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COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND FINANCE AND  
MASSACHUSETTS NURSES ASSOCIATION, SUP-3007 (12/20/89). SUPPLEMENTARY DECISION  
AND ORDER OF COMPLIANCE.

82.11 back pay  
82.111 interest  
82.112 mitigation  
83. Compliance

Commissioners participating:

Paul T. Edgar, Chairman  
Maria C. Walsh, Commissioner  
Elizabeth K. Boyer, Commissioner

Appearances:

William J. Hayward, Jr., Esq. - Representing the Commonwealth of  
Massachusetts, Commissioner of  
Administration and Finance

James F. Lamond, Esq. - Representing the Massachusetts Nurses  
Association

SUPPLEMENTARY DECISION AND  
ORDER ON COMPLIANCE

Statement of the Case

On November 3, 1987, the Labor Relations Commission (Commission) issued a Decision and Order in this case affirming a hearing officer's decision finding that the Commonwealth of Massachusetts, Commission of Administration and Finance (Commonwealth) had violated Sections 10(a)(1) and (5) of Massachusetts General laws, Chapter 150E (the Law) by unilaterally reassigning nurses employed at the Employee Assistance Program (EAP) of the Fernald School. The Commission ordered, *inter alia*, that the Commonwealth re-establish the EAP in the same form as it had existed prior to February 10, 1986 and that the two affected employees be reassigned to their former positions and made whole for any loss of earnings and benefits caused by the Commonwealth's unlawful conduct.<sup>1</sup> The Commonwealth did not appeal that Decision and Order.

On January 6, 1988, the Massachusetts Nurses Association (Association) wrote to the Commission and requested that it conduct a Compliance Conference. A Commission agent conducted a conference with the parties on March 15, 1988.

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<sup>1</sup>  
The full text of the Commission's decision is reprinted at 14 MLC 1277 (1987).



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Although the parties agreed to settle the matter at that conference, by letter dated November 30, 1988, the Association requested the Commission to reinstitute compliance proceedings. Accordingly, the Commission directed that a Compliance Hearing be scheduled to determine the amount of back pay owed to one of the affected employees, Dorothy Hudson (Hudson), under the Commission's November 3, 1987 Decision and Order. That hearing took place before Commission Chief Counsel John Cochran on February 17 and March 20, 1989. Both parties filed written briefs on May 23, 1989, which we have considered along with the record of the Compliance Hearing.

#### FACTS

On February 6, 1986, the Commonwealth disbanded the EAP at the Fernald School where Hudson was working as an employee counselor,<sup>2</sup> and Hudson was informed that she would be doing direct care nursing.<sup>3</sup> After the EAP was disbanded, Hudson took an unspecified amount of sick and vacation days. Subsequently, Hudson advised the Fernald administration in writing that her doctor had authorized her to take a medical leave.<sup>4</sup> By letter dated February 13, 1986, Peter O'Meara, the Superintendent at Fernald, informed Hudson that her request for medical leave was denied because she had not provided sufficient medical information and that, if she failed to provide that information by February 21, 1986, she might face disciplinary action.

In April 1986, a hearing was held to determine what action should be taken against Hudson for, *inter alia*, failing to provide the medical information requested by O'Meara in his February 13 letter denying her medical leave.<sup>5</sup> Based on that hearing, O'Meara suspended Hudson without pay for two weeks. Nevertheless, Hudson still considered herself to be on medical leave. On November 16, 1988, she

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The EAP at Fernald was an appointment only service, and Hudson worked nights and weekends when necessary.

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The hearing officer found that Hudson had been doing counseling for twenty-five years, and was no longer familiar with regular nursing duties. Hudson informed the Fernald Superintendent of this and advised him that, because of her medical condition, she could not accept the proposed assignment.

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The record does not reflect the reason for which Hudson requested a medical leave. However, the Hearing Officer's decision found that "Hudson has diabetes, and the shock of her scheduled transfer adversely affected her chemical imbalance." 13 MLC at 1502.

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Although Hudson acknowledged attending the disciplinary hearing, she testified that she never subsequently had been notified whether her request for medical leave had been granted or denied.



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filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination in which she stated, "I was on medical leave from February 1986 to December 1986."<sup>6</sup>

Hudson did not work at Fernald between February 10, 1986 and April 18, 1988. On June 16, 1988, Alan Cash, the Association's Associate Director, sent Paul Murphy, Associate Director of the Commonwealth's Office of Employee Relations, a calculation of the back pay the Association claimed the Commonwealth owed to Hudson for that period of time under the Commission's November 3, 1987 Order. According to that calculation, the gross amount of back pay owed Hudson was \$71,355.37, plus \$8,562.64 in interest.<sup>7</sup> Cash's letter acknowledged that the Commonwealth had already paid Hudson \$24,365.94 in partial settlement of the back pay owed her under the Commission's November 3, 1987 Order. Although Murphy requested further financial information from Hudson, the Commonwealth does not contest the figures provided by Cash.

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Hudson testified that she remained able to perform the employee counselor duties.

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Cash's calculations, which were based on the salary rates for R.N. IV's in the applicable collective bargaining agreements, reflected the following:

1. Feb. 10, 1986 - Sept. 27, 1986  
Step 7 - \$569.36/wk.  
# of weeks - 33 x 596.36 = \$18,788.88
  2. Sept. 28, 1986 - Oct. 3, 1987  
Step 7 - \$621.58/wk.  
# of weeks - 53 x \$621.58 = \$32,943.74
  3. Oct. 4, 1987 - April 16, 1988  
Step 7 - \$700.19/wk.  
# of weeks - 28 x \$700.19 = \$19,605.32
  4. Apr. 18, 1988 Holiday  
1 Day at Step 7 = 17.32
  5. Interest as per  
MGL c.231, Sec. 6B @ 12%
- TOTAL: \$71,355.37 x .12 = \$ 8,562.64  
\$71,355.37 + \$8,562.64 = \$79,918.01



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From February through December 1986, Hudson paid the same premiums for health insurance coverage that she had paid while working as an employee counselor in the EAP. Pursuant to article 13 of the parties' 1984-1987 collective bargaining agreement, that amount was ten percent (10%) of the premium rate for the kind of coverage she received. However, in January 1987, Hudson began paying the full amount of health insurance premiums, which amounted to \$347.40 each month. She continued to make the increased premium payments through April 1988.

Between February 1986 and April 1988, Hudson attended various counseling seminars and courses for which she paid a total of \$1,000 in tuition. Those included a thirty-session course at Boston College for credit toward alcoholic counseling certification. The tuition for that course was \$750.00. Hudson believed that those seminars and courses would assist her to obtain other employment.

In 1978, Hudson founded Stow Counseling Service, Inc. (Stow), a nonprofit counseling and educational referral service for individuals with psychological problems, and she serves as the Director of Stow, which has no other employees. Between 1981, when Hudson began working as an employee counselor in the EAP until February 1986, Hudson usually saw private clients through Stow in the evenings and on weekends.<sup>8</sup> Since February 1986, she has continued to see private clients through Stow in the evenings and on weekends.

Hudson receives a consulting fee for these services based upon the income produced by Stow. The annual Form 990's Stow has filed with the Internal Revenue Service since 1981<sup>9</sup> show her earnings from Stow to be:

September 1981 - August 1982:	\$2,265.00
September 1982 - August 1983:	\$2,435.00
September 1983 - August 1984:	\$3,450.00
September 1984 - August 1985:	\$4,300.00
September 1985 - August 1986:	\$4,300.00
September 1986 - August 1987:	\$10,499.00 <sup>10</sup>

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She would see clients evenings and weekends because they were generally unavailable to meet with her during the day. Daytime appointments, if held, were always for crisis intervention.

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On September 2 and November 16, 1988, Paul Murphy wrote to Alan Cash and requested documentation, including tax forms, concerning Hudson's earnings from 1985 to 1987. However, he never received the requested documentation, and the first time he saw any tax forms filed by Hudson or Stow for the relevant time period was at the hearing in this matter.

10 (see page 1459)



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Hudson estimated that she had received approximately \$5,000 from Stow between September 1987 and April 1988. She attributed the increase in her annual income to Stow's greater income as its services became better known.

Beginning at some time in 1986, Hudson personally contacted a number of friends and colleagues concerning possible openings in the nurse counseling field.<sup>11</sup> She also reviewed the classified advertisements in the Boston Sunday Globe and the Beacon, a local newspaper, and attended professional meetings where she might learn about such openings. Throughout the 1986 calendar year, Hudson sent letters and resumes to several prospective employers, including: Westborough State Hospital, which was seeking a Director of Nursing; Herbert Lipton Community Mental Health Center; and CPO Search Committee, which was seeking Field Operations Managers, an Accreditation Director, and a Deputy Assistant Commissioner for Community Programs and Operations; and the Fay Rotenberg School, which was seeking a Clinical Coordinator.

#### Discussion

The formula for computing the amount of back pay owed to an unlawfully discharged employee is: net back pay = gross back pay - (interim earnings - expenses)<sup>12</sup>. Greater New Bedford Infant Toddler Center, 15 MLC 1653 (1988); Newton School Committee, 8 MLC 1538, 1555 (1981); Plymouth County House of Correction, 6 MLC 1523 (1979). Guided by decisions of the Federal and Massachusetts courts, the Commission has also held that employees discharged in violation of Chapter 150E have an obligation to mitigate back pay liability by seeking appropriate interim employment. Newton School Committee, 8 MLC at 1538; see also Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); and Ryan v. Superintendent of Schools of Quincy, 374 Mass. 670 (1976). The burden of proof on the issue of mitigation is on the employer. Newton School Committee, 8 MLC at 1560. To meet that burden, an employer must demonstrate that: 1) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than,

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<sup>10</sup> (from page 1458)

Hudson testified that the compensation she received for that period was only \$4,059.00. However, that is inconsistent with the Form 990 Stow filed for the period.

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The Association offered evidence concerning Hudson's attempt to obtain alternative employment by way of rebuttal. The Commonwealth objected on the ground that there was no evidence in the Commonwealth's case in chief to warrant this kind of rebuttal testimony. However, in light of evidence concerning the nursing position the Commonwealth offered Hudson at Fernald in February 1986, and the Commonwealth's questions concerning what Hudson did when she was not seeing clients at Stow evenings and weekends, this testimony was properly admitted.

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Expenses are the costs incurred in earning the interim income.



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the place of former employment; 2) the employee unreasonably made no attempt to apply for the comparable jobs; and 3) it was reasonably likely that the employee would have obtained one of those jobs. Newton School Committee, 8 MLC at 1561; Black v. School Committee of Malden, 369 Mass. 657, 661-62 (1976).

Here, the gross back pay period began on February 6, 1986, when the Commonwealth unlawfully disbanded the EAP and caused Hudson to lose her position as an employee counselor, and continued until April 18, 1988, the date Hudson resumed her former position. The Association calculated the amount of gross back pay due Hudson for that period of time to be \$71,355.37 plus \$8,562.64 in interest, and the Commonwealth has not contested that calculation. The Commonwealth asserts, however, that any back pay found to be owed Hudson must reflect that: 1) Hudson's income from Stow Counseling increased between February 1986 and April 1988; 2) between February 6, 1986 and December 1986, Hudson was on medical leave and unable to work; and 3) as a nurse, her services were in demand.

#### Interim Earnings

From 1981 through February 1986, Hudson saw private clients through Stow Counseling night and weekends. She continued this practice after the Commonwealth eliminated her employee counselor position at Fernald. Although Hudson's income from Stow Counseling increased significantly, from \$4,300 to \$10,599 during the year ending August 1986, there is no evidence that she worked either more or different hours at Stow after February 6, 1986 as compared with her previous practice while employed at Fernald. Gross back pay is offset by income earned as a result of the employee's termination. An employee who works two jobs, is terminated from one, and continues to work the second has not replaced the first job with the second. Therefore earnings from the second job are not considered "interim earnings" except to the extent that the employee's income changes due to the employee's increased availability to work. See Newton School Committee, 8 MLC at 1565; Town of Townsend, 1 MLC 1450, 1453 (1974). There is no evidence that Hudson's increased income from Stow resulted from her increased availability for work after February 6, 1986. Therefore we do not consider income from Stow to be "interim earnings" that must be subtracted from the gross back pay calculations.

#### Mitigation

The Commonwealth argues that Hudson's back pay should be reduced or eliminated because she failed to make reasonable efforts to secure interim employment.<sup>13</sup> It asserts that, because Hudson was a licensed nurse, she was "in demand," and

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We note that the Commonwealth's offer of a direct care nursing job was not an offer to reinstate Hudson to her former position as an employee counselor, nor does the Commonwealth contend that Hudson's failure to accept a direct care nursing position was equivalent to rejecting reinstatement to her former job.



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that her failure to obtain interim employment must have resulted from an inadequate employment search. Further, the Commonwealth asserts that Hudson should not be entitled to back pay for the period from February 10, 1986 through January 1, 1987 because she was, by her own admission, medically unable to work during that period.

After the EAP was disbanded, Hudson advised the Fernald administration that her doctor had authorized her to take a medical leave. Although she failed to submit medical documentation for that leave when requested to do so by the Commonwealth, Hudson still considered herself to be on medical leave through December 1986. Indeed, on November 16, 1988, Hudson made the following admission in a Charge of Discrimination she filed with the Massachusetts Commission Against Discrimination: "I was on medical leave from February 1986 to December 1986." Accordingly, the evidence demonstrates that Hudson withdrew from the job market between February 10, 1986 and January 1, 1987 due to her own assessment of her physical condition.<sup>14</sup> Therefore, we conclude that she is not entitled to back pay for that period. Cf. Big Three Industrial Gas & Equipment Co., 263 NLRB 1189, 1200-01 (1982); American Manufacturing Co. of Texas, 167 NLRB 520 (1967).

However, the Commonwealth has not met its burden of establishing that Hudson failed to satisfy her obligation to mitigate back pay liability between January 1987 and April 18, 1988. The Commonwealth adduced no evidence demonstrating that there existed any discoverable opportunities for comparable employment in an equally convenient location for which Hudson unreasonably failed to apply, or that it was reasonably likely that she would have obtained one of those comparable jobs.<sup>15</sup> Moreover, Hudson testified without contradiction that she was unsuccessful in obtaining interim employment during that period, despite her efforts. No

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Although Hudson testified that, at some time in 1986, she began contacting colleagues about possible openings in the nurse counseling field and sending out employment inquiries, by her own admission she was medically unable to work until January 1987. Accordingly, we are unable to credit her employment inquiries as anything more than expressions of her availability for work in January 1987, when she considered herself medically able to return to the workforce.

Although Hudson testified that she remained medically able to perform counseling duties, we consider that her testimony on that point is impeached by her own statement in the complaint she filed with the Commission Against Discrimination. In addition we note that there is no evidence that she resumed her search for work until October 1986, a date which would be consistent with an expectation of returning to work in or around January 1987.

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The Commonwealth presented no evidence establishing that nurses with Hudson's particular work experience were in demand as an employment commodity, nor would such general evidence suffice to satisfy its burden to prove that Hudson had a reasonable prospect of being hired for one or more available and comparable employment opportunities.



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evidence established that she had not made significant attempts to find suitable employment or that she ever abandoned the search after January 1, 1987. Accordingly, we conclude that Hudson is entitled to back pay for the period between January 1987 and April 18, 1988.

#### Health Insurance

The Commission has consistently held that an employee who incurs additional health insurance costs because of an unlawful termination may recover the increased cost expended in obtaining comparable coverage. Newton School Committee, 8 MLC at 1538; Plymouth County House of Correction, 6 MLC at 1530. From January 1987 through April, 1988, Hudson paid \$347.40 per month, the full amount of the health insurance premiums necessary to ensure the same insurance coverage she had while working as an employee counselor at Fernald. While employed by the Commonwealth, she had been required to pay ten percent (10%) of that premium, or \$34.74 per month.<sup>16</sup> Accordingly, Hudson is entitled to recover \$309.66 per month from January 1987 through April 1988, which represents the increase in her insurance premium costs for that period of time.

#### Tuition Expenses

Hudson also seeks to be reimbursed \$1000 for tuition she paid for various counseling seminars and courses between February 1986 and April 1988.<sup>17</sup> Her tuition expenses included \$750.00 for a course for credit toward certification in alcoholic counseling. Generally, tuition expenses are only recoverable when they relate directly to securing and pursuing interim employment. Plymouth County House of Correction, 6 MLC at 1523. Here, Hudson testified that she took the counseling seminars and courses because she believed that they would assist her in obtaining other employment. However, apart from Hudson's personal belief about the value of those courses, the record does not demonstrate that they related directly to obtaining alternative employment. Accordingly, we will not include those tuition expenses in calculating the amount of back pay owed to Hudson.

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<sup>16</sup>

Between February and December 1986, Hudson continued to pay the same insurance premium that she had paid while working as an employee counselor.

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The Commonwealth does not claim and the record does not establish that Hudson's attendance at these educational seminars affected her availability for interim employment.





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Conclusion

Therefore, for the reasons set forth above, we conclude that the amount of back pay the Commonwealth owes Hudson is \$24,824.21. That figure is derived as follows:

Back Pay Period from January 1, 1987 to April 18, 1988	
1/1/87 - 10/3/87 = 39 wks 2 days x \$62.58/wk	= \$24,490.25
10/4/87 - 4/16/88 = 28 wks x \$700.19 wk	= \$19,605.32
4/18/88 = 1 day	= \$ 140.02 <sup>18</sup>
Gross Back Wages	= <u>\$44,235.59</u>
Health Insurance = 16 months x \$309.66	= \$ 4,954.56
Amount of back pay paid by Commonwealth to date	<u>\$49,190.15</u> - \$24,365.94
TOTAL Remainder due	<u>\$24,824.21</u>

ORDER

WHEREFORE, based on the foregoing, and based on the authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the Commonwealth of Massachusetts shall:

Pay to Dorothy Hudson the sum of \$24,824.21 together with interest on all compensation due, calculated in the manner specified in Everett School Committee, 10 MLC 1609 (1984).

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
 LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN  
 MARIA C. WALSH, COMMISSIONER  
 ELIZABETH K. BOYER, COMMISSIONER

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The undisputed calculations provided by the Association reflect that one day's back pay based on a rate of \$700.19/week would be \$17.32. However, the correct amount at that daily salary would be \$140.02.

