

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 08-29
JOEL DAVIDSON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 24, 2008, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Joel Davidson ("Grievant"). Grievant alleges that the State of Vermont Department of Public Safety ("Employer") violated various provisions of the collective bargaining agreements between the State of Vermont and VSEA for the State Police Bargaining Unit effective July 1, 2007 to June 30, 2008, and July 1, 2008 to June 30, 2010 (collectively referred to as the "Contract"), and orders of the Labor Relations Board, through actions taken against Grievant since the Labor Relations Board rescinded his dismissal and ordered him reinstated to employment.

Specifically, Grievant alleges that the Employer discriminated against Grievant, and retaliated against him, due to his grievance activity in violation of Articles 5 and 15 of the Contract, rules and regulations and past practice by: a) failing to reinstate Grievant to his pre-dismissal position as Curriculum Coordinator, b) failing to allow Grievant to attend professional career development trainings, c) failing to promote Grievant, d) failing to provide Grievant overtime opportunities and pay commensurate with his pre-termination levels or commensurate with other employees, e) failing to assign Grievant to the Employer's Lab Team, f) failing to properly compensate Grievant for losses he sustained as a result of his improper dismissal by improperly paying interest owed on back pay, and annual leave compensation payments over the annual leave cap, outside the

state payroll system in a manner intended to deprive Grievant of retirement credits for that income, and g) acting contrary to past practice by not correcting errors in the accrual rates for Grievant's annual and sick leave balances prior to his dismissal. Grievant further asserts that the Employer has violated Article 21 of the Contract since his reinstatement by either significantly decreasing, or completely eliminating, his overtime opportunities while other employees have been permitted to earn overtime.

The Labor Relations Board conducted hearings on this grievance on March 26, May 20, June 29, and June 30, 2009, before Board Members Richard Park, Acting Chairperson; Leonard Berliner and James Kiehle. VSEA General Counsel Michael Casey represented Grievant at the March 26 hearing; Attorney Thomas Somers represented Grievant at the other hearings. Special Assistant Attorney General William Reynolds and Employer Attorney Howard Kalfus represented the Employer. The parties filed post-hearing briefs on August 4, 2009.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

...

ARTICLE 5 NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT:**
In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, nor harass any employee because of . . . age . . . membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

...

ARTICLE 15 GRIEVANCE PROCEDURE

...

2. DEFINITION

...

- (b) "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.

...

- 6. The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer.

...

ARTICLE 21 REGULAR HOURS AND OVERTIME

...

4. OVERTIME

...

- (e) The Department shall make a reasonable effort to distribute scheduled overtime as equitably as possible among classified employees.

...

2. Grievant worked for the Vermont State Police from 1988 until his dismissal on January 17, 2006. At the time of his dismissal, Grievant's rank was Sergeant and he was working at the Office of Professional Development ("OPD") in Pittsford as Curriculum Development Coordinator. Grievant filed an appeal of his dismissal with the Labor Relations Board. On May 4, 2007, the Labor Relations Board issued a decision on Grievant's appeal. 29 VLRB 105. The Board Order provided in pertinent part:

- 1. The Appeal of Joel Davidson is sustained;
- 2. Appellant shall be reinstated to his position as Sergeant with the Office of Professional Development of the Vermont State Police, Department of Public Safety;
- 3. Appellant shall be awarded back pay and benefits from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Appellant would have worked, minus any income (including unemployment compensation received any not paid back) received by Appellant in the interim;
- 4. The interest due Appellant shall be computed on gross pay, shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period beginning with Appellant's dismissal, and ending on his reinstatement; interest shall be computed from the

amount of each paycheck minus income (including unemployment compensation) received by Appellant during the payroll period;

5. The parties shall file with the Board . . . a proposed order indicating the specific amount of back pay and other benefits due Appellant; and if they are unable to agree on such proposed order, shall notify the Board in writing by that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. . .

3. The parties were unable to agree on all components of a proposed order concerning the back pay and benefits due Grievant. The Labor Relations Board held a hearing on June 25, 2007, on the issues in dispute between the parties. Immediately prior to the hearing, there were settlement discussions at Board offices on outstanding issues. One of the outstanding issues concerned Grievant's claim that his annual and sick leave accrual rates should reflect prior service credit for Grievant's employment with the State Departments of Corrections and Agriculture in the 1980's. The parties reached an agreement during settlement discussions, which was read into the record at the start of the back pay hearing, that Grievant "will receive temporary service credit beginning January 22, 2006, and it will effectively change the accrual rate to 7.27 (hours) per pay period for both sick and annual leave". Grievant originally had sought this prior service credit in 1990. He did not receive such credit at that time and did not file a grievance over the failure to receive it or otherwise pursue the issue (State's Exhibit 14; Grievant's Exhibits 21, 23).

4. The Board issued a decision on specific back pay and benefits due Grievant on September 26, 2007. 29 VLRB 243. Grievant filed a motion to reconsider the decision. The Board issued an order on December 13, 2007, denying the motion.

5. Prior to the June 25, 2007, back pay hearing and continuing through October 2007, Grievant's attorney and the attorneys for the Employer engaged in

discussions on attempting to reach agreement on Grievant receiving a monetary payment and retiring in lieu of returning to work. These discussions ultimately were unsuccessful.

6. Captain Ray Keefe was assigned to be Commander of the OPD in August 2006. When Keefe joined OPD, the Curriculum Development Coordinator position formerly held by Grievant was vacant. The duties of the position were being handled by Sergeant Steve McNamara in addition to his regular duties as fitness coordinator. In January 2007, Sergeant Thomas Jacques was transferred to OPD. Keefe assigned Jacques to the position of Inservice Training Coordinator. In this position, Jacques performed many of the duties previously performed by Grievant. McNamara returned to performing his regular duties as fitness coordinator.

7. Keefe reported to Major William Sheets. In December 2007, Sheets informed Keefe that Grievant was going to be reinstated to work at OPD in January 2008, and that McNamara was going to be transferred to New Haven to become a patrol commander. Neither Sheets nor any other superior of Keefe gave him specific guidance concerning Grievant's duties upon reinstatement except to let him know that it was his responsibility and he needed to determine how to handle it.

8. Keefe believed that the Employer decision to dismiss Grievant was a disgrace. He felt compassion for Grievant.

9. In early January 2008, Keefe and Grievant had a frank and open discussion about Grievant's reinstatement. Grievant informed Keefe that he had a lot of annual leave built up and that he was going to be using a lot of annual leave. He also informed Keefe that he would be using a great deal of sick leave due to his wife undergoing cancer treatment. Grievant further informed Keefe that he was going to file

grievances and a lawsuit against the Employer. Grievant told Keefe that he did not want to be disruptive to the office when he returned to OPD.

10. Subsequent to his discussion with Grievant, Keefe determined that he would create a new position entitled “Special Projects Coordinator” to which he would assign Grievant. Keefe decided not to have Grievant replace Jacques as Inservice Coordinator to provide a continuity of operations at OPD and as an accommodation to Grievant. Keefe did not believe it was fair to Grievant to place him in the busy Inservice Coordinator position given the amount of leave to be taken by him and the need to become acclimated to returning to work at the reorganized OPD.

11. Keefe sent Sheets a memorandum dated January 7, 2008, concerning Grievant’s job responsibilities. It provided:

Initial responsibilities for Sgt. Davidson:

- get qualified with weapon/other needed trainings.
 - look back into MASP on-line courses via University of Mass.
 - take over tech liaison duties from Liz.
 - recruitment vs. retention study for past three years.
 - do projects as needed within support services.
 - manage college website postings binder (blast fax). Initial postings/re-postings as required.
 - maintain contact with Community access TV stations in VT to run our TV spot.
 - research and develop a list of fax #'s for two year colleges in ME, NH, VT, NY, MA, CT, RI, PA, NJ. This will allow us to blast fax our employment opportunities to these in addition to the 4-yr schools already being faxed.
 - research and experiment with “go to meeting” options.
 - any and all projects assigned by Captain Keefe.
- (State’s Exhibit 1, p.2)

12. Sergeant Tara Thomas has been performing the duties of quartermaster for the State Police since October 2006. As quartermaster, Thomas is responsible for distributing uniforms, firearms and other equipment to state troopers. Thomas had never met or had any dealings with Grievant before January 2008. Prior to Grievant’s return to

work in January 2008, Thomas called Grievant on the telephone to obtain his uniform sizes. During the telephone conversation, Grievant asked Thomas if his old Class A uniform had been taken apart. When Thomas replied that it had, Grievant responded “those lowlifes”. As Grievant was going through his equipment needs with Thomas, he made the comment “I get to make them pay now”, or words to that effect, referring to the Employer. Grievant also told Thomas that former Department of Public Safety Commissioner Kerry Sleeper had resigned earlier than he planned because of Grievant. Grievant asked to be issued a new firearm. Thomas told him that he would receive a used firearm (State’s Exhibit 1, p.5).

13. Grievant returned to work at OPD on Tuesday, January 15, 2008. Keefe drove Grievant to the Employer’s headquarters in Waterbury so that he could be issued uniforms, equipment and a vehicle. Pursuant to standard operating procedure, Thomas provided Grievant with two bankers’ boxes containing used uniforms in the sizes Grievant had requested. Many of the uniforms issued to officers are used. Regardless of an officer’s rank, Thomas has consistently shown them the used uniforms first. If nothing fits, Thomas shows officers new uniforms. This is done to use uniforms to the extent possible before purchasing new ones. Thomas scrutinizes the used uniforms to ensure they are usable. The Employer has not ordered new Class A, or dress, uniforms since 2006. It is not unusual for officers regardless of rank to be issued used Class A uniforms. Grievant took an unusually long time going through the used uniforms in the boxes. Thomas ultimately issued Grievant a used Class A uniform which was usable. Grievant received a new uniform shirt.

14. All state police officers received new firearms in the fall of 2007. Subsequently, it has been the practice for a new or returning officer to be issued a used firearm. Thomas issued Grievant a firearm that had been issued to Sergeant Jack Himmelsbach, who retired effective December 31, 2007. When Himmelsbach returned his firearm to Thomas upon his retirement, he informed her that the gun had been cleaned recently. When Thomas issued the firearm to Grievant, she observed it to be clean and free of rust. After receiving the firearm, Grievant cleaned it upon returning to OPD.

15. Grievant made several requests after his reinstatement for winter boots. He did not receive winter boots until the summer of 2008.

16. When Sergeant McNamara left OPD in January 2008 to become a patrol commander in New Haven, he took the vehicle that had been assigned to Grievant, a 2002 Crown Victoria. When Grievant returned to OPD in January 2008, he was issued a temporary “loaner” car that was in poor condition. Keefe viewed the vehicle as unacceptable. A few weeks later, Keefe was able to get Grievant the 2002 Crown Victoria that he had been previously assigned.

17. Upon Grievant’s return to OPD, Keefe obtained a two-year waiver of training for Grievant from the Criminal Justice Training Council. This was standard operating procedure for an officer who had left the state police force for a period of time and then returned to work, such as officers who performed military service.

18. Upon his return to OPD, Grievant requested that he be reassigned to the department lab response team. Grievant claimed that he worked on the lab response team prior to his dismissal and that it was a source of overtime for him. Prior to his dismissal, Grievant was activated on four occasions outside of his regular duties to assist at crime

scenes. Grievant worked five hours of overtime on one of the cases, and no overtime on the other cases. In performing such work, Grievant was not part of a department lab response team. Instead, he was called to the crime scenes as a Bureau of Criminal Investigation detective assisting in the investigation of crimes (State's Exhibits 20, 21, 22; Grievant's Exhibit 32).

19. Prior to the spring of 2007, the Department of Public Safety had a Vermont Forensic Lab crime search team comprised of civilian employees from the forensic lab and the assistant director of the lab. The assistant director was the only member of the State Police who was on the Forensic Lab crime search team. In the spring of 2007, the Vermont State Police took over the duties of processing crime scenes from the Forensic Lab through a newly created crime scene search team. Since then, the crime scene search team has been comprised of twelve members of the State Police distributed across the state by geographic region, and has been supervised by the assistant director of the forensic lab. There has been no turnover of members of crime scene search team since its inception in 2007 (State's Exhibit 5; Grievant's Exhibits 15, 16).

20. Upon his reinstatement, Grievant sought to receive his department identification card. Grievant believed he could not work overtime until he received one. Grievant's identification card was made on January 24, 2008, and sent to OPD to distribute to him. Grievant received the identification card on January 31, 2008 (State's Exhibit 2).

21. On January 31, 2008, VSEA Representative Gretchen Naylor requested on Grievant's behalf a Step I grievance meeting with Keefe. The meeting was held on February 20, 2008. Issues discussed during the meeting included duties being performed

by Grievant, promotions, training and overtime. Grievant did not tell Keefe that he wished to move into the position occupied by Jacques (State's Exhibit 6).

22. It has been the practice of the State Police for approximately 12 years to solicit FBI National Academy attendees from command staff, which consists of officers holding the ranks of lieutenant and above. On February 6, 2008, Grievant sent an email message to Keefe requesting permission to attend the FBI National Academy. Keefe forwarded the request to Major Sheets who responded: "Please inform Sgt. Davidson that we are only sending our members holding the rank of Lt. and above to this training and that we consider this command level training." Keefe informed Grievant of the response of Major Sheets (State's Exhibits 3, 4; Grievant's Exhibit 14).

23. Grievant requested that he be allowed to attend training for dealing with hazardous materials, known as hazmat training. Keefe denied Grievant's request because the State hazmat team no longer includes members of the State Police. No other employees at OPD have received hazmat training, which is intensive and costly.

24. Grievant requested that he be allowed to attend ICS ("Incident Command System") 400 training. ICS 400 is designed to train law enforcement officers who would be instructing other officers in incident command systems. Keefe denied the request and informed Grievant that only lieutenants were being sent to this training. There is no evidence that officers below the rank of lieutenant attended training during this period.

25. On February 14, 2008, Grievant requested approval from Keefe to attend a three-day VIBRS conference from June 3 through June 5, 2008. The conference addressed updates, systems changes, policies and procedural information for computer

users in law enforcement agencies. Keefe approved Grievant's request because he had assigned Grievant to be OPD's computer liaison (State's Exhibit 2, p.11-12).

26. Grievant did not work for much of the month of March 2008. He used sick leave for 10 days, and annual leave for 6 days, that month. In April 2008, Grievant used 9 days of sick leave (State's Exhibits 12, 13).

27. On April 21, 2008, Lieutenant Michael Macarilla of State Police headquarters informed Keefe that Grievant and Sergeant Jacques had not responded to a survey. When Keefe instructed Grievant and Jacques to complete the survey as soon as possible, Grievant and Jacques informed Keefe that they had not received the survey and were not receiving group emails sent to State Police members. Keefe told Grievant and Jacques to contact information technology staff to get on the group email list (Grievant's Exhibit 25).

28. On July 9, 2008, Grievant put in an information technology help desk ticket. John Mangione of the Employer's Office of Technology Services called Grievant the next day to discuss the problem, but Grievant was on sick leave that day. Mangione and Grievant finally spoke on July 16. Grievant expressed concern that he was not receiving emails regarding promotional opportunities. Mangione immediately placed Grievant on two email lists that would inform him of promotional opportunities. Grievant has remained on these lists since then. Grievant did not submit any information technology help desk tickets after July 9, 2008. Correct placement on various group email lists is a pervasive problem in the Department of Public Safety (Grievant's Exhibit 24).

29. Grievant used sick leave for 15 days in May 2008, 14 days in June 2008, 9 days in July 2008, and 7 days in August 2008. Grievant's use of sick leave declined from

September 2008 through November 2008. He used a total of 1 ½ days of sick leave during these three months. His use of sick leave increased in the subsequent three months. He used sick leave for 6 days in December 2008, 5 days in January 2009, and 9 days in February 2009 (State's Exhibits 12, 13).

30. Grievant used a total of 89 days, 6 hours, of sick leave from his reinstatement in January 2008 through February 2009. He used 24 days, 5 hours, of annual leave during this same period (State's Exhibits 12, 13).

31. In October 2008, Grievant requested that he receive SPIN training. SPIN is an acronym for State Police Intelligence Network. It is an intelligence database maintained by the State Police. At the time of his dismissal, Grievant had access to the SPIN system. Access to SPIN is generally limited to State Police members who actively investigate cases such as detectives and road troopers. Keefe denied Grievant's request because OPD staff do not perform such investigations. No OPD staff have received SPIN training and none have SPIN access (State's Exhibit 2, p.7-9; Grievant's Exhibit 14, p.75-76).

32. Keefe generally has restricted overtime usage at OPD to what he views as reasonable. The amount of overtime worked at OPD is based on individual job responsibilities. Keefe has been under pressure during the last few years to hold down overtime by OPD staff due to budget restrictions. Keefe also believed that some of the training, leading to overtime, previously offered to OPD staff did not constitute good uses of taxpayer monies.

33. During the period January 20, 2008, to September 13, 2008, OPD employees other than Grievant worked the following number of overtime hours: a)

Sergeant Jeffrey Danoski worked 102 hours; b) Lieutenant Robert Kalinowski worked 131 hours; c) Lieutenant Craig Iverson worked 55.75 hours; d) Captain Ray Keefe worked 21 hours; and e) Sergeant Thomas Jacques worked 78.5 hours. 28.5 of the overtime hours worked by Jacques were for his work performed on the peer support team. Grievant has never been on the peer support team (Grievant's Exhibit 18).

34. Jacques and Kalinowski requested Keefe to work more overtime than they were assigned. They both previously had worked more overtime hours before they came to OPD and would have liked more overtime opportunities.

35. Grievant worked no overtime between the time of his reinstatement in January 2008 and March 13, 2009. Prior to his dismissal, Grievant worked overtime by, among other things, conducting applicant testing and pre-basic training. After his reinstatement, Grievant did not conduct such testing and training prior to March 13, 2009. Keefe was deposed on March 13, 2009, by Grievant's attorney and was questioned about Grievant's lack of overtime. Subsequent to March 13, 2009, Grievant has worked overtime, including conducting applicant testing and pre-basic training.

36. Keefe viewed it as difficult for Grievant to work much overtime because of his use of leave. Keefe had the impression that Grievant was not interested in much overtime due to his absences. Grievant requested the opportunity to work overtime since his reinstatement in January 2008. Grievant complained to Keefe on one occasion about a lack of overtime with respect to the testing of recruits. Keefe told Grievant to seek overtime outside OPD because that was where he would have significant overtime opportunities (Grievant's Exhibit 12).

37. On March 18, 2009, Keefe asked Mangione to place Grievant on group email lists that would list possible overtime opportunities. Keefe was not aware until his March 13, 2009, deposition that there was an ongoing issue with respect to Grievant's placement on email lists. Mangione immediately placed Grievant on additional email lists containing overtime opportunities.

38. Grievant, as a State Police member, is part of Plan C of the state retirement system. The Plan C pension benefit is based upon the plan participant's average earnable compensation during the two consecutive years with the highest average. "Earnable compensation" means "the full rate of compensation that would be payable to an employee if the employee worked the full normal working time for the employee's position." 3 V.S.A. §455(4)(B) & (8).

39. The State Retirement Division calculates "earnable compensation" pursuant to 3 V.S.A. §455. The Retirement Division includes an annual leave payout of unused annual leave to a Plan C member upon retirement in the member's retirement benefit if the pension benefit is based on the last 24 months of employment. However, the State Retirement Division does not consider an annual leave over the cap payment in a backpay award as earnable compensation. A State Police member with Grievant's years of service can accrue up to 405 hours of annual leave pursuant to the Contract. The Retirement Division considers a payment of up to 405 hours of unused annual leave to be included as part of earnable compensation, but does not consider any payment over this 405 hour cap to be earnable compensation.

40. John Berard, Labor Relations Specialist with the Department of Human Resources, created the back pay spreadsheets relating to Grievant's reinstatement. In

calculating payments due Grievant for interest and annual leave over the cap, Berard provided that such payments be paid by a voucher through the State's VISION system rather than through the payroll system. This meant that these payments would not be credited to Grievant's retirement. Berard reasoned that, if Grievant had been continuously employed, he would not have received payment for annual leave over the cap because the Contract prohibited it. Berard concluded that the annual leave over the cap payment to Grievant should not be credited to Grievant's retirement because it would have resulted in improper credit to Grievant for a payment he never would have received if he had been continuously employed. Berard similarly reasoned that, had Grievant remained continuously employed, he never would have received any interest and, thus, interest should not be credited to Grievant's retirement.

OPINION

There are various preliminary issues which we need to decide before we discuss the merits of the issues before us. The deadline for postmarking post-hearing briefs established at the hearing and agreed upon the parties was August 4, 2009. Both parties filed briefs on August 4, 2009. On August 5, 2009, the Employer hand-delivered to the Board a letter which was identified as an addendum to the Employer's brief. Grievant objects to the Board considering this document in deciding this case because it was filed after the mutually agreed upon deadline for submitting briefs.

We concur with Grievant and decline to consider this letter. Section 12.16 of Board *Rules of Practice* provides: "Failure to file a brief when due shall mean the Board will consider the party to have waived its right to file a brief and such brief shall not be

considered by the Board.” This provision prohibits late filing of an addendum to a brief just as it does not allow late filing of the brief in chief. Otherwise, the purpose of mutual filing of briefs pursuant to a deadline would be frustrated. One party would gain an unfair advantage over the other party in asserting its arguments.

Another threshold issue which we need address is a Motion to Introduce Newly Discovered Evidence filed by Grievant on October 21, 2009. Grievant seeks to open the record in this case for the purpose of admitting an information letter he received from the Internal Revenue Service providing that “supplemental wages” should be reported on a W-2 form rather than on Form 1099. Grievant contends that this supports his argument that the State wrongly deprived him of retirement credits by placing a payment Grievant received for annual leave over the cap on a Form 1099 instead of treating it as W-2 wages. The Employer opposes Grievant’s motion to introduce the IRS information letter into evidence on the grounds that it is not relevant and constitutes unreliable hearsay.

Section 12.17 provides that the “Board may, in its discretion or on its own motion, reopen a hearing and take further testimony at any time.” In circumstances such as the one before us, we examine the evidence offered by the moving party and determine whether it would affect the decision reached. Grievance of Camley, 24 VLRB 185 (2001). We conclude that the evidence offered by Grievant would not affect the decision reached, and thus we deny the motion to introduce the evidence. In deciding whether Grievant should receive retirement credits for annual leave over the cap payments, we are governed by the Vermont retirement statutes and their administration by the State Retirement Division. It is not within our purview to consider federal tax implications which may attach to such payments made to employees.

Another preliminary issue concerns a contention made by Grievant in his post-hearing brief that the Employer retaliated against him by delaying his reinstatement for eight months after the Board ordered that he be reinstated. We conclude that this issue is not properly before us because it was not raised in the grievance filed with the Board. We decline to resolve issues that were not raised in the grievance filed with the Board pursuant to Section 18.3 of Board *Rules of Practice*, which requires that a grievance contain a concise statement of the nature of the grievance. The Board will not reach the merits of an issue not raised in the grievance filed with the Board. Grievance of Regan, 8 VLRB 340, 364 (1985). Grievance of Shockley and VSCFF, 5 VLRB 192, 202-203 (1982).

We turn to addressing the merits of the issues raised in the grievance. Grievant alleges that the Employer took various actions which discriminated against Grievant and retaliated against him due to his grievance activities, which included successfully challenging his improper dismissal, in violation of Articles 5 and 15 of the Contract, rules and regulations and past practice. Specifically, Grievant challenges the following actions: a) failing to reinstate Grievant to his pre-dismissal position as Curriculum Coordinator, b) failing to allow Grievant to attend professional career development trainings, c) failing to promote Grievant, d) failing to provide Grievant overtime opportunities and pay commensurate with his pre-termination levels or commensurate with other employees, e) failing to assign Grievant to the Employer's Lab Team, f) failing to properly compensate Grievant for losses he sustained as a result of his improper dismissal by improperly paying interest owed on back pay, and annual leave compensation payments over the annual leave cap, outside the state payroll system in a manner intended to deprive

Grievant of retirement credits for that income, and g) acting contrary to past practice by not correcting errors in the accrual rates for Grievant's annual and sick leave balances prior to his dismissal.

In cases where employees claim management took action against them for engaging in the protected activity of filing grievances, the Board employs the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Grievance of Brewster, 23 VLRB 314 (2000). Grievance of Cronin, 6 VLRB 37 (1983). Grievances of McCort, 16 VLRB 70 (1993). Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Grievant was engaged in the protected conduct of filing grievances, including successfully contesting his improper dismissal.. He now must show the conduct was a motivating factor in the decision to take action against him. In Sypher, 5 VLRB at 131, the Board noted the factors it would examine to determine whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee: whether the employer knew of the employee's protected activities; whether the timing of the adverse action was suspect; whether there was a climate of coercion; whether the employer gave protected activities as a reason for the decision; whether an employer interrogated the employee about protected activities; whether the employer discriminated

between employees engaged in protected activities and employees not so engaged; and whether the employer warned the employee not to engage in protected activities.

In applying these factors to the evidence before us, we conclude that Grievant has not sustained his burden of demonstrating that his grievance activities were a motivating factor in the decision to not reinstate him to his pre-dismissal position as Curriculum Coordinator. The decision on the duties to assign Grievant was made by Captain Keefe, Commander of the OPD. In making that decision, Keefe received no specific guidance from his superiors except to let him know that it was his responsibility and he needed to determine how to handle it. Keefe had played no part in the decision to dismiss Grievant, and had been assigned to work at OPD after Grievant's dismissal.

Prior to deciding the duties to assign Grievant, Keefe met with him. During that discussion, Grievant informed him that he would be taking a great deal of annual and sick leave after he was reinstated. Subsequent to this discussion, Keefe determined that he would create a new position entitled "Special Projects Coordinator" to which he would assign Grievant. Keefe decided not to have Grievant replace Sergeant Thomas Jacques as Inservice Coordinator, in which position Jacques was performing many of the duties previously performed by Grievant before his dismissal. Keefe made this decision to provide a continuity of operations at OPD and as an accommodation to Grievant. Keefe did not believe it was fair to Grievant to place him in the busy Inservice Coordinator position given the amount of leave to be taken by him and the need to become acclimated to returning to work at the reorganized OPD.

Grievant has not demonstrated that Keefe was motivated by animus against Grievant due to his grievance activities in making this or any other decision involving

him. Keefe believed that the Employer decision to dismiss Grievant was a disgrace, and he felt compassion for Grievant. Since Keefe was the management person solely responsible for assigning duties to Grievant, and Grievant has presented no evidence casting doubt on the non-discriminatory motives of Keefe, Grievant's discrimination claim fails with respect to the failure to reinstate him to his pre-dismissal position as Curriculum Coordinator.

Grievant also has not demonstrated that the Employer was motivated by discrimination against Grievant due to his grievance activities in failing to allow him to attend certain professional career development trainings. The evidence indicated that such trainings either were limited to officers with superior rank to the sergeant rank held by Grievant, or were not applicable to the work Grievant would be performing. The evidence does not indicate that he was treated in a discriminatory manner to other State Police officers in this regard.

Grievant further has not demonstrated that the failure to assign him to the Vermont Forensic Lab crime search team was motivated in any way by discrimination against him. Grievant claimed that he worked on such a team prior to his dismissal which was a source of overtime for him, and that the failure to reassign him to the team upon his reinstatement was due to retaliation against him due to his grievance activities. However, Grievant was unable to establish that he was part of a lab crime response team prior to his dismissal. Further, the crime search team to which he seeks to be assigned was newly created after his dismissal, and has had no openings since Grievant's reinstatement.

Grievant made an additional allegation in his grievance that the failure to promote him was a result of discrimination against him. Grievant presented no evidence at the

hearing in support of this allegation. Thus, Grievant has not established discrimination in this regard.

Grievant further alleged in his grievance that the Employer engaged in discrimination and retaliation against him by failing to properly compensate him for losses he sustained as a result of his improper dismissal. Grievant asserted that this was accomplished by improperly paying interest owed on back pay, and payments over the annual leave cap, outside the state payroll system in a manner intended to deprive Grievant of retirement credits for that income. Grievant has withdrawn his claim concerning interest owed on back pay, but continues to contend that payments over the annual leave cap were improperly made outside the state payroll system. Grievant contends that the annual leave payments constitute taxable wages and ought to be creditable towards Grievant's ultimate retirement benefit.

The Employer did not act improperly by making the annual leave over the cap payments outside the state payroll system, resulting in Grievant not receiving retirement credit for such payments. In so proceeding, the Employer acted consistent with the State Retirement Division not considering an annual leave over the cap payment in a backpay award as earnable compensation on which retirement benefits are based. The evidence does not support a conclusion that the Employer engaged in a discriminatory action against Grievant by taking an action affecting his retirement in line with the administrator of the State's retirement system.

This treatment of annual leave over the cap payments is consistent with the purpose behind the awarding of such payments in back pay awards. The Board has decided that an improperly dismissed employee like Grievant who is owed annual leave

accruals upon reinstatement which would put the employee over the contractual limit on annual leave accrual is entitled to a payment representing the monetary value of the annual leave exceeding the contractual limit. The Board has reasoned that such payment is proper since the employee was in the situation of not being able to use such leave through no fault of the employee. Grievance of Merrill, 8 VLRB 383, 386 (1985). Grievance of Greenia, 22 VLRB 85, 87 (1999).

Thus, the annual leave over the cap payment is made to account for the fact that the normal course of using annual leave before the cap is reached cannot be followed. It follows that such payment would not be included within the definition of “earnable compensation” upon which the pension benefit is based of “the full rate of compensation that would be payable to an employee if the employee worked the full normal working time for the employee’s position”. An annual leave over the cap payment would not be received by the employee as part of normal working time.

If we were to rule that Grievant should receive retirement credit for annual leave over the cap payments, he would receive more retirement credit than if he had not been improperly dismissed. This would be contrary to the standard applied in calculating a back pay award that the monetary compensation awarded should correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee “whole”. To make an employee whole is to place the employee in the position he or she would have been in if the Contract had not been violated. Grievance of Lilly, 24 VLRB 233, 244 (2001). Grievance of Lowell, 15 VLRB 291, 339040 (1992). Grievance of Sherbrook, 13 VLRB 359, 361 (1990). If the Employer had not violated the Contract by dismissing Grievant, Grievant would not have received annual leave over the

cap payments to be applied to his retirement credits. He either would have used accrued leave so he did not exceed the annual leave cap or would have forfeited any leave which exceeded the cap.

Grievant contends that the Employer engaged in discrimination against him through acting contrary to past practice by not correcting errors in the accrual rates for Grievant's annual and sick leave balances prior to his dismissal. Specifically, Grievant asserts that the Employer should retroactively adjust his annual and sick leave accrual rates back to the beginning of his State Police employment to account for his temporary employment in the 1980's with the Departments of Corrections and Agriculture.

This claim can be summarily dismissed. Grievant has not presented evidence supporting a past practice making such temporary service credit retroactive. Grievant received such temporary service credit prospectively through his back pay award for his improper dismissal. He has presented no basis to support any awarding of such credit retroactively.

The remaining discrimination claim made by Grievant in his grievance concerns the failure to provide him with overtime opportunities. Grievant points out that he received no overtime from his reinstatement in January 2008 to March 2009 even though his colleagues in OPD received regular overtime. He also relies on the failure to be included on Department of Public Safety group email lists that would have alerted him to overtime opportunities.

Grievant has not established that his lack of overtime was motivated by discrimination against him. His lack of overtime within OPD resulted from decisions by Keefe. As previously discussed, Grievant has not demonstrated that Keefe was motivated

by animus against him due to his grievance activities in making any decision involving him. Keefe viewed it as difficult for Grievant to work much overtime because of his use of leave. Keefe had the impression that Grievant was not interested in much overtime due to his absences. There is some basis for this reasoning by Keefe because Grievant used a total of 114 days of sick leave and annual leave during the 14 months he worked no overtime. This does not mean, as discussed below, that Keefe was entitled to provide no overtime to Grievant. It does, though, bolster our conclusion that Keefe was not motivated by discrimination against Grievant due to his grievance activities in making overtime decisions.

The evidence does not indicate that the problem with Grievant being placed on group email lists was motivated by discrimination against him. There is no evidence of any representative of the Employer hindering Grievant from being placed on such lists. Grievant was placed on lists quickly when he sought the assistance of the Employer's office technology staff. Grievant did not quickly and aggressively pursue placement on lists, and the delays that resulted appear to result from his lack of initiative rather than any improper conduct of the Employer.

However, in addition to his claim of discrimination due to grievance activities with respect to lack of overtime, Grievant alleges that the Employer violated Article 21 of the Contract. Article 21, Section 4, provides that the "Department shall make a reasonable effort to distribute scheduled overtime as equitably as possible among classified employees". OPD employees other than Grievant worked an average of approximately 10 overtime hours per month. He worked no overtime for 14 months even though Grievant requested the opportunity to work overtime since his reinstatement. The

disparity between Grievant and the other employees leads us to conclude that the Employer violated the Article 21 requirement to make a reasonable effort to equitably distribute overtime by providing no overtime to Grievant.

In determining a remedy for this violation, we are seeking to place Grievant in the position he would have been in if the Contract had not been violated. In determining the amount of overtime Grievant would have worked but for the contractual violation, we take into account the large amount of leave Grievant took during the applicable period and the fact that the amount of overtime worked at OPD is based on individual job responsibilities. A reasonable estimate is that Grievant would have worked five hours per month, which is half of the average amount of overtime worked by OPD employees during this period. The Employer should pay Grievant his overtime rate of pay at 5 hours a month for the 14 months he was not assigned overtime to make him whole for the violation of Article 21.

ORDER

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

- 1) The grievance of Joel Davidson is sustained with respect to his allegation that Article 21 of the Contract was violated and is denied in all other respects; and
- 2) The Employer shall provide Grievant with payment for 70 hours of overtime he would have worked, plus interest, during the period January 2008 through February 2009. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due, and ending on the date he receives the payment.

Dated this 14th day of December, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Acting Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner, Member

/s/ James C. Kiehle

James C. Kiehle