PLYMOUTH COUNTY HOUSE OF CORRECTION AND JAIL AND IBPO, MUP-2234, 2429 (10/24/79). Supplementary Decision and Order.

(80 Commission Decisions and Remedial Orders)
82.11 back pay

Commissioners participating:

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Comissioner

Appearances:

Lawrence M. Siskind, Esq.	- Counsel for the Plymouth County House of Correction and Jail
Robert J. Canavan, Esq.	- Counsel for Paul Ahlborg, Claimant
Joseph W. Monahan, III, Esq.	- Counsel for David Benoit, Kevin McCormack and Malcolm Robischeau, Claimants

SUPPLEMENTARY DECISION AND ORDER

Statement of the Case

On December 6, 1977, the Labor Relations Commission (Commission) issued its Decision and Order in the above-captioned matters finding that the Plymouth County House of Correction and Jail (Employer) had unlawfully discharged Paul A. Ahlborg, David Benoit, Kevin McCormack and Malcolm Robischeau in violation of Chapter 150E of the General Laws (Law). The Employer has not appealed this Decision. As part of the remedial order, the Employer was directed to:

> (a) Offer Paul A. Ahlborg, David Benoit, Kevin McCormack and Malcolm Robischeau reinstatement to their prior positions or a substantial equivalent thereof and make each of them whole for loss of earnings, if any, suffered as a result of the unlawful discharge by payment to each a sum of money equal to that which each of them would have earned from their date of discharge to the date of the Employer's offer of reinstatement with backpay computed on a quarterly basis plus interest at the rate of seven (7) percent interest per annum;

The parties were unable to agree on the amounts due under paragraph 2(a) of the Order quoted above. The Commission was subsequently requested to investigate issues relating to compliance. Formal hearings were held before Garry J. Wooters on April 3, 4 and 28, June 20, 21 and 22, and July 11, 1978. Briefs on behalf of the Employer and the four claimants were filed on May 3, 4 and 7, 1979.

Upon the entire record in this matter, the Commission makes the following findings of fact, and renders the following opinion.

Plymouth County House of Correction and Jail and IBPO, 6 MLC 1523

1. General Considerations

The amount of compensation to which an individual is entitled under a Commission "make whole" order is determined by the following formula:

NET BACK PAY = GROSS BACK PAY - (INTERIM EARNINGS - EXPENSES)

Town of Townsend, 1 MLC 1450 (1975). In this computation, Gross Back Pay is the total amount of wages and other compensation to which the employee would have been entitled but for the unfair labor practice. Interim earnings are amounts earned during the back pay period which are attributable to employment secured to replace the jobs lost. Expenses are generally considered to be expenses incurred in earning the interim income.

The period of back pay runs from the date of unlawful discharge to the date when the employee is unconditionally offered reinstatement to the former position. The case law is clear that the offer must, in fact, be unconditional, and if it is not, the back pay period is extended until the date when the employee actually returns to work. Theomoid Co., 90 NLRB 614,25 LRRM 1257 (1950); McCarron, d/b/a Price Valley Lumber Co., 106 NLRB 26,32 LRRM 1401 (1953); National Labor Relations Board Casehandling Manual, Part III, Compliance Proceedings, sec. 10530.1(b).

The Employer claims that it made an unconditional offer of reinstatement to the claimants on December 19, 1977. The employees did not return to work until January 16, 1978 in the case of Robischeau, Benoit and Ahlborg. On March 3, 1978 McCormick elected not to accept reemployment at the Jail. The employees claim that January 16, 1978 is the date which should mark the end of the back pay period. The Employer contests the period from January 4, 1978 through January 16, 1978.[1]

The relevant facts on this issue may be briefly summarized. Following the December 6, 1977 Decision and Order of the Commission which ordered the reinstatement of the four employees, the Employer decided not to appeal, and to offer the employees reinstatement. This decision was communicated to them, through counsel, by a letter of December 19. Counsel transmitted the decision to their clients.

After being informed of the decision not to appeal, Benoit called the Jail and talked with Captain Higgins. Higgins confirmed that Benoit would be going back to work, and they arranged that he would start January 2, 1978. Benoit testified that he later received a message from Sheriff Snow that there were legal problems with his re-employment, and that he could not return on January 2.

After being informed that he had the option of returning to work at the Jail,

[1] The offer of December 19, 1977 did not specify a date on which the employees were to return to work. The employer apparently relies on the subsequent communications between the Sheriff and the claimants to support its claim that back pay should terminate as of January 4, 1978.

Kevin McCormack had a conversation with Sheriff Snow, probably in late December of 1977. McCormack was about to enter a probationary period with the United States Postal Service, and asked if he could have until March 3, 1978 to decide whether to return to the Jail or remain with the Postal Service. He later decided that he did not desire reinstatement.

Malcolm Robischeau believed that he had to indicate by January 6, 1978 whether he wished to return to work. Following notification of the Commission's decision, and the decision of the Employer not to appeal, Robischeau called Captain Higgins to arrange a starting time. They agreed on January 6, 1978. Later Sheriff Snow called and told Robischeau that he could not start on the 6th, but that it would be a few weeks later. Robischeau reported to the Jail on January 6, 1978, but was turned away. Ahlborg and Benoit learned of this shortly after.

At a conference on compliance held at the Labor Relations Commission on January 10, 1978, it was arranged that Benoit, Robischeau and McCormack would start on January 16, 1978.

On these facts we believe that the back pay period for Robischeau, Benoit and Ahlborg should end on January 16, 1978. No unconditional offer was made to these employees until that date, or if it was, it was subsequently rescinded by Snow's telephone conversations with Ahlborg and Benoit, and by turning Robischeau away when he reported for work. In the case of Kevin McCormack, however, we find that he is not entitled to back pay for the period from January 1 through January 16, 1978. By that time he had requested and been granted an extension of time to consider re-employment until March 3, 1978. Whether considered as a declination of the offer of reinstatement or an indication of being unavailable for employment, this response disqualifies him for back pay for the disputed period.

a. Gross Back Pay

It is well settled that Gross Back Pay includes not only loss of salary, but may also include compensation for the loss of other economic benefits attributable to the lost employment.

> In addition to his regular pay [gross back pay] includes overtime pay, bonuses and Christmas gifts, vacation pay which would have been earned except for the employees' illegal discharge, paid holidays, retirement and insurance benefits, tips, employee owned housing, employee discounts on purchases, and the like. Town of Townsend, supra, at 1451-52. (citations omitted).

In this case, gross salary for the claimants is not in dispute. Brief for the Employer at 7. In addition to salary lost, however, the claimants would have us include within Gross Back Pay amounts attributable to lost fringe benefits. The employer contests a number of these areas, both as to their inclusion in Gross Back Pay, and, in some cases, the amount of such benefits if they are to be included.

Plymouth County House of Correction and Jail and IBPO, 6 MLC 1523

1. Loss of Federal Details

Had the four employees involved in the Plymouth County case not been discriminatorily discharged, they would have been eligible to work federal details. The work involved guarding federal prisoners on a per diem basis ($60.00 per day for an 8-hour detail). Prior to the discharges, the detail work was very sporadic and sparse. In fact, none of the four officers involved ever worked more than three such details. The available work was posted and the officers were free to sign up so long as no details were worked for an 8-hour period immediately following a regularly scheduled tour of duty. At about the same time the officers were discharged, the amount of detail work apparently increased substantially although Sheriff Snow testified that the detail work continued to be sporadic (T.7-113-127).

The employer does not appear to contest the propriety of including loss of detail money within Gross Back Pay, but rather contends that the claimants have failed to establish with any certainty what these amounts would have been. Thus any compensation for loss of detail money would be speculative, and improper. Brief of Employer at 12.

We believe that the claimants have met their burden of proof in showing that they would have been entitled to work such details had they not been unlawfully discharged. The inability to determine with precision exact amounts which would have been earned does not mean that there can be no compensation for such losses. In similar cases the National Labor Relations Board has used the average amount earned by other employees in similar positions to approximate the amounts which would have been earned by the discriminatees. Rice Lake Creamery Co., 151 NLRB 1113,58 LRRM 1542 (1965), enf'd in part, 365 F.2d 888,62 LRRM 2332 (D.C. Cir. 1966). In this case, the hearing officer attempted to obtain records from which such a computation could have been made with accuracy. The employer was unable to supply such records. Tr.7, 127. Under such circumstances, we think it would be improper to penalize the dischargees who were unable to establish actual losses because they were unlawfully discharged, and unable to establish average earnings because the employer did not keep or produce sufficient records of details. Lacking any hard evidence on the actual amount of detail work during the back pay period, we will rely on the estimates of detail work made by the discriminatees based on their discussions with other correction officers. The estimates of Ahlborg, Robischeau, and McCormack are consistent. Robischeau and McCormack estimated that they would have earned $800 from details during the back pay period. Ahlborg estimated that he would have earned $1,200 during the time he was separated from the Jail. Each of these estimates amounts to approximately $400 dollars per year, or between six and seven details per year. We believe that this estimate is reasonable. It is also unrebutted on this record.[2] We will, therefore, accept the fiture of $100 per quarter as the best available estimate of lost earnings due to federal detail work during the back pay period.[3]

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[2]The best evidence, testimony by correction officers who worked during the back pay period, was equally available to all parties. None was called.

[3]Benoit's estimate of $1,400 from lost details during the back pay period is discounted as being wholly inconsistent with the estimates made by the other claimants.

2. Holiday Pay

The Plymouth County House of Correction and Jail was staffed seven days a week, twenty-four hours per day. Correction officers were entitled to eleven paid holidays per year. If a holiday fell on a day the officer was scheduled to work, he worked that shift, and received an extra day's pay. Thus, in a week where the officer worked a holiday, he would receive six, rather than five days' pay. The claimants argue that they should receive money in addition to their total annual salary to reflect that extra money which they would have made from working holidays. The Employer argues that compensation for the holidays has already been included in the total annual salary.

We find that the claimants are entitled to compensation for lost holiday pay. The record makes clear that correction officers will be scheduled to work on approximately five of every seven holidays. During the back pay period for Ahlborg there would have been thirty-one paid holidays; for Benoit, twenty-three;[4] for McCormack,[5] twenty-one; and for Robischeau, twenty-three. Each is entitled, therefore, to five-sevenths of the amount he would have earned if he had worked each of those days.

3. Meals at the Jail

Each of the claimants testified to a practice of permitting correction officers to eat institution meals, at no cost, when on duty. It appears that the practice was for the convenience of the Employer since it insured that the employees were available in an emergency situation. In any event, it is clear that officials of the Jail were aware of the practice and condoned it. The Employer contends that the value of such meals should not be included as part of the Gross Back Pay. The Employer further contests the value placed on the meals by the claimants, and suggests that if compensable at all the value should be measured by the cost to the Employer of providing the meals, not by what it would cost the employee to purchase a comparable meal elsewhere.

The National Labor Relations Board has drawn a distinction between meals provided as a convenience to the employer, and those situations where the meal is simply a benefit to the employees and the employer receives no benefit from the arrangement. See, e.g., Empire Worcested Mills, 53 NLRB 683,692 13 LRRM 123 (1943); AMSH Assoc., Inc., 234 NLRB No. 125,97 LRRM 1360 (1978). A similar distinction is made by the Internal Revenue Service in determining whether the value of such meals should be treated as "income" for tax purposes.

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[4]The parties are in disagreement as to the precise date when the four were offered reinstatement. The period in dispute contains two of the paid holidays. As we have concluded above that there was no unconditional offer of reinstatement until January 16, 1978, we have included Christmas Day 1977, and New Year's Day 1978 in our computation of holiday pay. See pp 4-6, supra.

[5]The back pay period for McCormack runs from January 7, 1976 through December 30, 1977.

We have examined the rationale of these cases but decline to adopt such a rule. The purpose of a "make whole" remedy is to compensate the employee for lost benefits. The reason why a benefit is being provided is irrelevant to a determination of whether it is, in fact, a definite economic advantage to the employee.[6] Free meals at the jail were such a definite economic advantage to the employee regardless of the reason why they were offered. If meals were not provided on an eight hour shift, employees would have to either bring or purchase meals at their own expense. If we fail to compensate the employee for loss of this benefit, we have afforded less than a "make whole" remedy. We conclude that the value of the meals is an element of back pay.

Our conclusion that the purpose of the "make whole" order is to compensate the employee for lost economic benefits is also dispositive of the Employer's contention that the correct measure of the value of the meals is their cost to the Employer. If the purpose is to compensate the employee for a lost benefit, the correct measure of value must be some "replacement" cost. But what replacement cost? The claimants argue that we should value the meals by the price a restaurant would charge for a similar meal. We think such a measure is excessively generous to the employees. The benefit conferred was not a restaurant meal, where part of the value is attributable to setting, atmosphere, and the quality of cuisine. The value of an institution meal is little more than the value of the food itself, and the advantage of having it prepared for you. Under such circumstances we do not consider Mr. Ahlborg's estimate of $2.00 per meal to be unconscionably low as an average value for the one lunch or dinner per shift made available to the claimants.

4. Costs of College Tuition and Books

David Benoit testified that while employed at the Jail he took three courses at Cape Cod Community College which were paid for by the Law Enforcement Assistance Administration because he was at the time a correction officer. After his discharge Benoit continued to take courses, and, in fact, became a full-time student. As he was no longer a correction officer, he was no longer eligible for LEAA reimbursement for tuition and book costs. Benoit claims that he should be entitled to these costs pursuant to the Commission's back pay order. We disagree.

While it is true that Benoit's eligibility for LEAA reimbursement was terminated as a result of his unlawful discharge, his decision to continue incurring such expenses was voluntary. Such voluntarily incurred costs should not be compensable unless they relate directly to securing and pursuing interim employment. The tuition costs here in question do not fall into such a category. There is no evidence that Benoit's academic pursuits were of any assistance in obtaining alternative employment. The only suggestion on this record is that it may have made him somewhat less available for other jobs. We will not include

[6] In determining whether to treat such meals as taxable income it is logical to consider whether the employee must accept the offered benefit, or whether he chooses to do so. The same logic does not support the distinction in back pay cases.

tuition and book costs in Gross Back Pay for claimant Benoit.

5. Interest and Finance Charges On Personal Loans

Benoit testified that following loss of his position at the Jail, he was unable to secure another position. In order to meet his obligations he took out several personal loans. He now seeks to recover, in this proceeding, the interest and finance charges on those loans. We believe that such a recovery is clearly improper.

The make whole remedy is intended only to replace compensation lost by virtue of the prohibited practice. It is not intended to recover all consequential and indirect effects of the discharge. The finance charges and interest here sought are clearly indirect consequences of Benoit's termination. They never formed any part of the compensation he would have received from the Jail if not discharged. They may not, therefore, be compensated as part of back pay.

We have no doubt that many dischargees are forced to either lower their standard of living or incur personal indebtedness during the extended period required to litigate and enforce a prohibited practice case. To the extent that these losses are not recovered, the employee has not been made whole. Nevertheless, we are constrained by what we believe to be the intent of the Legislature and our views as to the traditional remedial authority of administrative agencies. Only direct compensation lost may be recovered in a back pay proceeding.

6. Vacations

Correction officers at the Jail earn vacation credit based upon years of service. Each of the claimants here would have been entitled to two weeks of vacation per year during the back pay period with the exception of Paul Ahlborg, who would have been entitled to three weeks during the last year of the back pay period. Vacation credit could be accrued under certain circumstances, but employees did not have the option of working in lieu of vacation and receiving extra pay. Each of the claimants here contends that, in addition to their fifty-two weeks of annual pay, they are entitled to one week additional pay for each week of vacation to which they were entitled. The employer contends that they are entitled to no more than fifty-two weeks' pay for any year. The most recent NLRB precedent in the area is Sioux Falls Stock Yards Co., 236 NLRB No. 62,99 LRRM 316 (1978) where the Board concluded that illegally discharged employees were entitled to compensation for lost vacations even in a situation where employees were required to take a vacation in order to get vacation pay. The discrimatees in that case got more than fifty-two weeks' pay for the year. This appears to be the general rule. See, Fuchs, Kelleher, and Pye, Back Pay Revisited, 15 B.C. Ind. and Comm. L. Rev.227,240. The exception to the general rule is in cases where the plant or business is shut down during the vacation period. In such cases, the claimant is not entitled to pay in addition to regular salary. Moss Planing Mill Co., 110 NLRB 933, 35 LRRM 1165 (1954), reversed on other grounds, 224 F.2d 702,36 LRRM 2534 (5th Cir. 1955).

We are unpersuaded by the logic of the Board cases. Additional vacation pay is justified by the curious logic that the employee has been deprived of the choice of whether or not to take a vacation (Sioux Falls Stock Yards, supra.).

The choice involved is the choice of either not working and being paid, or working and being paid twice the weekly amount. We are not persuaded that being deprived of such a choice is significant. Similarly, we do not understand why the NLRB reaches a different result in plant shutdown cases. The only difference is that in one case all employees take their vacations at the same time, and in the other the employees take vacations at different times during the year. This seems to be a distinction without substance.

We are persuaded that the vacation is a benefit to the employee which has some value. We do not agree that the appropriate measure of the vacation benefit is an additional week's pay for each week of lost vacation benefit. What was lost was the entitlement to be paid for not working, not to be paid twice for any week. The employee did not lose a fifty-third or fifty-fourth week of pay. But the employee has lost a benefit. Loss of a job with a five week vacation entitlement is a greater loss than a job with no vacation benefit. We believe the appropriate way out of this dilemma is to replace the lost benefit in kind. We will order that the employees be given the amount of vacation credit they would have accrued had they worked continuously during the back pay period. We need not put a monetary value on the benefit. We note the general agreement among the parties that we should credit the sick leave bank of these employees with whatever total sick leave they would have accrued. A similar treatment of vacation pay seems to us warranted.

7. Medical and Dental Bills

Claimant Ahlborg incurred $208.50 in medical bills which would have been paid under the County group insurance program if he had not been unlawfully discharged. The Employer agrees that the County is liable for such amounts, and concurs in the amounts. Brief for the Employer at 21. The employer has taken a contrary position with regard to pregnancy-related expenses of Ahlborg's wife. The expenses were incurred after Ahlborg's reinstatement to the Jail, but to date, Blue Cross/Blue Shield, the group insurance carrier, has refused payment for covered services. The Brief for the Employer suggests that this may be due to the break in service caused by the discharge. As a result of the discontinuous service, Ahlborg may have to incur a new waiting period before becoming entitled to maternity benefits. If so, those expenses should be recoverable by Ahlborg. They relate directly to the termination of his employment, and the only way for Ahlborg to mitigate damages would be to purchase double coverage during such a waiting period. We do not think this should be a requirement to mitigate damages. We find that if Blue Cross/Blue Shield finally denies the claim for the reasons discussed above, the County is liable for the extra cost incurred by Ahlborg. Ahlborg is also entitled to eighty percent of expenditures for dental services which would have been covered under the County plan.

We reach a different conclusion with regard to certain claims for medical expenses submitted by Benoit. Certain of these expenses were generated by Benoit's decision to join the baseball team at Cape Cod Community College during part of the back pay period. Others relate to injuries or illness dating from prior to the unlawful discharge. We do not believe that either category of expense is compensable. The expenses for a physical examination relating to the baseball team were incurred voluntarily and were not expenses of earning interim income. Whether this physical examination would have been covered under the County's group plan or not, it should not be included as a part of gross back pay.

The expenses relating to injuries predating the discharge are not compensable as the claimant has not shown that the refusal of Blue Cross/Blue Shield to pay has any connection to the unlawful termination. Absent such a showing we will not order reimbursement for such charges. The employer which commits a prohibited practice does not thereby become liable for all debts or claims the dischargee may incur, but only those which spring directly from the prohibited practice.

b. Interim Earnings

The Employer does not question the amount of Interim Earnings submitted by the claimants. Claimants Ahlborg and McCormack argue that not all of their Interim Earnings should be deducted from Gross Back Pay, as these amounts are attributable to overtime hours worked at the interim employment. The facts on which these claims are based are not in dispute.

Claimant Ahlborg earned "overtime" from two employers during the back pay period. From February 10, 1976 through February 24, 1977 Ahlborg was employed as the manager of Happy's Oil Service, Inc. During this time his regular work week was fifty-five hours, for which he received a salary of one hundred fifty dollars per week. He was permitted to work additional hours at a rate of $2.50/hr. Ahlborg claims that $3,497.63 out of his earnings of $9,362.82 is attributable to either work in excess of forty hours per work, or to overtime in excess of fifty-five hours per week. The two categories are not differentiated.

Ahlborg also worked for the Arnold Zildjian Co., a cymbal maker. The regular work week included five, nine-hour shifts per week. Eight hours of each shift was considered straight time; the additional hour was considered overtime and compensated at time and one-half. Of the total earnings at Zildjian, $4,115.87 is attributable to overtime.

McCormack also claims "overtime" income from two employers. During a six week period in 1977 he worked for Davenport Realty. Much of the work was outdoors and dependent on the weather. Although McCormack never worked more than forty hours per week (averaging only about twenty) his computations show a deduction for "overtime". While at the United States Postal Service, McCormack worked a split shift, two four-hour work periods with a four-hour break between. He claims that he is entitled to deduct some of the money earned at the Post Office (one-half of the $4,633.63 earned) because he had to "work" a twelve-hour day to earn eight hours' pay.

Certain of these contentions are easily disposed of. McCormack's claim that he is entitled to protect half of his earnings from the Post Office is without merit. He does not work overtime to make his forty-hour week. He simply works a schedule less convenient than he would prefer. Such inconvenience is wholly insufficient to warrant treating any part of this income as "overtime". Similarly we reject his claim to "overtime" work for Davenport Realty. McCormack testified that the work was dependent on weather, and that he worked only one hundred twenty-five hours in a six-week period, never working more than thirty-six hours in any week. Even if he may have worked more than eight hours in any given day, the length of a shift at the Jail, we do not consider that this relaxed work schedule warrants excluding any of the income from Interim Earnings.

Plymouth County House of Correction and Jail and IBPO, 6 MLC 1523

The claims raised by Paul Ahlborg require greater consideration. At both Happy's and Zildjian, Ahlborg worked hours in excess of his normal tour of duty at the Jail. To offset such overtime earnings against gross back pay provides a disincentive for the discriminatee to undertake such work, and provides to an employer guilty of the prohibited practice the fruits of the employees' industry. On the other hand, it is equally unfair to compensate an employee for lost overtime opportunities by including them in Gross Back Pay, and to insulate overtime earned in interim employment from interim earnings. We believe that the correct approach is to offset overtime earned in interim employment only against lost overtime included within Gross Back Pay. There is some authority for such an approach under the National Labor Relations Act. An employee will not be considered to have incurred a wilful loss of earnings if he refuses work during the back pay period in excess of the hours required at the job from which he was discharged. United Aircraft Corp., 204 NLRB 1068, 83 LRRM 1616 (1973); McCann Steel Co. v. NLRB, 570 F.2d 658, 99 LRRM 2921 (1978). NLRB Casehandling Manual, Part III, Compliance Proceedings, sec. 10530.1(d). Under this rule, we consider the income from Happy's attributable to hours worked in excess of forty hours per week to be overtime, in the sense that they are hours in excess of those which would have been worked at the Jail. The overtime earned at Zilijian is also entitled to be treated as overtime, and to be set off only against that part of Gross Back Pay attributable to lost overtime opportunities. The total overtime from interim earnings for Ahlborg is $7,603.50. The total Gross Back Pay attributable to lost overtime is the federal detail pay and the holiday pay, a form of premium or overtime pay. As the overtime from interim employment is greater than the overtime included in Gross Back Pay, the mathematical result may be obtained by excluding from Gross Back Pay all of the detail and holiday pay, and excluding from Interim Earnings all overtime pay.[7]

c. The Duty to Mitigate

The Employer argues that the amounts owed to all four claimants should be reduced because they failed to make adequate efforts at securing interim employment.

The duty of unlawfully discharged employees to mitigate damages is well

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[7] If NBP = New Back Pay; GBP = Gross Back Pay; IE = Interim Earnings; E = Expenses; ST-GBP = Straight Time Gross Back Pay; OT/GBP - Overtime Gross Back Pay; ST/IE = Straight Time Interim Earnings; OT/IE = Overtime Interim Earnings, then

NBP = GBP - (IE - E)
GBP = ST/GBP + OT/GBP
IE = ST/IE + OT/IE

Making the substituations,

NBP = ST/BGP = OT/GBP - (ST/IE + OT/IE - E)

Because of the rules we have set forth above, OT/IE can never exceed OT/GBP. Where OT/IE exceeds OT/GBP, we treat them as equal, and include ;in the calculation the excess OT/IE. In this case, OT/IE does exceed OT/GBP, thus

OT/GBP = OT/IE
NBP = ST/GBP - ST/IE + E

established under the Labor Management Relations Act as well as Commission precedent. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941); Town of Townsend, supra. The Supreme Judicial Court has found an obligation to mitigate damages where employees have been reinstated under the teacher tenure law or the Civil Service law.

> "Where one is under contract for personal services, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest and intelligent efforts to this end." Maynard v. Royal Worcester Cement Co., 200 Mass. 1,85 N.E. 877 (1908), cited with approval, Ryan v. School Committee of Quincy, Mass. Adv. Sh. (1978) 725,373 N.E. 2d 1078 (1978).

The burden of proof on the issue of mitigation is on the Employer. Town of Townsend, supra; Ryan v. School Committee of Quincy, supra. Where a group of employees have been discharged, the efforts of each employee to secure interim employment must be considered independently. NLRB v. Madison Courier, 471 F.2d 1037, 88 LRRM 1403 (D.C. Cir. 1972).

a. Paul Ahlborg

Paul Ahlborg did not find work for approximately eleven months following his termination from the Jail. He testified that during that time he had filed ten to fifteen applications with prospective employers, without success. He may have been referred for one maintenance position by the Division of Employment Security, but did not receive the position. During this period of time he collected thirty-nine weeks of unemployment compensation.[8] At approximately the time that his unemployment ran out, Ahlborg was offered a job at Earth Shoe as a lining cutter. This was work similar to that he had done for ten years prior to going to work at the Jail. The job paid only $2.50/hour with no overtime. Ahlborg turned the job down. Approximately one month after his unemployment had expired, Ahlborg heard about the job at Happy's from a friend and accepted it. He moved from the job at Happy's to employment at Zildjian where he worked until his reinstatement at the Jail.

The Employer argues that this record establishes that Ahlborg made inadequate efforts at securing interim employment. Great reliance is placed on the fact that Ahlborg did not secure employment until his unemployment compensation had expired. From this coincidence in timing the Employer would have us infer "that the Claimant was obviously satisfied to live on unemployment and welfare benefits" and that he "did not demonstrate an inclination to work and was not

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[8] None of the parties here briefed the issue of whether unemployment benefits should be set-off from a back pay award. We believe that this issue properly turns on whether the Division of Employment Security can or does recoup such payments where the employee eventually is paid for the period in question. As we have no information on this issue, we will make no set-off, but will notify the Division of our award in this case so that they may take such action as they deem to be appropriate.

sincere in obtaining interim employment." Brief for the Employer at 32,33.

We find that the Employer has not satisfied its burden of proof in demonstrating failure to seek interim employment. The "coincidence" in timing between the expiration of unemployment benefits and Ahlborg's initial employment following his termination from the Jail is entirely consistent wiht a good faith effort to find work. When Ahlborg was entitled to $107 per week in tax free benefits there would be little incentive to take a job paying less. There is no evidence that there were jobs avilable which paid more than the unemployment benefit. When the benefit expired, Ahlborg "lowered his sights" and accepted employment at Happy's at less than three dollars per hour. Such conduct is consistent with the duty to mitigate. NLRB v. Madison Courier, Inc., supra. The Employer's other major contention deals with the failure of Ahlborg to contact directly or make application to his former employer, the Rubin Leather Co. Ahlborg had called an employee of the company who told him that this employer was not only not hiring, but was laying off employees. On these facts, the Employer has failed to show that if the employee had applied that there was any reasonable likelihood that he would have obtained the position. Ryan v. Superintendent of Schools of Quincy, supra.

We find that claimant Ahlborg made adequate efforts to secure comparable interim employment.

b. Malcolm Robischeau

Malcolm Robischeau failed to secure interim employment until August of 1977, nineteen months after he was terminated from the Jail. Robischeau testified that during this time he had been referred to fifteen or twenty jobs and gone to six or seven others on his own, all without success. During this time, Robischeau and his family survived on a bi-weekly welfare benefit of $199, plus a food stamp allotment which permitted him to purchase ninety dollars worth of food for forty dollars.

Prior to his employment at the Jail, Robischeau had been employed as a National Guard Technician, a position which combined full-time civilian employment in a military-related position with membership in the National Guard as a condition of employment. After Robischeau went to work at the Jail, he resigned from the Guard because the Sheriff feared that his weekend obligations might interfere with his work schedule. In August of 1977, Robischeau rejoined the National Guard, employment which earned him one hundred dollars per month. At approximately the same time, he obtained employment through a WIN[9] referral.

The Employer would have us find on these facts that the claimant did not exercise reasonable diligence in securing interim employment. This argument is based upon the inference that the claimant was comfortable enough on his welfare benefit that he did not desire to find employment. We are unable to draw such an inference. The testimony of the witness that he sought employment both on his own, and through referrals from government agencies was entirely credible. There is no evidence that he did not go to all job referrals,

[9]WIN was a federally sponsored work-incentive program.

and there is no evidence that he ever turned down any employment offered. Robischeau was not a skilled employee (his prior employment with the National Guard was in security work) and the Employer introduced no evidence of positions available during the back pay period for which Robischeau was qualified and which he likely could have secured. The Employer offers only the "inference" that Malcolm Robischeau preferred to live on welfare rather than to seek other employment. Such an "inference" cannot overcome the uncontradicted testimony of the claimant, and cannot be substituted for the Employer's burden of proof on this issue.

We also reject the argument that the claimant was obligated to re-enlist in the National Guard. There were no openings in the technician program in which Robischeau had previously been employed. Weekend service cannot be considered as employment substantially equivalent to the job he lost at the Jail. He had not been serving in the Guard while at the Jail. It could well be argued that accepting the reappointment to the National Guard would make re-employment at the Jail more difficult, since the sheriff had previously objected to it. In any event, we cannot say that by refusing to re-enlist in the National Guard until August of 1977 Robischeau willfully declined substantially similar employment or that he voluntarily withdrew from the labor market.

We find that claimant Robischeau is entitled to back pay for the period from January of 1976 through August of 1977.

c. David Benoit

David Benoit presents a more difficult issue on the adequacy of his attempts to secure interim employment.

As noted above, Benoit had been enrolled part time at Cape Cod Community College during part of his tenure at the Jail. Following his termination from Jail, Benoit increased his course load such that he was essentially a full-time student attending classes Monday through Thursday evenings. Benoit first secured employment in October of 1976 as a part-time cab driver for Town Taxi. The timing coincides with the expiration of his unemployment benefits. Cab driving, Benoit's only interim employment until his reinstatement in January of 1978, earned him a total of $4,928. Benoit testified that he looked for jobs at three or four places a week as required by the Division of Employment Security, but was unable to find more gainful employment.

The Employer challenges Benoit's credibility on several grounds. Benoit indicated on one of his unemployment forms that he was not enrolled in college at a time that he was taking courses at Cape Cod Community College. Benoit testified that he did not believe that he had to indicate night school on the form.

The Employer further attacks Benoit's creditibility by offering evidence that Benoit did not search for interim employment.

Sheriff Snow testified that he had a conversation with one Beverly LaConte in December of 1977, shortly after the Commission Decision ordering Benoit's resinstatement. LaConte was a CETA court officer in the Plymouth District

Court, and had indicated interest in a job at the Jail. She had known Snow for a long period of time. Snow testified that during a conversation about employment at the Jail, LaConte told him that Benoit had told her that he had not looked for interim employment during the back pay period because it would "affect his case at the Commission." Snow further testified that LaConte said that Benoit was getting money "under the table from the cab company for which he was driving. Snow's attorney testified that in June of 1978, in preparation for the hearings on this matter, he had approached LaConte while she was working at the courthouse. A conversation ensued where the attorney claims that LaConte confirmed the gist of her prior conversation with Snow, but indicated that she would not testify on the matter. The attorney claims to have made a nearly contemporaneous memorandum of the conversation which was offered in evidence. CP-B-25.

LaConte took the stand and denied that she had made the statements attributed to her by Snow and Siskind. She agrees that there was a conversation with the Sheriff in December of 1977, but insists that there was no mention by her that Benoit had said either that he did not seek employment during the back pay period, or that he was getting money from a cab company which he did not intend to report.

On this record we conclude that the Employer has failed to satisfy its burden of proof in establishing that Benoit's search for interim employment was inadequate. If we credit the testimony of LaConte, it is clear that the Employer's defense must fail. The record then is uncontradicted that Benoit sought employment frequently and regularly, with only such success as he has reported. As we have found in the preceding discussions of Ahlborg and Robischeau such evidence will establish the adequacy of the search for interim employment unless the Employer can show that there were comparable positions available which the claimants knew or should have known of, and for which they did not apply, and which they would likely have gotten if they had applied. Ryan v. Superintendent of Schools of Quincy, supra.

Even if we credit the testimony of Siskind and Snow, we believe that this record is inadequate to result in disqualification of Benoit for back pay during the period in question. If we credit this testimony it establishes only that LaConte made the statements in question to Snow and Siskind. It does not establish that Benoit made them, or that they are true. The testimony is "totem pole" hearsay. Such testimony is notoriously unreliable. Kelly v. O'Neill, 1 Mass. App. 213, 296 N.E.2d 223 (1973) and cases cited. If LaConte had testified that Benoit made the statements in question, the testimony would clearly have been admissible as falling within the exceptions to the hearsay rule dealing with prior inconsistent statements, and admissions against interest. Leach and Liacos, Handbook of Massachusetts Evidence (4th Ed. 1967); Ch. 9, 13. Mottla, Proof of Cases in Massachusetts (2nd Ed. 1966), Ch. 16. The testimony is significantly less probative as to the truth of the matter contained where it is second level hearsay, however. Thus, LaConte may have indicated to Snow and Siskind her best recollection of what Benoit had said some time before. The statement was of no particular import to LaConte when it was made. Similarly, Snow may have given his best recollection of what he believed LaConte said about her previous conversations with Benoit. After two retellings, the precise words used in the original conversation may have been lost. With such a conversation, even a slight change may alter dramatically the meaning and the inferences to be

drawn from the statement. Thus, Benoit may have said that his lawyer had told him that any earnings during the back pay period would be deducted from the money owed by the Jail, and that Benoit did not have to take any job which came along, but only substantially equivalent employment. LaConte could easily have drawn the inference from such a statement that Benoit was not looking for work, and reported this version to Snow. Snow was anxious to hear such statements, and would likely read even an ambiguous version of the conversation as indicating lack of interest in finding employment. There was also a tendency for LaConte to tell Snow what he wants to hear, as he is a propsective employer. Against this inherently unreliable evidence (as it bears on whether Benoit had made an honest and diligent effort to secure employment) is the uncontradicted testimony of Benoit himself, and the corroborating testimony of Ahlborg, McCormack and Robischeau as to market conditions for employees with correction officer backgrounds. There is no evidence on this record of any jobs for which these applicants were qualified during the back pay period.

Thus we need not resolve the inconsistency between the testimony of Benoit and LaConte, on the one hand, and Siskind and Snow on the other. On either version we would conclude that Benoit made an adequate effort to mitigate damages.

d. Kevin McCormack

Like Ahlborg and Benoit, Kevin McCormack applied for unemployment compensation during the period immediately following his termination. As his wife was employed,[10] he received ninety-five dollars per week for the maximum

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[10]The Employer objected numerous times to the refusal of the hearing officer to permit inquiry into financial affairs of McCormack's wife. See, e.g., Tr.V, 89, 91, 110-115, 125-26. The Employer argues that this line should have been permitted in order that the Commission might draw the inference that between his wife's earnings and his own unemployment and veteran's benefits, McCormack was comfortable enough that he did not seek interim employment. Brief for the Employer at 39-40. The Employer took an interlocutory appeal of the hearing officer's ruling pursuant to MLRC Rules, 402 CMR 13.02(4). We denied that appeal, finding that review of such evidentiary rulings was more appropriate upon the record of the proceedings following the close of the hearing. We now affirm the hearing officer on the merits of the ruling.

We find that the testimony sought by the excluded line of questioning was well beyond the scope of the back pay proceedings. The issue before the hearing officer was what efforts McCormack actually made to find interim employment, not what incentive existed for him to do so. To open the hearing to the "totality of circumstances" as suggested by counsel for the employer, would unnecessarily and unreasonably lengthen the proceedings. McCormack's wife was employed both before and after his discharge from the Jail. He received veteran's benefits both before and after his unlawful termination. The amount of this income is irrelevant to whether he actually did seek other employment. Even if it were established that McCormack was independently wealthy, and worked at the Jail only as a hobby, the issue would still be his actual efforts to seek interim employment. There was no error in the hearing officer's ruling. See Mottla, supra at 515 et seq.

thirty-nine weeks. As a veteran with a partial disability, he also received forty-one dollars per month during this period, an amount unrelated to his employment status.

McCormack testified that he made application and inquiry at numerous businesses seeking employment as a nursing attendant, retail clerk, or bartender. Neither the unemployment office nor the Veterans Administration were able to refer McCormack to productive job opportunities. At one point during the back pay period McCormack was told by an employee of the Veterans Administration that Sheriff Bowes in Barnstable County might be hiring. This was apparently not a referral, but rather a rumor or suggestion that the employee had heard. McCormack did not follow up on this suggestion, as he considered it unlikely to be productive. Tr. V., 99-100. The Brief of the employer makes much of this incident. Prior to his employment at the Jail, McCormack had been engaged in the carpet cleaning business. While engaged in that business he apparently lost approximately thirty thousand dollars, most of it borrowed from his family and his in-laws. The Brief for the Employer suggests that McCormack's failure to follow up on the lead of a possible job at the Barnstable County Jail, coupled with his failure to re-enter the carpet cleaning business, warrants his disqualification from any back pay entitlement in this case.

Such a finding would be wholly inconsistent with our reading of Ryan v. Superintendent of Schools of Quincy, supra, and the precedents of the NLRB. The fact that McCormack did not follow up on the rumor offered by a Veterans Administration employee does not demonstrate that a job existed, or that if it existed there was any likelihood that Kevin McCormack would have qualified for it. Both are elements of the test in Ryan. Nor does the record in this case indicate that resuming the carpet cleaning business would have mitigated damages. McCormack lost money when he was in the business. It is plain that re-entry into the business would require capital expenditure with no likelihood of later profit. The doctrine of mitigation cannot require such a financial adventure by a discriminatee. We conclude that the Employer has failed to establish that McCormack failed to make an adequate search for interim employment.

Expenses in Interim Employment

The Employer does not contest the figures submitted on expenses incurred in earning the interim employment.

Expenses of the Litigation

In its December 6, 1977 Decision and Order the Commission directed that the Employer "pay to [the claimants] a sum of money equal to the out-of-pocket expenses which each of them incurred in the pursuit of these cases." The order was not appealed. We construe this portion of the order to apply only to expenses in the litigation of the prohibited practice cases, and not to any additional expenses incurred in the back pay proceeding itself. Nor do we construe this order to require the payment of attorneys' fees, as such costs are not normally recoverable in litigation even by a successful litigant. We shall compensate the claimants for such items as telephone expenses, mileage and parking fees insofar as they are established on this record.

Benoit's estimates on mileage and telephone expenses are partially

documented. Thus, in support of his claim that the litigation increased his telephone bill from approximately forty-five dollars per month to two hundred dollars per month, he introduced a sampling of bills from a period prior to the litigation, and a number of bills from the period when the litigation was in progress. In support of the mileage expenses he produced a contemporaneous log of the trips involved. Each of the resulting figures is substantially higher than the estimates of the other employees. It is conceded that Benoit functioned as the "leg man" on the case, doing considerably more traveling and telephoning in preparation for the case. The estimates submitted by Benoit and the lower estimes of the others were not substantially challenged by the Employer.[11] Although we find these estimates to be suspiciously high in the case of Benoit, we have no choice on this record but to sustain them, along with the lower and more reasonable estimates of the others.

ORDER

WHEREFORE, in accordance with the foregoing, IT IS HEREBY ORDERED, that the Plymouth County House of Correction and Jail:

1. Pay to Paul Ahlborg the amount of twenty-three thousand, five hundred eighty-one dollars and sixty-three cents ($23,581.63), plus interest[12] at seven percent (7%) from

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[11] The Employer rather challenges the right of the Commission to compensate a dischargee for such expenses at all, not the amounts claimed in each case. As the order was not appealed, we believe that the question of liability is foreclosed, and only the amount of this element of damages is in question.

[12] Although the employer submitted salary and benefit information by quarter, no such quarterly breakdown of data on interim earnings or expenses was submitted by any of the claimants. We find that it is appropriate under such circumstances to assume that the net back pay was accrued equally in the full calendar quarters following the terminations. Any error in such an averaging process will faovr the employer in this case, since for all claimants interim earnings were concentrated at the end of the back pay period, and thus, net back pay for those quarters would be less than the average. As reimbursement has not yet been made, no final computation of interest owing to each claimant is possible.

We have made an interim calculation of the interest owed to each employee using the formula

$$I = (NBP \times R)(A/2 + (N-A))$$

In the calculation, I is the total amount of interest; NBP is the net back pay owed to the claimant; R is the daily interest rate; A is the number of days in the back pay period; N is the number of days for which interest is owed. This formula will produce a result accurate to one-half of one day the averaging assumptions discussed above.

Through October 15, 1979, the amounts of interest owed are as follows:

Ahlborg	$5130.00
Robischeau	$3925.00
McCormack	$4187.00
Benoit	$4133.00

the date of his termination, March 20, 1975, to the date of of reimbursement in accordance with the terms of this Supplemental Decision, and further, to credit the vacation leave account of the said Paul Ahlborg with thirty-five (35) days of vacation to which he would have been entitled if not unlawfully discharged.

2. Pay to Malcolm Robischeau the amount of twenty-three thousand and thirty-four dollars and eighteen cents ($23,034.18), plus interest at seven percent (7%) from the date of his unlawful termination, December 29, 1975, to the date of reimbursement in accordance with the terms of this Supplemental Decision, and further, to credit the vacation leave account of the said Malcolm Robischeau with twenty (20) days of vacation to which he would have been entitled if not unlawfully discharged.

3. Pay to Kevin McCormack the sum of twenty-four thousand five hundred sixty-eight dollars and twenty-nine cents ($24,568.29), plus interest at seven percent (7%) from the date of his unlawful termination, December 31, 1975 to the date of reimbursement in accordance with the terms of this Supplemental Decision, and further, to credit the vacation leave account of the said Kevin McCormack with twenty (20) days of vacation to which he would have been entitled if not unlawfully discharged.

4. Pay to David Benoit the sum of twenty-four thousand three hundred seventy dollars and sixty-three cents ($24,370.63), plus interest at seven percent (7%) from the date of his unlawful termination, December 31, 1975, to the date of reimbursement in accordance with the terms of this Supplemental Decision, and further, to credit the vacation leave account of the said David Benoit with twenty (20) vacation days to which he would have been entitled if not unlawfully discharged.

The computation of these sums is contained in an Appendix to this Decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JAMES S. COOPER, Chairman
GARRY J. WOOTERS, Commissioner
JOAN G. DOLAN, Commissioner

APPENDIX

to

SUPPLEMENTARY DECISION AND ORDER:

PLYMOUTH CO. HOUSE OF CORRECTION AND JAIL
and
INTL. BROTHERHOOD OF CORRECTIONAL OFFICERS

CASE NOS.: MUP-2234; MUP-2429

BACK PAY COMPUTATION

DAVID BENOIT

ITEM	AMOUNT	REFERENCE
Gross Back Pay Salary (through 1/4/78)	$21,778.19	Stipulation
Salary (1/1/78 through (1/15/78)	425.86	Decision at 5. (2 wk pay at 1978 rate)
Retroactive Cost of living	776.94	Stipulation
Federal details	800.00	Decision at 9.
Vacations	00.00	Decision at 17. (Twenty days to be credited to vacation account)
Holidays	652.55	Decision at (5/7 X $913.57)
Retirement	1524.47	Stipulation
Meals at Jail	960.00	Decision at 13. ($2.00/day X 480 days)
Educational costs	00.00	Decision at
Interest on loans	00.00	Decision at
Medical bills	00.00	Decision at
Expenses:		Decision at 37.
mileage	1099.20	
parking	190.00	
telephone	1091.68	
Interim earnings	4928.20	Stipulation
Expenses	00.00	Stipulation (none claimed)
TOTAL	24,370.63	

* The employer, although contesting any payment for holidays during the back pay period, suggested a gross amount of $870.99 for Benoit. Benoit claimed 952.28, but offered no evidence of that figure. As the claimant has the burden of proof on elements of gross back pay, we have taken the employer figure as a base for our calculation. We have, however, assumed that the employer amount does not include New Years Day 1978, which we have determined to be within the back pay period. We have, therefore, added to the base figure $42.58, Benoit's daily rate of pay for January 1978.

BACK PAY COMPUTATION

KEVIN McCORMACK

Item	Amount	Reference
Gross Back Salary (through 1/4/78)	$21,209.72	Stipulation
Salary (1/4/78 through 1/12/78)	00.00	Decision at 6.
Retroactive cost of living	766.94	Stipulation
Federal details	800.00	Decision at 9.
Holidays	620.34	Decision at (5/7 X $869.32)*
Retirement	1491.68	Stipulation
Meals at Jail	940.00	Decision at 13. ($2.00/day X 470 days)
Expenses:		
mileage	761.60	Decision at 37.
parking	140.00	
telephone	150.00	
Interim earnings	2411.99	Stipulation
Expenses from interim earnings	100.00	Stipulation
Net Interim Earnings	2311.99	Stipulation
TOTAL	24,568.29	

MASSACHUSETTS LABOR CASES
Plymouth County House of Correction and Jail and IBPO,
6 MLC 1523
CITE AS 6 MLC 1543

* As McCormack had declined reinstatement prior to New Years' Day, 1978, we have not included any amount attributable to that holiday in our computation. Rather, we have used the employer's base figure of $869.32.

BACK PAY COMPUTATION

MALCOLM ROBICHAUD

Item	Amount	Reference
Gross Back Salary (through 1/4/78)	$21,954.83	Stipulation
Holidays	684.49	Decision at (5/7 X $958.28)
Salary (1/1/78 through 1/15/78)	425.80	Decision at 5.
Retroactive cost of living	766.94	Stipulation
Vacations	00.00	Decision at 17. (Twenty days to be credited to vacation account
Federal details	800.00	Decision at 9.
Meals at Jail	960.00	Decision at 13. ($2.00/day X 480 days)
Expenses:		Decision at 37.
mileage	435.20	
parking	160.00	
telephone	240.00	
Interim earnings	3443.08	Stipulation.
Expenses from interim earnings	50.00	Stipulation.
Net Interim Earnings	3393.08	
TOTAL	23,034.18	

BACK PAY COMPUTATION
PAUL AHLBORG

Item	Amount	Reference
Gross Back Salary (through 1/1/78)	$33,081.00	Stipulation.
Back Salary (1/1/78 through 1/15/78)	474.06	Decision at 5. (2 wks x 234/wk)
Retroactive cost of living	832.74	Stipulation.
Retirement	2315.17	Stipulation.
Meals at Jail	1110.00	Decision at 13. (655 days x 2.00/day)
Federal details	00.00	Decision at 21.
Holidays	00.00	Decision at 21.
Vacations	00.00	
Medical bills	208.50	Stipulation (Does not include pregnancy-related costs Decision at 18.
Dental bills	163.20	Decision at 18. (80% X 204.00)
Expenses: mileage parking telephone	 112.00 12.00 100.00	Decision at 37.
Interim earnings	22,164.70	Decision at 21.
Interim earnings from overtime	7603.50	
Straight time interim earnings	14,561.14	
Expenses from interim earnings	266.50	Stipulation.
TOTAL	23,581.03	Decision at 21. (Gross back salary - straight time interim earnings - expenses)