VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 87-43
JOHN MORIARTY	)	

FINDINGS OF FACT

Statement of Case

This matter is on remand from the Vermont Supreme Court for the Labor Relations Board to make findings on the issue of mootness.

On May 27, 1988, the Vermont Labor Relations Board issued its consolidated Findings of Fact, Opinion and Order in the Grievance of John Moriarty, Docket No. 87-43, and Appeal of John Moriarty, Docket No. 87-60. In Docket No. 87-43, the Board found that Grievant had not met his burden of proof that the transfer at issue was either discriminatory or disciplinary in nature within the meaning of 20 VSA Section 1921(b) and in violation of 20 VSA Section 1880. With regard to Docket No. 87-60, the Board upheld the charge against Grievant citing two sections of the Vermont State Police Code of Conduct, and the Board concluded that just cause existed for the suspension imposed against Grievant. Accordingly, the Board dismissed both the grievance and the appeal. Grievance of John Moriarty; Appeal of John Moriarty, 11 VLRB 183 (1988).

On June 8, 1988, Grievant's representative, the Vermont State Employee's Association ("VSEA") filed a Notice of Appeal with the Vermont Supreme Court on the issue of Grievant's transfer, Grievance of John Moriarty, Docket No. 87-43. Pursuant to stipulation of the parties, on September 21, 1989, the Vermont Supreme Court remanded the matter to the Vermont Labor Relations Board for the purpose of taking evidence on the question of whether the matter had been rendered moot by virtue of Grievant's resignation.

On March 22, 1990, a hearing on the issue of mootness was held before Board Members Charles H. McHugh, Chairman; Catherine L. Frank; and Leslie G. Seaver. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the State of Vermont, Department of Public Safety (" Employer").

On May 23, 1990, VSEA filed Requested Findings of Fact and a Memorandum of Law on Remand. On the same date, the Employer filed with the Board a Memorandum of Law on Remand, and filed a Motion for Clarification of Board Function with the Vt. Supreme Court. Pursuant to the Motion for Clarification of Board Function, the State argued that the Board should decide the issue of mootness as well as make findings of fact. In VSEA's Memorandum of Law on Remand filed with the VLRB, VSEA argued that the Board's function should be limited to findings of fact on the question of mootness without deciding the issue.

On June 4, 1990, the Board notified the parties that it would defer further action pending the ruling of the Vermont Supreme Court on the State's Motion for Clarification. On June 11, 1990, the Vermont Supreme Court issued an Entry Order stating that it is sufficient for the Board to take evidence and make findings on the issue of mootness.

FINDINGS OF FACT

1. Grievant is forty years old. At the time of his resignation discussed herein, Grievant had been employed by the Vermont State Police for a period of approximately seventeen and one-half years. In August of 1987, immediately following disciplinary action for charges of improper conduct brought against Grievant, Grievant received notice of a transfer reassignment from the Brattleboro Station, where he was then employed, to State Police Headquarters in Waterbury. Grievant was initially told that the transfer reassignment was temporary.

2. As a result of the transfer, on September 1, 1987, the VSEA filed a grievance on behalf of Grievant with the Vermont Labor Relations Board. The grievance asked that the Board find that the transfer was either discriminatory or disciplinary in nature, rescind the transfer thereby reinstating Grievant at the Brattleboro Station, and grant such other relief as the Board deemed necessary and proper. That grievance, Docket No. 87-43, resulted in a hearing and decision, the Findings of Fact of which are incorporated herein by reference. See Grievance of Moriarty; Appeal of Moriarty, 11 VLRB 183 (1988).

3. As a result of the transfer, Grievant and his supervisors worked out an arrangement whereby Grievant would be allowed to commute to and from Waterbury on work time, in a State vehicle at State expense, during the term of his grievance appealing the transfer reassignment. See Grievance of Moriarty, 11 VLRB at 198-99, 201 (Findings #31-37, 42).

4. The round trip distance between Grievant's home in Vernon, Vermont and State Police Headquarters in Waterbury, Vermont is about 265 miles. Depending on weather and traffic conditions, the round trip required about four hours daily. Grievant normally worked a 9 1/2 to 10 hour day.

5. On November 2, 1987, Department of Public Safety Commissioner James Walton issued a Special Order, effective January 10, 1988 at the latest, which made permanent Grievant's transfer to Headquarters in Waterbury. See Grievance of Moriarty, 11 VLRB at 200-201 (Finding #41). During December, 1987, Grievant was told by his supervisors that he would subsequently only be allowed to commute one-half of the round trip on work time; the other half of the commute would have to be made on Grievant's own time outside of normal working hours. It is generally Department procedure that, when a transfer is made permanent, the affected officer

has to move within 20 miles of their work station. The Department generally pays for temporary housing for 14 days while the officer seeks permanent housing. However, in Grievant's case, it was agreed that Grievant would not be required to establish residence in the Waterbury area during the term of his grievance appeal. See Grievance of Moriarty, 11 VLRB at 201 (Finding #42).

6. While Grievant was assigned to Headquarters in Waterbury, he was the subject of several incidents which he found to be demoralizing and which diminished his trust in his superiors. One of the incidents concerned Grievant not being notified in a timely manner by his superiors of a letter of commendation being placed in his personnel file, although it is Department policy that such notification be provided. Another incident concerned Grievant receiving a memorandum from his supervisor alleging that Grievant had exercised extremely poor judgment and improperly used federal funds provided for speed enforcement by engaging in four hours of overtime work performing speed checks on a day when the general rate of travel was very slow due to hazardous weather conditions. Grievant, in fact, worked only two hours of overtime on that date, and during that overtime attended to two accidents due to unavailability of other officers. Following Grievant's written response to and denial of the allegations, Grievant's supervisor offered to retract the memorandum. A further incident concerned Grievant compiling a list of common navigational points on Lake Champlain, including corresponding chart numbers and latitude and longitudinal coordinates. Grievant did this work on his own time and was not assigned to do such work by his superiors. When Grievant's supervisor learned that a Department secretary had spent approximately two hours of work time typing on this project, Grievant's

supervisor told Grievant not to perform the project on work time, told Grievant that the State Police would not use Grievant's project, and instructed Grievant not to publish the project (Grievant's Exhibit 5, 6 and 7 on Remand).

7. On May 27, 1988, the Vermont Labor Relations Board issued its decision in Docket Numbers 87-43 and 87-60, and ordered that the grievance and appeal be dismissed.

8. On May 28, 1988, Grievant interviewed for employment at Vermont Yankee Nuclear Power Plant located in Vernon, Vermont. At the time of the interview, Grievant informed Vermont Yankee that he intended to appeal the VLRB decision to the Vermont Supreme Court, and that if Grievant prevailed on appeal he would seek reemployment with the State Police. Grievant recognized that, even if he prevailed on appeal, his reinstatement by the State Police would not be automatic.

9. On June 8, 1988, VSEA filed a Notice of Appeal with the Vermont Supreme Court with respect to his grievance, VLRB Docket No. 87-43.

10. Sometime during late September or early October of 1988, Grievant was offered employment with Vermont Yankee. Shortly thereafter, Grievant discussed the offer with Colonel Robert Horton, Director of the Vermont State Police. Grievant told Horton that he would be unable to continue commuting for the time it took his grievance to be heard on appeal, a period that Grievant estimated to be another one and one-half to two years, and that Grievant intended to submit a request for a leave of absence from the Department until his appeal was decided. Horton told Grievant that he would recommend that Grievant's request for a leave of absence be denied. Horton understood that Grievant would resign if the request for a leave of absence was not granted. Grievant gave Horton two

weeks notice, and told Horton that whether the request for a leave of absence was approved or denied, Grievant would accept the employment offer with Vermont Yankee.

11. On September 30, 1988, Grievant submitted a written memorandum to Commissioner Walton requesting a leave of absence from the Department during the term of Grievant's appeal to the Vermont Supreme Court. In pertinent part, that memorandum states:

> I have, for the past thirteen months, exercised my right of appeal with regard to your decision to transfer me from Station Commander in Brattleboro to Assistant Staff Operations Officer here at Headquarters. In order to pursue this appeal I have found myself faced with two options during the interim. One was to support myself, at my own expense, in the greater Headquarter's area. The other was to commute daily from my home in Vernon. Inasmuch as I had already, once before, incurred this kind of expense when I originally moved to Brattleboro (for a period of ten months) I could not aford either from a financial or a family standpoint to do this again and for a much longer period of time as well.
>
> The only alternative was to attempt the commute. After thirteen months . . . I have driven in excess of 60,000 miles. . . . [T]wo hours of my workday are spent on the road . . . . I spend two additional hours of my own time each day while commuting. . . . [which time] is uncompensated for.
>
> The length of this process has put a strain on my relationships here at work and at home. It has had a decided effect on my energy level, interest, enthusiasm and morale. I have become physically exhausted as well as demoralized with respect to my career and future with the Vermont State Police.
>
> I feel that the situation I have experienced over the past year would not be prescribed by anyone as a healthy, desirable work environment.
>
> I do feel, however, that I am entitled to pursue my right of appeal.
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> Inasmuch as . . . . I am faced with at least another eighteen to twenty-four months before the process is complete, I am convinced it would be in the best interests of the Department and myself for this commuting situation to end. Given the numbers I have described, to keep this up for this period of time presents an intolerable situation.
>
> It is also a situation which I feel no one should have to bear in order to exercise their rights.

> I respectfully request a leave of absence pending the final disposition of my appeal. . . .
>
> Finally, I feel there is a need for me to separate myself now from the Department for a period of time. This leave of absence will afford me that opportunity so that when my appeal is finalized I will be better prepared to continue my career or not.
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> I would like to make it clear that this request is not predicated upon the eventual outcome of my appeal but simply that I can no longer continue in this way while waiting for the process to be completed (Grievant's Exhibit 1 on Remand.)

12. The need to separate himself from the Department, to which Grievant made reference in the next to the last paragraph of his memorandum, referred in part to Grievant's demoralization resulting from the incidents referred to in Finding of Fact #6.

13. On October 3, 1988, Grievant submitted a written memorandum of resignation to Commissioner Walton. That document stated:

> Please be advised that in light of your denial of my request for a leave of absence and for the reasons outlined in that request, I regretfully resign my position with the Vermont State Police effective Thursday, October 27, 1988 (Grievant's Exhibit 2 on Remand.)

14. At some point during the period September 30 to October 3, 1988, Grievant met with Colonel Horton and gave Horton a copy of the request for a leave of absence and of the written resignation, both addressed to Commissioner Walton. Grievant wanted Horton to be aware that denial of Grievant's request for a leave of absence would result in Grievant's resignation from the State Police. Grievant's supervisors questioned him as to whether resigning was what Grievant really wanted to do. Grievant informed his supervisors that he did not want to resign or leave the Department. Before the transfer, Grievant had never considered resigning from the State Police. Grievant believed that if his request for a leave of absence was denied, he would have no other option but to resign.

15. On October 17, 1988, Grievant began employment with Vermont Yankee Nuclear Power Corporation in the position of security supervisor.

16. On October 18, 1988, Commissioner Walton wrote a letter informing Grievant that Grievant's request for a leave of absence was denied. That letter provided in pertinent part:

> I regret to inform you that I must deny your request for a leave of absence. While I can sympathize with the difficulties you have experienced, you must also realize that it is the same situation encountered by all Troopers who are faced with a transfer. Your commuting time also brings with it a definite strain on the Department. I feel Lieutenant Colonel Horton has been extremely flexible during your appeal process by allowing you to commute for two hours into your normal work day resulting in the loss of much needed work time (Grievant's Exhibit 3 on Remand).

17. On October 19, 1988, Commissioner Walton informed Grievant that his resignation dated October 3, 1988, had been accepted (Grievant's Exhibit 4 on Remand).

18. By virtue of Grievant's resignation, Grievant forfeited 270.25 days of accumulated sick leave, and lost the right to continue as a member of the State Employees Medical Benefit Plan. Grievant's resignation adversely affected the amount of retirement allowance he will ultimately receive from the State, and delayed his retirement eligibility date. By virtue of his resignation, Grievant also lost the right to be considered for promotion to the rank of Captain. At the time of Grievant's

resignation, Grievant was among the three candidates from whom the selection for Captain would have been made.

Dated this 23rd day of August, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank, Member

Leslie G. Seaver, Member