VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION and GARY GENOVA	)	DOCKET NO. 03-1
	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 2, 2003, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of itself and Gary Genova (collectively referred to as "Grievants"), alleging that the Vermont Department of Public Safety ("Employer") violated Article 15, Section 2, of the collective bargaining agreement between the State of Vermont and the VSEA for the State Police Unit, effective July 1, 2001, to June 30, 2003 ("Contract"); Vermont State Police Rules Section III, Article II, Part C, Section 6.0, and Personnel Policy 2.3, Chapter 3, 3.015 by refusing to allow Genova to engage in off-duty canine training and consultation.

The Labor Relations Board held a hearing on July 10, 2003, in the Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Carroll Comstock and John Zampieri. William Reynolds, Assistant Attorney General, represented the Employer. Michael Casey, VSEA Deputy General Counsel, represented Grievants. The Employer and Grievants filed post-hearing briefs on August 11, 2003.

FINDINGS OF FACT

1. Article 15, Section 2(b), of the Contract provides:

> "Grievance" is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

2. Section III, Article II, Part C, Section 6.0 of the Vermont State Police Rules and Regulations provides in pertinent part:

EMPLOYMENT OUTSIDE OF DEPARTMENT

> 6.1 No member shall engage in off-duty employment outside of the Department without having first obtained permission from the Commissioner or his/her designee.
>
> 6.2 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 by affected, or require that any special consideration be given to scheduling the member's regular duty hours. . .
>
> (Grievants' Exhibit 12, State's Exhibit 14)

3. The State Personnel Policies and Procedures provide in pertinent part:

Number 2.3

Applicable To: All classified employees with the Executive Branch of the State of Vermont.
. . .
3.015 An employee shall not engage in any employment, activity or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with his duties as a classified employee or with the duties, functions, or responsibilities of the agency by which he is employed.

. . .

Number 5.2
. . .
Subject: CONFLICTS OF INTEREST ARISING FROM EMPLOYMENT
. . .
Applicable To: All classified employees, as well as exempt, appointed, temporary, contractual, and applicants for employment with the Executive Branch of the State of Vermont.
. . .
<u>POLICY STATEMENT</u>

> It is the State's responsibility to conduct employment matters in a manner that avoids not only conflicts of interest, but also any appearance of a conflict of interest. Conflicts of interest may arise in . . . outside employment or activities engaged in by employees . . .
>
> . . .
>
> **Number 11.5**
> . . .
> **Subject: INCOME FROM OUTSIDE SOURCES (MOONLIGHTING)**
>
> **Applicable To:** All classified employees, as well as exempt, temporary, contractual, and appointed, with the Executive Branch of the State of Vermont.
> . . .
> PURPOSE AND POLICY STATEMENT
>
> . . . Employees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties as classified employees, or with the duties, functions, or responsibilities of the agency by which they are employed.
> . . .
> (Grievants' Exhibit 12, State's Exhibits 16 & 17)

4. The State Personnel Policies and Procedures have been applied to State Police members as exempt employees. Among the personnel policies and procedures that have been applied to them concern bloodborne pathogens, pay plan administration, implementation of benefits, sexual harassment and non-discrimination. The State has provided notice to VSEA since at least 1996 that the State Personnel Policies and Procedures apply to State Police members. Prior to this grievance, VSEA had not objected to the application of the policies and procedures to the State Police.

5. Gary Genova has been a member of the State Police since 1987. In 1988, he became a canine handler. In 1996, Genova was promoted to the rank of Sergeant and assigned to the Training Division as a head trainer at the Vermont Police Academy in Pittsford, his current position. He is Head Canine Trainer for the Vermont State Police Canine Program at the academy.

6. The Vermont Police Academy and the Vermont Police Canine Program are run by the Vermont Criminal Justice Training Council ("VCJTC"), which is made up of various state and local law enforcement officials. The VCJTC has promulgated education and performance standards for canines to meet to be certified. There is no requirement that canines involved in law enforcement in Vermont be certified by the VSJTC or any other entity. Most law enforcement agencies in Vermont who do use canines voluntarily choose to have them certified by the VCJTC.

7. Vermont law enforcement agencies that seek to have their canines certified through the VCJTC first must apply to the VCJTC Executive Director, with documentation on training the canine has received. As Head Trainer, Genova usually then assesses whether the canine is a viable candidate for certification. Generally, 10 – 12 canines will be examined before one or two are found to be viable candidates. Training a viable candidate for certification generally takes four-five months. Training can be provided through the Vermont Police Canine Program or through private trainers. Most law enforcement agencies in Vermont receive training through the Vermont Police Canine Program.

8. Genova has personally trained approximately 100 hundred canines through the Police Canine Program. He is the only full-time trainer for the Police Canine Program. All of the canines trained by him that have sought VCJTC certification have received it. Part-time trainers also are involved in training canines for the Police Canine Program. Genova supervises the part-time trainers.

9. The VCJTC has established the Canine Committee to oversee the testing and certification of canines. The Canine Committee consists of members of various law

enforcement agencies in the State. Four members of the Canine Committee also are part-time canine trainers supervised by Genova. Three of the seven or eight members of the Canine Committee participate in testing a canine team for certification, and two members participate in testing of canines for recertification. The Canine Committee recommends canines for certification to the VCJTC.

10. As Head Canine Trainer, Genova is on the Canine Committee. It has been longstanding practice, predating Genova's tenure as Head Canine Trainer, that the Head Canine Trainer generally not participate in the certification process due to having trained many of the dogs being tested. Genova participated in the certifications of one or two of the approximately 70 teams certified over the past two years.

11. If a member of the Canine Committee has trained a canine that is seeking certification or recertification, the member is not on the Canine Committee review team evaluating a canine. The Vermont Police Canine Program Manual provides that "(m)embers of the Certification Committee, who are applying for certification, or are part of a working K-9 team and applying for the annual recertification . . . shall not participate in the decision-making process during their own certification or recertification" (State's Exhibit 11).

12. If the judging members of the Canine Committee determine that a dog meets VCJTC standards to be certified, that determination is sent to the VCJTC for actual certification. Genova is not a member of the VCJTC. All dogs certified in Vermont were trained in Vermont except for three dogs. Two of the three dogs were trained by a New York trainer who moved to Vermont; the third dog was trained in Michigan and was sold to a municipal police department in Vermont.

13. As Head Canine Trainer, Genova works a Monday through Friday daytime schedule. It is unusual for him to work overtime or to be called out in emergencies.

14. Genova is married and has four children. By law, he must retire from the State Police when he reaches the age of 55. As a means to earn additional income now and serve as a transition into retirement, Genova and his wife planned to open a canine kenneling, training and consultation business. In early 2002, they registered a trade name, "Canine Specialty Services", and created an Internet web site for the business that indicated that all training and purchasing was guaranteed. The guarantee means that Genova will train another dog or refund the client's money if a dog he trains does not pass certification as a police canine. Genova and his wife intended to construct a kennel at their residence in Monkton, Vermont, and provide lodging, training and consultation there. They initially intended to provide canine training, including for law enforcement purposes, to canines for use in Vermont or out of state. Genova intended to work in the business on evenings and weekends when he did not work for the State.

15. Genova sent a memorandum dated February 10, 2002, to Commissioner of Public Safety A. James Walton, Jr., that provided in pertinent part:

> I am currently in the planning stages of building a kennel facility at my residence. I am considering starting a side business involving short and long term kennel care, private canine training and consultation.
>
> Pursuant to Department Policy (Section III, Article II, subsection 6.0) I am requesting authorization to actively pursue outside self-employment. I believe that the business nature of this employment would only advance my experience and capabilities in the canine profession, and in no way would this venture interfere or adversely affect my commitment to the department or my position duties (Grievants' Exhibit 1, State's Exhibit 2).

16. Lieutenant Craig Iverson, Vermont State Police Director of Training and Genova's immediate supervisor, and Captain Mark Metayer, Staff Operations Officer and Iverson's supervisor, made written representations on Genova's memorandum to Commissioner Walton that they supported Genova's request for authorization for outside employment (Grievants' Exhibit 1).

17. Genova has worked under Lieutenant Iverson for 10 – 12 years. At all times relevant, Iverson observed Genova's work on a regular basis and was familiar with his responsibilities. At all times relevant, Captain Metayer was familiar with Genova's work and responsibilities.

18. Lt . Colonel Thomas Powlovich, Director of the State Police, sent Genova a memorandum dated February 26, 2002, that provided in pertinent part:

> I have received your request for outside employment. From my discussions with Lt. Iverson, it is my understanding that you will be training young canines to become "police canines" and then sell the dogs to police agencies looking to purchase trained police dogs.
>
> I see this type of employment as too similar to the work you do with the Department, and, at times, would come in conflict with your present position.
>
> Therefore, I am denying your request for outside employment in canine kennel care, training and consultation (Grievants' Exhibit 2, State's Exhibit 3).

19. After Powlovich denied Genova's request for outside employment, Genova and Iverson met with Powlovich on March 27, 2002, to discuss why Genova's request was denied. Powlovich expressed concerns about the outside employment constituting a conflict with Genova's State Police duties, Genova taking on more than he could handle and the potential liability to the Employer if one of the dogs trained by Genova injured someone. Genova told Powlovich he would address these concerns.

Powlovich requested that Genova respond in writing. At the meeting, Genova offered to have Iverson supervise his outside employment. Iverson supported this; Powlovich did not support it.

20. Genova sent Lieutenant Colonel Powlovich a memorandum dated March 27, 2002, that provided in pertinent part:

> Thank you again for taking the time to consider my request for outside employment, and for allowing me the opportunity to further provide you with additional information. At your request I am identifying in more detail the issues of "K9 Police Training" and all other aspects of a side business venture.
>
> **Issues of expressed concern:**
>
> - *Training and Sale of "Police K9's"* to police departments. Their(sic) was a concern regarding the amount of time I would commit to a side venture and the impact you believe it would have on my duty assignments. I am prepared to regulate the amount of actual police related training I perform off duty to a maximum of no more than six Police Patrol Dogs annually. That this training would be reserved for only those agencies that did not want to enroll in a fulltime course or any of the programs we currently offer at the academy.
>
> - *General Requests for Services.* I will deny any and all requests to do private training for any organization that would normally be involved in the VT Police Canine Program.
>
> - *Personnel and Department Liability.* I will ensure that all organizations or departments associated with my side business are solely responsible for the liability and operation of a purchased canine. That after I conclude any form of training that those agencies acknowledge and sign a legally binding liability release.
>
> - *Behavior and Management Consultation / Training.* I will refuse to be involved in any private consultation that is a part of any current activity job related. That any consultation I do will be reserved for those agencies or departments not affiliated with or actively involved in our police canine program.
>
> Above all I will ensure that any side business under my care is managed and conducted in a manner that does not interfere with or compromise my current position or standing with the department, and that the department

> will not be publicly used as a mechanism to advocate or solicit my personal business interests.
>
> Other Business Details
>
> - Software Development – I will be actively involved in software development and research. Products would be sold retail to organizations and persons desiring to automate canine training records. Available for all forms of training not just specifically for police training.
>
> . . .
>
> - Kenneling for Hire – Handled and mostly managed by my wife. Daily and Temporary placement. We desire to construct a moderate sized kennel building on our property.
>
> - General Advertisement – We would time to time actively advertise our business, whether to promote our kennel, training opportunities, selling of an animal, or to announce any free training or volunteer activity (Grievants' Exhibit 3, State's Exhibit 5).

21. Lt . Colonel Powlovich sent Genova a memorandum dated April 5, 2002, that provided in pertinent part:

> I have received and reviewed your March 27th memo, which further outlines your request for approval to train and kennel police canines in an outside employment capacity.
>
> I have shared and discussed your memo with the command staff. In considering the information that you have supplied in your memo, we are in agreement that the type of outside employment you are requesting, is too closely related to your present assignment and duties, and thereby, conflicting with your position. I am, therefore, denying your request for outside employment in canine kennel car(sic), training and consultation.
>
> Per our discussion, I have reviewed the list of members previously granted approval for outside employment. I have not found any examples of prior approval for outside employment whereby the outside employment so closely resembles the members(sic) current assignment (Grievants' Exhibit 4, State's Exhibit 6).

22. Since 1999, Lieutenant Colonel Powlovich has been responsible for reviewing requests for outside employment. Powlovich has denied officers' requests for outside employment when he has determined it would interfere with an officer's

duties or conflict with their position. He has denied officers' requests to serve as tow truck drivers due to a conflict resulting from the State Police contacting tow truck drivers in the event of motor vehicle accidents. The Employer maintains a list of individuals that have been denied and approved. Powlovich is unaware of the Employer ever being sued because of an employee's outside employment. There is no evidence that the Employer ever has been sued as a result of employees' outside employment (Grievants' Exhibits 9, 10; State's Exhibits 9, 10).

23. At all times relevant, employees of the State Police who were authorized to engage in outside employment were required to sign a memorandum that provided in pertinent part:

> 1. Employment will not be conducted where an apparent conflict with your position with the Vermont State Police may exist. . .
> 2. Your actions bring no adverse or undesirable publicity to the Department.
> 3. Employment will not be conducted in instances where you may be placed in conflict with any State or Federal Agency through testimony or otherwise.
> 4. Employment will not be conducted which involves violation of State or Federal Statutes.
> 5. No Departmental equipment, supplies or facilities will be used.
> 6. You will not solicit employment in any fashion which uses, as an inducement, your position . . .
> 7. You must fully understand that if you are injured while engaged in part-time work outside the Department that Worker's Compensation within the Department will not apply.
> 8. Annual re-application to continue in part-time employment will be required. . .
> 9. Deviation by you or failure to comply with the above will cause this approval to be rescinded. . . (State's Exhibits 21, 22).

24. Captain James Baker has been a member of the State Police for 25 years. He is Assistant Field Force Commander. His duties include exercising oversight over tactical support units of the State Police. Since 1991, the Employer has authorized Baker to engage in outside employment as a teaching consultant. He currently teaches non-

verbal communication and officer safety as it applies to the concept of fight or flight. He has taught Vermont State Police employees and has been an instructor in Vermont for federal training. Approximately once a month, Baker travels to other states to teach law enforcement officers. He has taught in approximately 30 states. He would not be able to respond to public safety emergencies in Vermont if he was in a distant state due to his outside employment.

25. Kathleen Knoras has been employed by the Employer since 1992 as a clerk dispatcher. Her job responsibilities include dispatching state troopers and municipal police officers and rescue services. Knoras also was an Auxiliary State Trooper from 1994 – 2002, patrolling snowmobile trails and waterways and enforcing state motor vehicle laws. As such, she had powers of arrest and carried a firearm. While performing these duties for the Employer, the Employer authorized Knoras to engage in outside employment with the Springfield Police Department as a police officer and fill-in dispatcher (Grievants' Exhibit 9).

26. Lori Haskins is a clerk dispatcher for the Employer in Rockingham, and has performed similar clerk dispatcher responsibilities to those of Knoras. Since at least May 2001, the Employer has approved Haskins to engage in outside employment as a dispatcher/clerk for the Brattleboro Police Department where she dispatches police officers (Grievants' Exhibit 9).

27. Dane Shortsleeve was a sergeant with the Employer until recently retiring. On October 23, 2001, Powlovich approved Shortsleeve's request to engage in outside employment as a firearm salesperson for the Smith & Wesson Company. At the time this

outside employment was approved, Shortsleeve was a member of the State Police Tactical Support Unit (Grievants' Exhibit 9).

28. Several state troopers have engaged in outside employment performing security details for the United States Marshal Service. They provide armed secure transport of federal prisoners between correctional facilities, detention centers and courts. When working as state troopers, these individuals provide armed transport to correctional facilities and detention centers for persons arrested.

29. Lieutenant David Stanton is assigned to the Employer's Homeland Security Division where he is involved in planning and preparing for emergency situations. The Employer has authorized him to engage in outside employment as a fire services instructor and chief of a hazardous materials crew, which require Stanton to have knowledge and expertise similar to what is required for his position with the Employer.

30. After Powlovich denied Genova's request to engage in outside employment, the Montgomery County Police Department in Maryland requested that Genova submit a bid to provide them with two untrained canines and two canines trained for law enforcement purposes. The value of an untrained canine is between $3,000 and $5,000. The value of a trained canine is between $9,000 and $14,000. Grievant did not submit a bid because he was prohibited from engaging in the outside employment of training and selling canines. A police department in Connecticut requested that Genova submit a bid to sell the department a pre-trained drug detection canine. Genova would have bid between $3,600 and $4,600 for this work had he not been precluded from engaging in the outside employment of training canines.

31. During the second step of the grievance procedure on this grievance, the Employer granted Grievant permission to operate a kennel but continued to deny him the ability to train dogs or provides consulting services.

OPINION

Grievants contend that the Employer violated Section 6.0 of its own rules and regulations, and a provision of the State Personnel Policies and Procedures addressing off-duty employment conflicting with an employee's state position, by refusing to allow State Police Sergeant Gary Genova to engage in off-duty canine training and consultation.

Section 6.0 of the Employer's Rules and Regulations provides that permission for a state police member to engage in off-duty employment "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". None of these criteria justify denying Genova's modified request to engage in off-duty canine training and consultation. Genova would be available during an emergency since his off-duty employment is situated in his home and he would be able to suspend his training and consultation activities to respond to any emergency. Further, the evidence does not indicate that his modified off-duty employment would be so physically or mentally demanding that it would physically or mentally exhaust him to the point that his performance of state police duties may be affected. Also, no special consideration needs to be given to scheduling Genova's regular duty hours since his outside canine training and consultation would take place

during evenings and weekends when he is not regularly scheduled to work in his state position.

Nonetheless, the fact that none of the Section 6.0 criteria apply to Genova's outside employment does not necessarily mean that the Employer had no basis to deny Genova's off-duty employment request. In denying Genova's modified request, Lieutenant Colonel Powlovich informed Genova by a memorandum dated April 5, 2002, that "the type of outside employment you are requesting is too closely related to your present assignment and duties", and thereby conflicted with his position. Thus, any rules and regulations applying to the State Police that prohibit off-duty employment conflicting with an employee's state position provide a basis for the denial of Genova's request.

The Employer relies on provisions of the State Personnel Policies and Procedures that prohibit off-duty employment conflicting with an employee's state position to support the decision to deny Genova's outside employment request. Grievants contend that the Employer should not be able to rely on these provisions because they were not cited earlier by the Employer as a basis for its decision. We disagree. Lieutenant Powlovich's April 5, 2002, memorandum indicated that a basis for the denial of Genova's outside employment request was that such employment was too closely related to his present assignment and duties and would conflict with his position. This provided clear notice to Grievants that the denial of Genova's request was based on a conflict with his state position, and nothing required the Employer to cite the rules and regulations pertinent to Genova's request.

Nonetheless, Grievants assert that the provisions of the State Personnel Rules and Regulations, issued by the Department of Personnel with the approval of the Secretary of

Administration, do not apply here. They contend that neither the Secretary of Administration nor the Department of Personnel have statutory authority to issue rules regulating State Police members, other than rules relating to job evaluation and assignment of positions to classes and salary ranges, pursuant to 3 V.S.A. Section 311. Grievants maintain that the Secretary of Administration and Department of Personnel are limited to issuing rules applicable to persons in the classified service.

Grievants' contentions in this regard are not supported by statutory provisions. It is true that 3 V.S.A. Section 311 provides that the "department of public safety shall be deemed to be within the classified service for purposes of job evaluation and assignment of position classes to salary ranges only, and not otherwise". However, this provision simply addresses the coverage of the classified service and does not by itself limit the statutory authority of the Secretary of Administration and Department of Personnel. Other statutory provisions must be reviewed to determine statutory authority.

The Department of Personnel is part of the agency of administration under the direction and supervision of the Secretary of Administration, and is responsible for the "provision of centralized human resources management services for state government". 3 V.S.A. Sections 2221, 2283. The Department of Personnel is granted the authority to "compile and publish a manual . . . containing the pertinent statutes, rules and regulations of the department and its rules of procedure". 3 V.S.A. Section 309(13). 3 V.S.A. Section 315 states that "all officers and employees of the state shall comply with the provisions of this chapter and the lawful rules, regulations and orders of the commissioner of personnel pursuant thereto".

These statutory provisions are sufficient to confer on the Department of Personnel the authority to issue rules and regulations applicable to state employees beyond the classified service, including State Police members exempt from the classified service except for purposes of job evaluation and assignment of position classes to salary ranges. In addition to the statutory provisions, we note that there is a practice of applying the State Personnel Policies and Procedures to State Police members as exempt employees and VSEA has not previously objected to the application of the policies and procedures to the State Police.

Numbers 5.2 and 11.5 of the State Personnel Policies and Procedures apply to exempt employees such as the State Police, and are pertinent to this case as they prohibit off-duty employment conflicting with an employee's state position. We now determine whether the Employer has violated these provisions by refusing to allow Genova to engage in off-duty canine training and consultation. Number 5.2 of the Policies and Procedures provides that outside employment must be conducted in a manner that "avoids not only conflicts of interest, but also any appearance of a conflict of interest". Number 11.5 states that "(e)mployees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties . . or with the duties, functions, or responsibilities of the agency by which they are employed."

Grievants contend that the Employer has applied these provisions to Genova in a discriminatory manner. In cases where grievants claim a "discriminatory application of a rule or regulation", the Board has followed the Supreme Court guidance that 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). Grievance of Imburgio, 11 VLRB 168 (1988). Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination. Id. Grievance of Gobin, 158 Vt. 432, 434 (1992). Grievance of Roll, 2 VLRB 228, 233 (1979).

The Employer contends that Genova's proposed outside employment presents a conflict of interest, or at least the appearance of a conflict of interest, with his duties as head trainer of the Vermont State Police Canine Program. We disagree that Genova's modified request to provide canine training and consultation presents a conflict of interest or the appearance of conflict of interest with his duties with the State Police Canine Program. The Employer contends that, because of his state position, Genova would be able to offer his off-duty employment clients an inside track towards certification of their dogs by the Vermont Criminal Justice Training Council through the State Police Canine Program. We conclude that Genova's modified request for off-duty employment sufficiently addressed this concern of the Employer.

Therein, he indicated that his outside employment would be reserved for those that did not want to enroll in any of the programs offered through the State Police Canine Program. He further stated that "I will deny any and all requests to do private training for any organization that would normally be involved in the VT Police Canine Program", and "I will ensure that any side business under my care is managed and conducted in a manner that does not interfere with or compromise my current position . . with the department". These statements of Genova's intent, plus monitoring of his outside employment by the Employer with appropriate adjustments as necessary, would mean that Genova's clients would not normally proceed through the certification process. If

infrequent and unforeseen situations occur where his clients ultimately do go through the certification process, it is apparent Genova could be removed from involvement with the process without a significant burden on the Employer's operations.

The Employer also expressed concern about Genova taking on more outside work than he could handle, thereby adversely impacting on his performance in his state position. It is apparent that Genova sufficiently addressed this concern by agreeing in his modified request to train no more than six police dogs annually.

The Employer also expressed concern about the potential liability to the Employer if one of the dogs trained by Genova in his outside employment injured someone. We do not find the Employer's concerns in this matter persuasive. Genova would not be acting within the scope of his employment with the Employer, or acting as an agent for the Employer, through his outside employment. The evidence does not indicate any instances where the Employer has been sued because of an employee's outside employment, and we fail to see how the Employer would be subject to a suit to a greater degree due to Genova's outside employment than the Employer is subject to a suit arising from its other employees engaging in outside employment.

Also, the Employer has applied the conflict rules to Genova in a discriminatory manner. In his April 5 memorandum to Genova, Lieutenant Colonel Powlovich indicated that the proposed outside employment was "too closely related to your present assignment and duties", and stated: "I have not found any examples of prior approval for outside employment whereby the outside employment so closely resembles the members(sic) current assignment". Although this formed a basis for denying Genova's request, the Employer approved other employees' outside employment requests that

resembled their state positions to a degree at least as great as the situation involving Genova. The Employer authorized dispatchers to perform similar dispatching functions for municipal police agencies. The Employer approved the requests of state troopers to engage in the outside employment of serving as armed escorts of federal prisoners for the U.S. Marshal Service, a function similar to their state duties of providing armed transport to correctional facilities and detention centers of persons arrested.

Further, the Employer's expressed concern of liability with respect to Genova's outside employment reflects discriminatory treatment of him when compared with the granting of a request by Sergeant Dane Shortsleeve, a member of the Employer's Tactical Services Unit, to engage in the outside employment of selling firearms. It was discriminatory for the Employer to cite potential liability as grounds for denying Genova's request to train and sell dogs a few months after granting Shortsleeve's request to sell the more lethal instruments of firearms.

In sum, we conclude that the Employer violated the provisions of the State Personnel Policies and Procedures addressing off-duty employment conflicting with an exempt employee's state position by refusing to grant Genova's modified request to engage in off-duty canine training and consultation. As a remedy, Grievants request that the Board award Genova lost earnings he sustained as a result of being wrongfully denied the opportunity to engage in outside employment. Specifically, Grievants request that Genova receive the income from two bids he would have put in for out-of-state police departments seeking to purchase trained and untrained canines.

We decline to award this requested remedy. The evidence is insufficient for us to conclude there was a probability that Genova would have been successful in his bids, and

we will not grant a backpay award given such circumstances. Instead, we conclude that it is a sufficient remedy to order the Employer to grant Genova's modified outside employment request. If the conditions placed on Genova's outside employment prove to need adjustment over time, the approval granted to Genova can be revisited by the Employer and modified.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of the Vermont State Employees' Association and Gary Genova is sustained and the State of Vermont Department of Public Safety shall grant Genova's modified request to engage in the off-duty employment of providing canine training and consultation.

Dated this ____ day of October, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
Carroll P. Comstock

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John J. Zampieri