

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

JOHN IMBURGIO

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DOCKET NO. 88-14

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 9, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of John Imburgio ("Grievant"). The grievance alleged that the State of Vermont, Department of Public Safety ("Employer") discriminatorily applied a rule of the Employer in denying Grievant permission to join the military reserves.

A hearing was held before Labor Relations Board members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Louis A. Toepfer on April 28, 1988. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant.

Grievant filed Requested Findings of Fact and a Memorandum of Law on May 4, 1988. The Employer filed a Memorandum of Law on May 5, 1988.

FINDINGS OF FACT

1. Grievant is a uniformed member of the Vermont State Police and is covered by the collective bargaining agreement between the VSEA and the State for the State Police Unit, effective for the period July 1, 1986 - June 30, 1988 ("Contract"). He has been employed by the Employer in that capacity for about 6½ years, and holds the rank of Senior Trooper, pay grade 18. At all times relevant, Grievant has

been assigned to the Middlesex station. There are approximately 18 Troopers assigned to that station.

2. Prior to working for the Employer, Grievant had served on active duty in the United States Air Force. At the time of his hire, Grievant had satisfied his military obligation, and was not a member of the Air Force Reserves.

3. Pursuant to 21 VSA §1874(a), the Commissioner of Public Safety is given the authority, subject to the Governor's approval, to promulgate rules for the administration of the Department of Public Safety. Pursuant to that authority, the Commissioner issued the following rule:

"No member shall engage in off-duty employment outside of the Department without having first obtained permission from the Commissioner or his/her designee. Permission may be denied if it appears that the outside employment might render the member unavailable during an emergency, physically or mentally exhaust the member to the point that his/her performance of duties might be affected, or require that any special consideration be given to scheduling the member's regular duty hours." (Grievant's Exhibit 1).

4. The Employer interprets this "moonlighting" rule to apply to military reserve duties, but not to active military service. The Employer has concluded, pursuant to the Contract and federal law, that the Employer may not prohibit a State Police member from enlisting for active military service and must allow the member to return to his position upon completion of the active duty obligation. However, the Employer applies the "moonlighting" rule if a member wishes to undertake a military reserve obligation.

5. In early 1987, Grievant began inquiring into the possibility of joining the Air Force Reserves as an OSI (Office of Special Investigations) Reservist. The Air Force OSI is charged with investigating

matters of fraud and violent felonies, and is involved with counter-intelligence. Grievant's motivation in inquiring into such an obligation was to obtain more training in criminal investigations, which knowledge he could apply to his duties as a State Police Officer. As the result of his inquiry, Grievant learned that his initial training, while on active duty, would consist of a two-week school (with classes in interviewing techniques, fraud investigations, investigating major crimes, forensics, etc.), which school would satisfy his active duty obligation for calendar year 1987. He also learned that he could satisfy his annual 12 days of reserve duty by scheduling such duty on his regular days off. (Grievant's Exhibit 3).

6. Grievant, in accordance with the moonlighting rule, submitted a request to the Commissioner of Public Safety for permission to become a member of the Air Force OSI Reserves. (Grievant's Exhibit 3).

7. By memorandum dated March 12, 1987, Lieutenant Colonel Robert Horton, Director of the State Police, acting as the designee of the Commissioner, denied Grievant's request and informed him:

I find that I must deny this request based on the number of active reservists at the Middlesex Station at this time. However, should those members already involved in a reserve status elect not to re-enlist or are transferred to a new duty station, I will reconsider your request. (Grievant's Exhibit 4).

8. Horton based his denial of Grievant's request on a combination of applying the "moonlighting" rule and an unwritten policy of the Employer that one State Police member per station is allowed to be on military reserve duty. At the time Grievant's request was denied, there were approximately four reservists at the Middlesex Station.

9. This unwritten policy has not been reduced to writing because the following circumstances have resulted in some workplaces

in the Department having more than one member on military reserve duty: 1) some members created a reserve obligation over which the Employer had no control by enlisting in the active military service, subsequently returning to employment in the Department, and having a reserve obligation upon completion of the active service phase of their enlistment; and 2) over time there have been transfers of members who have reserve obligations. Pursuant to federal law, the Employer cannot require members to resign from the reserves.

10. The Middlesex Station and Department headquarters each presently have more than two employees on military reserve duty due to the circumstances described above in Finding #9.

11. The purpose of the "one-member" policy is to ensure that enough members are available to staff the station in emergencies and all other circumstances.

12. The unwritten "one member" policy does not apply to non-military "moonlighting" by State Police members. The distinction made by the Employer relates to the nature of "moonlighting" employment. If a member working in a non-military "moonlighting" job is called into work by the Employer due to an emergency, the Employer requires the member's first obligation to be to the State Police. However, the Employer expects that a member working a military "moonlighting" job will not be able to leave that reserve duty even in the event of a State Police emergency.

13. The "one-member" policy uniformly has been applied in situations where a member requests permission to join the military

reserves and at least one member in the Station already is on reserve duty. In all such cases, the request has been denied. There have been cases where denials have been changed to approvals when circumstances change in the applicable station so that no other members are on reserve duty.

#### OPINION

At issue is whether the denial by the Employer of Grievant's request for permission to join the Air Force Reserves constituted a discriminatory application of the "moonlighting" rule.

3 VSA §902(14) defines grievance, in pertinent part, as the "discriminatory application of a rule or regulation." Grievant first contends that a violation of this provision occurred because the Employer was bound by the "moonlighting" rule, and that rule was violated in that it was not the basis for denial of Grievant's request.

Discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination. Id., at 102-103. Grievance of Roll, 2 VLRB 228, 233 (1979).

However, we disagree with Grievant that the decision to deny Grievant's request was not founded upon the "moonlighting" rule. We have concluded by a preponderance of the evidence that the decision was based on the "moonlighting" rule in combination with the unwritten "one member" policy. The purpose of the unwritten policy addressed one of the bases of the "moonlighting" rule for denying a

"moonlighting" request; specifically "that the outside employment might render the member unavailable during an emergency." It is fair to conclude that the unwritten policy essentially was a specific application of a more general rule to particular circumstances. Thus, the Employer did not fail to apply its rule in denying Grievant's request.

Grievant next contends that, even if the decision was based on the "moonlighting" rule, the rule was not uniformly applied. We conclude that Grievant was not treated unequally. The evidence indicates that, in situations where a member has requested permission to join the military reserves and at least one member of the station already has reserve obligations, as was the situation in Grievant's case, the request uniformly has been denied. Thus, there was no discrimination against Grievant.

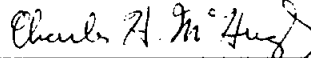
The fact that the "one member" policy was applicable only to military reserve obligations, and not to non-military "moonlighting", and that in some circumstances more than one member per station was on reserve duty, does not constitute discriminatory application of a rule to Grievant. The distinction with respect to military versus non-military moonlighting is based on a legitimate management concern about staff availability during emergencies. Essentially, the distinction made constitutes permissible dissimilar treatment due to dissimilar circumstances. The situations where more than one member per station were on reserve duty resulted from military obligations over which management had no control and transfers. These are circumstances much different than those with respect to Grievant's request, and do not indicate discriminatory treatment of Grievant.

ORDER

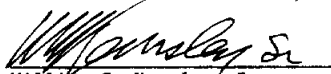
Now therefore, based on the foregoing reasons, it is hereby  
ORDERED the Grievance of John Imburgio is DISMISSED.

Dated the 20<sup>th</sup> day of May, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Charles H. McHugh, Chairman



William G. Kemsley, Sr.



Louis A. Toepfer