cash overtime for being "available" on June 21, 22, 25, 1980, but, by memo dated July 8, 1980, District Director Parris denied her request (Grievants' Exhibit 5).

43. The District Director of the Burlington SRS District Office regularly prepares statistics on the number of telephone calls received by "available" employees. The statistics show the total number of calls reflected on the telephone logs kept by "available" employees, and breaks the calls down into various categories (for example: child abuse, child neglect). The statistics also show the average length of time of calls, and the number of times "available" employees had to leave their homes (i.e., were "called out") in response to calls. The statistics for the period May 1, 1980 to September 30, 1980 (Grievants' Exhibit #19) show that "available" workers took 78 calls during the month of June, that during the entire five-month period the average call lasted

45 minutes, and that during the month of June 1980, there were four "call outs".

MARK SCHROETER

44. Schroeter has been employed by SRS since November 27, 1979. In May, 1980, his position was Juvenile Services Social Worker (Pay Scale 14), and his workplace was the Rutland SRS District Office. His responsibilities consisted of intervening in crisis situations involving adolescents.

45. In May of 1980, he lived in the community of Leicester, Vermont, which is located about 25 miles (or 30-35 minutes driving time) from the Rutland SRS District Office. His living quarters in Leicester were located on the second floor of a logging contractor's garage. He was unmarried in May of 1980.

46. He was assigned to be "available" more than once under the "Brady Policy", but was assigned to be "available" only once (i.e., for one week) under the "April 7th Policy": from 4:30 p.m. on Friday, May 16, 1980 to 7:45 a.m. on Friday, May 23, 1980.

47. Unlike the Burlington SRS District Office, the Rutland District Office did not provide beepers to "available" social workers, and only one worker was assigned to be "available" during any given seven-day period.

48. When he read the "April 7th Policy", it was clear to him that an "available" worker had to be reached by telephone within a half hour after the attempt to reach him was begun. It was his view, too, that the "April 7th Policy" held the "available" worker to approximately the same response time to which he would be subject during normal working hours. The difference, in his view, is one of the worker's state of mind;

that is to say that during normal working hours a worker would, because of the nature of the job, be prepared to deal quickly with an emergency situation, but during non-working hours, it would be more difficult for him to do so. On the other hand, just the knowledge of an "available" worker that the next time the telephone rang it could very well be an "emergency" telephone call, intruded upon the "available" worker's frame of mind, thereby interfering with the quality of his "available" hours.

49. During May of 1980, he lived with his brother. When his brother was not at home, however, during the period of his "availability", he did not work in his garden, as he would usually do during his free moments, because of concern that he would be unable to hear the telephone ringing in his second-floor apartment. While he could have gone to the garden, worked for 30 minutes, then returned to his apartment and called the answering service to "check in", he did not do so because one of the pleasures of gardening is not working against the clock.

50. During his May 1980 period of "availability", he did, on occasion, go into the town of Brandon to do some shopping. When he did so, he called the answering service every 30 minutes to inquire about telephone calls.

51. He also enjoys the game of golf, which he decided to forego during his period of "availability" in May of 1980. His decision to do so was based on an experience he had while "available" under the "Brady Policy". Under the "Brady Policy", he had, after the VLRB decision, assumed he, as an "available" worker, had two hours to respond to emergency calls, so he had begun a nine-hole game of golf on Bennington Rattle Day. On the fifth hole, he was summoned to the telephone to take a call involving children who had to be placed in foster homes because their

mother had shot their father. Because of the true emergency nature of that call, he immediately left the golf course without finishing his game in order to make arrangements for the children's immediate placement. Because of that experience, and because, as he understood the "April 7th Policy", he was required to call the answering service every 30 minutes, he decided not to risk the destruction of the pleasures of golf and the loss of greens fees by playing while "available" under the "April 7th Policy".

52. During 1980, he also played on two softball teams. He elected not to play any games during his period of "availability" during May, 1980, because there were no telephones on the ballfields where his team played.

53. During his May, 1980, period of "availability" he did go out to dinner on one occasion. He dined at a restaurant in Middlebury, and, while there, called the answering service every 30 minutes. While dining there, he did receive one "emergency" call, which involved the theft of a committed child's nightclothes from a clothesline. After that experience, he did not venture to dine out again during his period of "availability".

54. On one occasion during his May, 1980, period of "availability", he had planned to drive from Rutland to the Burlington area during working hours in order to visit three new "clients" in that area. Because the three planned visits would take up most of the day, he also planned to spend the night in Burlington (even though he was "available" that day), and return to Rutland the next day. He discussed his plans with Bernie Germaine, Field Operations Supervisor, because he was uncertain whether in carrying out his plans he would be in compliance with the "April 7th Policy". Mr. Germaine advised him that his planned overnight stay in Burlington would not be in compliance with the "April 7th Policy",

since he would be unable to travel from Burlington to Rutland in one hour. As a result of Mr. Germain's advice, he changed his plans so that he could return to the Rutland area by the end of working hours on the day of his trip to Burlington. This necessitated his making two trips on two days to the Burlington area.

55. During his May, 1980, period of "availability", he logged in 11 phone calls (Grievants' Exhibit 28, Pages 2-3).

56. As a result of his period of "availability", he submitted a request for overtime pay (Grievants' Exhibit 21), which was disapproved on June 4, 1980, by Carol LaBreque, Director of the Rutland SRS District Office.

WILLIAM HERRINGTON

57. In May, 1980, Herrington was a Social Worker (Pay Scale 14), and his workplace was the Rutland SRS District Office. He was assigned "availability" duty from May 5, 1980, to May 9, 1980, and from May 12, 1980, to May 15, 1980.

58. While on "availability" duty on May 7, 1980, he logged in a three and one-half hour phone call. For the "availability" period May 12-15, 1980, he logged in six phone calls, totalling two hours (Grievants' Exhibit 28, Page 1-2).

59. For his period of "availability", he submitted a request for overtime pay. The request was denied on June 4, 1980, by District Director LaBreque (Grievants' Exhibit 22).

60. On March 27, 1981, at a meeting in Burlington among SRS Commissioner Burchard (the successor to Stoneman), Tom Moore (Director of Social Services), Marion Parris (Burlington District Director), Sue LaGasse, and various Social Workers from the Burlington SRS District Office, SRS

Deputy Commissioner Marion Cummings told the group gathered that she had drafted the specific wording of the "April 7th Policy" in order to force the Vermont Labor Relations Board, or the Vermont Supreme Court, to determine what "on call" is.

OPINION

In the grievances before us, Grievants claim the Agreement entitles them to overtime compensation for all hours they were on "availability" duty under the "April 7th Policy", because they were, in fact, "on call" when on "availability" duty.

Article XVIII, Section 5(d), Agreement, provides:

An employee who is "on call" shall be considered as having worked for the purposes of computing overtime except as might otherwise be required under Paragraph (b) of Article XXI, "On Call".

Article XXI, Agreement, reads in its entirety:

a. "On Call" is defined as a requirement that an employee remain on or so close to either the employer's or employee's premises that he cannot use the time effectively for his own purposes.

b. An employee who is merely required to leave word at his home or with the appointing authority where he may be reached is not on call; however, appointing authorities in cooperation with the Department of Personnel are urged to work out alternative compensation methods, such as compensatory time off, for employees who are required to leave word where they may be reached and must be within any specific distance or time of their employer's premises.

The Agreement specifies three distinct categories of employees who are on the following decreasing degrees of "available" status during their regular off-duty hours:

1. employees required to remain on or so close to either the employer's or employee's premises that they cannot use the time effectively for his own purposes. These employees are "on call".

2. employees who are required to leave work where they may be reached and must be within any specific distance or time of their employer's premises.
3. employees who are merely required to leave work at their home or with the appointing authority where they may be reached.

Employees in these categories are contractually entitled to differing degrees of compensation. The first category is considered as having worked for purposes of computing overtime. Appointing authorities, in cooperation with the Department of Personnel, are urged to work out alternative compensation methods, such as compensatory time off, for employees in the second category. Employees in the third category are not contractually entitled to any compensation.

Grievants, in the case at hand, claim they were "on call" when on "availability" duty under the "April 7th Policy"; and thus were in the first category of employees and entitled to overtime compensation. The State contends they were in the second category of employees, and since they were given a day of compensatory time off for every seven days on "availability", Grievants were compensated in accordance with the Agreement.

The question before us is whether Grievants were, in fact, "on call" and entitled to overtime compensation. Were Grievants waiting to be engaged or engaged to wait? If the employee is so limited in his activities that his time cannot effectively be used as his own, then his availability is more beneficial to the employer than the employee, and he should be compensated for he is then "on call". He is engaged to wait. On the other hand, if the employee, while making himself available, may still carry out functions of his own and is only limited to a telephone number where he can be reached and a location from which he can respond to the call within a reasonable time, then he is not on call. He is waiting to be engaged. In re: Grievance of Brady ___ Vt. ___ (April 24, 1981).

Whether employees are waiting to be engaged or engaged to wait must be decided upon the facts in each case. Whether the time spent is predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case. Armour and Co. v. Wantock, 323 US 126, 133 (1944); Skidmore v. Swift and Co., 323 US 134, 140 (1944).

These grievances are distinguishable from Brady, supra, in that the respective "availability" policies differed. The so-called "Brady Policy" required "available" employees to deliver their services "in a manner and in a time-frame considered appropriate for services rendered during duty hours". The "appropriate time frame" was nowhere defined in the policy and, thus, the responsibilities of "available" employees was unclear. The "April 7th Policy", in contrast, explicitly defined the appropriate time-frame. An "available" employee was required to be reachable by phone within one-half hour and report to the office for duty, if necessary, within an hour from the time of contact.

It is undisputable here that being available under the "April 7th Policy" did limit the activities of Grievants. First, Grievants had to be reachable by phone or otherwise within one-half hour. Grievants working out of the Burlington SRS District Office were provided with beepers. The beepers allowed the Burlington Grievants the freedom of not having to call in to the answering service every half hour if they were away from their home or a location where the answering service could contact them. They simply had to be within a half hour of a telephone. For Grievants working out of the Rutland SRS District Office, the lack of a beeper meant they were more restricted as they had to call in to the answering service every half hour if they were away from a location

where the answering service could contact them. Second, Grievants had to be prepared to report to the office for duty, if necessary, within an hour from the time of contact. This restricted them to remaining within an hour of their respective district offices; certainly limiting any travel they may have wanted to do. These restrictions eliminated the possibility of Grievants engaging in such activities as traveling more than an hour from their office, sailing, and, for Grievants working out of Rutland, (due to lack of a beeper) playing golf, softball, and attending movies.

Nonetheless, we do not find that Grievants were "on call" as defined by Article XXI(a), Agreement. They, in no case, were required to remain "on or so close" to their homes or offices they could not use their time effectively for their own purposes. The "April 7th Policy" allowed Grievants to spend their time largely as they chose so long as they maintained contact with the answering service and were within an hour of the office. Grievants were free to perform most of their leisure time activities, such as most sports, shopping, gardening, social visits, church, and dining. Grievants expressed reluctance to engage in many of these activities for fear of being interrupted. Admittedly, they may have had to occasionally interrupt these activities, but their freedom to engage in them was not prohibited by the "April 7th Policy". The policy did not compel them to refrain from engaging in the activities. This is not to downplay the effect being "available" has on an employee's state of mind and their ability to relax during their leisure time. However, they can, in fact, use their time effectively for their own purposes - to engage in most of the activities they normally would during their leisure time. As stated in Pilkenton v. Appalachian Region Hospital, 336 F. Supp. 334, 338 (W.D. Va, 1971), the test is not

whether an employee's leisure is curtailed at all, but rather whether it is so restricted that it is not spent primarily for the employee's benefit. The time spent while "available" was predominantly for the benefit of Grievants, not the State.

We are aware Rutland Grievants were restricted in their activities to a degree significantly greater than their Burlington counterparts. Nonetheless, they were not on call and, thus, not entitled to overtime compensation for the time on availability status.

The compensation paid to Grievants here met the contractual obligations of the State. Grievants were in the second category of "available" employees under the Agreement - employees who are required to leave work where they may be reached and must be within any specific distance or time of their employer's premises. Accordingly, the method of providing Grievants with a compensatory day off for every seven days of availability fulfilled the requirements of Article XXI(b). In addition, when Grievants were contacted while "available", they were paid for all time talking on the phone, and, if they were "called out", were guaranteed a minimum three hours pay.

ORDER

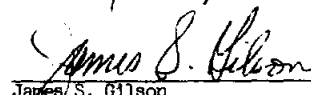
Now, therefore, based on the foregoing Findings of Fact and for all the foregoing reasons, it is hereby ORDERED that the Grievances of Mark Bornstein, William Rowe, Sue LaGasse, William Herrington and Mark Schroeter be DISMISSED and are DISMISSED.

Dated this 3rd day of September, 1981, Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William E. Kenney, Sr.


James S. Gilson