NEWTON SCHOOL COMMITTEE AND NEWTON SCHOOL CUSTODIANS ASSOCIATION, MUP-2501 (11/16/81). Supplementary Decision and Order.

(80 Commission Decisions and Remedial Orders)
82. Remedial Orders
82.11 back pay
82.3 status quo ante

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Richard W. Murphy, Esq.
John P. Flynn, Esq. - Counsel for the Newton School Committee

Alan J. McDonald, Esq. - Counsel for the Newton School Custodians Association

SUPPLEMENTARY DECISION AND ORDER

I. Procedural History

This is a supplementary proceeding arising out of a Decision and Order of the Labor Relations Commission (Commission) dated June 2, 1978[1] finding that the Newton School Committee (Committee) had violated Sections 10(a)(5) and (1) of General Laws Chapter 150E (Law) by failing to bargain with the Newton School Custodians Association over the impact and means of implementing a proposed reduction in force. The Commission ordered, inter alia, that the laid-off employees be reinstated with back pay "from the date of their terminations on July 1, 1976 to the date of the Employer's offer of reinstatement, less net earnings during that period...."[2]

The Committee appealed the Commission's decision to the Superior Court pursuant to the provisions of G.L. c.30A. Following hearings before a Master, the Superior Court, per Nolan, Jr., entered a Summary Judgment in favor of the Commission on July 5, 1979. An amended judgment was entered on September 10, 1979, which affirmed the Decision and Order of the Commission insofar as it found a violation of Sections 10(a)(5) and (1) of the Law and ordered reinstatement of the employees who had been laid off. The Court remanded the case to the Commission for the determination of back pay.

Formal hearings were held on the back pay issue before a Commission hearing officer on February 26, 27, and 28, 1980, and on March 3, 1980. At those hearings, the Committee contended that its back pay liability should terminate on the date

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[1] Newton School Committee, 5 MLC 1016 (1978).

[2] Id. at 1028.

it satisfied its bargaining obligation with respect to the disputed reduction in force, rather than the date it offered reinstatement to the laid-off employees. Pursuant to that argument, the Committee sought to introduce evidence of the parties' bargaining history subsequent to the unlawful layoffs. The hearing officer refused to admit such evidence.

In a supplemental order issued December 8, 1980, the Commission found that the hearing officer had erred in excluding evidence of bargaining history. We therefore ordered the hearing reopened for the purpose of receiving evidence of when, if at all, the Committee satisfied its bargaining obligation, and to hear legal argument as to whether the Committee might have so terminated its back pay liability at a point prior to its offers of reinstatement to the affected employees. The subsequent back pay hearings were conducted before Commissioner Gary D. Altman on January 12 and 26, 1981.

All parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence, and to be heard.

II. Scope of the Remedy

A. Factual Background

The background facts of this case are extensively detailed in the prior decisions of the Commission and the hearing officer.[3] For the sake of continuity, we summarize them briefly here.

In February, 1976, representatives of the School Committee informed the Union that some layoffs might be necessary because of budgetary constraints. The Union asked for an opportunity to give input should a reduction in force be required. In March and April, the Union reiterated its request for input on any reduction in force. The School Committee ignored these requests, and, on April 12, 1976, Director of Personnel Thomas P. O'Conor sent termination letters to seven custodians. O'Conor presented the terminations to the School Committee for ratification that night. When the Union president asked the School Committee to postpone its vote to allow time for bargaining, O'Conor said that nothing would be changed if the matter were postponed. The School Committee approved the terminations that night, effective June 30, 1976.

At the suggestion of the School Committee, the Union filed a grievance over the terminations, but the grievance was denied at all levels and not taken to arbitration. After an impromptu June meeting between O'Conor and Union officials suggested the possibility of fruitful discussions, the parties bargained on June 29 and 30, but reached no resolution. The layoffs went forward as planned the next day. The individuals terminated were: Lawrence Walsh, Donald Carmichael, Timothy Morris, Frank DiStefano, Stephan O'Brien, John Carvelli, and Kenneth Thibault.

The Commission ruled that the School Committee violated Sections 10(a)(5) and

[3] Newton School Committee, 4 MLC 1334 (H.O. 1977); aff'd. with modifications 5 MLC 1016 (1978).

(1) of the Law by unilaterally establishing the method and means of implementing a reduction in force on April 12. The Commission further held that the School Committee had not cured its violation thereafter by the bargaining on June 29 and 30. No good faith impasse permitting implementation was reached in those sessions because the School Committee unnecessarily abbreviated the time for bargaining. It is conceivable that an agreement might have been reached after a reasonable period of negotiations. Here, however, the School Committee bargained for only two days after refusing to bargain for four months. Thus, there was no good faith impasse permitting implementation.

Based upon the evidence introduced during the back pay hearings, particularly the reopened hearings on January 12 and 26, 1981, we make the following additional findings with respect to events occurring after the layoffs were effective.

On July 2, 1976, O'Conor wrote to President Peltier outlining how O'Conor thought things were left at the conclusion of bargaining on June 30. Specifically, O'Conor detailed the last School Committee proposal, which the Union found "unacceptable" according to the letter, and asserted that the Union had unilaterally declared an impasse in the bargaining. O'Conor asked Peltier to acknowledge the accuracy of the letter, but Peltier refused. The Union responded on July 3 in a letter to O'Conor from Union attorney Alan McDonald. McDonald disputed O'Conor's assertion that the Union had unilaterally declared an impasse; McDonald wrote that the Union had merely rejected the Employer's proposals and agreed to present counterproposals on July 7.[4] McDonald went on to state that the Union was refusing to withdraw its prohibited practice charge (in the present case), and that the School Committee's implementation of the layoffs had unlawfully impeded the bargaining.

The Union did not submit further proposals on July 7. In a letter on July 16, O'Conor told McDonald that he was referring the July 3 letter to School Committee counsel, Murphy, Lamere and Murphy. On August 18, McDonald wrote to John Lamere of Murphy, Lamere and Murphy, and sought the School Committee's position on further negotiations. In a follow-up conversation with Lamere, McDonald was referred to Richard Murphy of the same firm. McDonald spoke with Murphy and indicated that the Union's position at the outset was that the seven custodians should be returned to work before any further matters could be resolved, or as an essential part of any agreement. Murphy said that the School Committee would not be able to agree to do that, and McDonald and Murphy agreed that they would proceed with the litigation of the present case. A similar discussion occurred at a conference immediately prior to the original hearing in this case.

In the fall of 1976, the parties began negotiations for a successor agreement to take effect on July 1, 1977. They met numerous times through the fall, winter, and spring. Mediation began in March, 1977 and continued into May. A factfinder was appointed and hearings were held in July and August of 1977. The factfinder's report was issued in November of 1977, and was followed by additional mediation between January and April of 1978. On April 21, 1978 the parties executed a memorandum of agreement for a new contract covering the period July 1, 1977 through

[4]The School Committee disputes that the Union agreed to submit counterproposals on July 7.

June 30, 1980. That agreement contained a reduction in force provision. Throughout the bargaining, the Union insisted that its participation was without prejudice to the pending litigation regarding theJuly 1, 1976 layoffs. The memorandum of agreement contains the following provision:

> Reduction in force agreement attached hereto without prejudice to reights of either party in SLRC case involving prior RIF effective June 30, 1976.

A similar provision was included in the contract, executed February 21, 1979, which followed the memorandum of agreement.

B. Analysis

During the course of these proceedings the Committee has raised several objections to the scope of the Commission's June 2, 1978 reinstatement and back pay order. The two major contentions are that the Commission lacks authority to award back pay in cases alleging a violation of Section 10(a)(5) of the Law and that, if it has the authority to award back pay in such cases, it erred in directing that back pay continue until the Commission offered each of the laid off employees reinstatement.

1. Remedial Authority under Section 10(a)(5)

The Committee argues that back pay is appropriate only where the Commission finds a violation of Sections 10(a)(3) and (4) of the Law.[5]

The remedial authority of the Commission is detailed in G.L. c.150E, §11 which provides:

> If, upon all the testimony, the commission determines that a prohibited practice has been committed, it shall state its findings of fact and cause to be served on the party committing the prohibited practice an order requiring it to cease and desist from such prohibited practice and shall take such further affirmative action as will comply with the provisions of this section, including, but not limited to the withdrawal of certification of an employee organization established by or assisted in its establishment by any such prohibited practice. It shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section.

This section, like the similar language in the National Labor Relations Act (NLRA), has been interpreted as giving the Commission broad discretion in fashioning remedies in prohibited practice cases. Labor Relations Commission v. City of

[5]In these back pay proceedings, the Committee does not contest the Commission's reinstatement order. In fact, the seven custodians have all received offers of reinstatement. The sole issue here is the amount of back pay.

Everett, 1979 Mass. App. Ct. Adv. Sh. 1310, 319 N.E.2d 694 (1979); Cf. School Committee of Stoughton v. Labor Relations Commission, 1976 Mass. App. Ct. Adv. Sh. 509, 246 N.E.2d 129 (1976). Adapting a particular remedy to the facts of a particular case calls for the exercise of administrative expertise. Normally, such administrative discretion will not be disturbed unless it is beyond the authority of the agency or is punitive rather than compensatory in nature. NLRB v. Mine Workers Local 403, 375 U.S. 396, 55 LRRM 2084 (1964); but see, H.K. Porter Co. v. NLRB, 397 U.S.99, 73 LRRM 2561 (1970).

In exercising its authority to remedy prohibited practice violations the Commission has regularly ordered the party committing the prohibited practice to take "affirmative action" in addition to ceasing the prohibited conduct. In cases finding a violation of Section 10(a)(3) of the Law, the Commission routinely orders the reinstatement with back pay of employees discriminatorily terminated. City of Boston, 1 MLC 1271 (1975); Plymouth County House of Correction and Jail, 4 MLC 1455 (1977); Board of Regional Community Colleges v. Labor Relations Commission, 1979 Adv. Sh. 1080, 388 N.E.2d 1185 (1979).

The Commission has also exercised its authority to order affirmative relief in cases involving violations of Section 10(a)(5) of the Law. In Labor Relations Commission v. City of Everett, supra, the Commission found that the City had violated Section 10(a)(5) of the Law by unilaterally changing the duties of certain employees without prior bargaining. In addition to being ordered to cease and desist from the practice, the employer was directed to compensate employees for the increased duties. This compensatory remedy was approved by the Appeals Court. In City of Chicopee, 5 MLC 1043 (1978), the employer unilaterally discontinued certain insurance premium payments. As part of the remedy for the violation, the City was ordered to make employees whole for the increased costs of maintaining the coverage. On appeal, the remedy was sustained. City of Chicopee v. Labor Relations Commission, Hampden Superior Court 78-920 (1979). Therefore, there is no basis in the statutory language to distinguish between our authority to award back pay as a compensatory remedy for a violation of Section 10(a)(5) and our authority to award other types of monetary compensation for the same kinds of violations.

The National Labor Relations Board (NLRB or Board), operating under similar statutory authority, has frequently ordered the reinstatement of employees who have lost their jobs as a result of violations of the employer's duty to bargain in good faith. The Supreme Court has sustained remedial orders directing reinstatement with back pay in such cases. Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964).

We find no support in the statute or the case law for the Committee's claim that the Commission lacks authority to award reinstatement with back pay as a remedy in cases involving violations of Section 10(a)(5) of the Law. More difficult issues are raised by the contention that such a remedy, though within the potential authority of the Commission, is inappropriate on the facts of this case. We turn to consideration of that question.

2. Remedies in Unilateral Changes

The Commission in its June 2, 1978 order required that the Committee pay back

pay to the laid off custodians from the date of layoff to the date of offer of reinstatement. The Committee raises two primary contentions with respect to the back pay period. First, the Committee argues that back pay should not run from the day of layoff. Rather, the Committee appears to suggest that payments should commence, if at all, sometime after the issuance of either the hearing officer's decision or the Commission's decision. Second, the Committee argues that any liability for back pay should terminate not on the reinstatement date but on the date of occurrence of the earliest of the following events: (1) the date on which the employer bargained to agreement on the subject matter of the unilateral change; (2) the occurrence of a bona fide impasse; (3) the failure of the union to request bargaining in a timely fashion; or (4) the subsequent failure of the union to bargain in good faith. The arguments rely on such cases as Transmarine Navigation Corp., 170 NLRB 389, 67 LRRM 1419 (1968); Sundstrand Heat Transfer, Inc. v. NLRB, 536 F.2d 1257, 92 LRRM 3266 (7th Cir. 1976); Automation Institute of Los Angeles, 208 NLRB 725, 85 LRRM 1257 (1974); St. Patrick Mining Co., Inc., 227 NLRB No.242, 94 LRRM 1704 (1977). We turn first to the issue of the point at which back pay liability commences. We will then consider if the back pay liability should terminate short of the date of offer of reinstatement, as originally ordered.

(a) The Commencement of Back Pay Liability

Guided by the general constraints on their remedial authority discussed above, the NLRB and the Commission have attempted to fashion remedies in unilateral change cases which are compensatory in nature without being speculative or punitive. In order to compensate for the unlawful unilateral action, the agencies have attempted to restore the status quo ante in order to "restore the situation as nearly as possible to that which would have existed but for the unfair labor practice." Labor Relations Commission v. City of Everett, Mass. App. Ct. Adv. Sh. (1979) 1310 at 1315, 391 N.E.2d 694. See, e.g., Framingham school Committee, 4 MLC 1809 (1978).[6]

The Board cases involving layoffs caused by unlawful unilateral employer action have typically concerned total or partial plant closings or elimination of a facet of the employer's operations, often through subcontracting. The Board, in restoring the status quo ante, has typically ordered re-establishment of the closed operations, reinstatement of the employees, and back pay for the employees from the day of layoff

[6] A status quo remedy typically involves invalidation of the employer's unilateral action and a prohibition against the action in the future until and unless the bargaining obligation has been fulfilled. If the employees in the bargaining unit have suffered economic damages as a result of the action, they are compensated for them. City of Everett, supra; City of Chicopee, supra; Town of Andover, 4 MLC 1086, 1090 (1977). Such remedies are considered compensatory in nature because they are an attempt to return the Union to the bargaining position it would have enjoyed had it been given the opportunity to bargain prior to any change taking place; such remedies avoid, however, dictating the terms of any eventual agreement. For this reason such cases as Excell-o Corp., 185 NLRB 107, 74 LRRM 1740 (1970), enf'd. 449 F.2d 1058, 77 LRRM 2547 (D.C. Cir. 1970), cited by the employer, are not controlling. In these cases, the Board concluded that it was without power to order that a particular provision be included in the parties' contract as part of the remedy for a refusal to bargain. See also, H.K. Porter, supra. No such term is imposed here.

until such time as the employer has fulfilled its bargaining obligations. See, e.g., Town & Country Mfg. Co., 136 NLRB 1022, 49 LRRM 1918 (1962), enf'd., 316 F.2d 846, 53 LRRM 2054 (5th Cir. 1963).[7] For a recent Federal Circuit Court case enforcing a similar remedy, see Blue Grass Provision Co. v. NLRB, 636 F.2d 1217, 105 LRRM 3487 (6th Cir. 1980), cert. den. ___ U.S. ___, 107 LRRM 2632 (1981). See also Kronenberger d/b/a American Needle & Novelty Co., 206 NLRB 534, 84 LRRM 1526 (1973) (employer unilaterally transferred unit work to another plant, causing the layoff of nearly all unit employees). The Board has declined to order the re-establishment of the closed operations where such would be impractical or cause undue financial burden. Production Molded Products, 227 NLRB 776, 95 LRRM 1048 (1978) (undue financial burden); Winn Dixie Stores, Inc., 147 NLRB 788, 56 LRRM 1266 (1964), enf'd. in pert. part, 361 F.2d 512, 62 LRRM 2218 (5th Cir. 1966) (practical considerations). Even in these cases, however, the Board ordered back pay from the day of layoff, and continued payment to the employees as if they had been reinstated until such time as the employer satisfied its bargaining obligation.

The NLRB and the federal courts have not, however, required full back pay in all cases where layoffs have followed unlawful unilateral action by an employer. Rather, cases have been examined on their individual facts to determine the most appropriate remedy under all of the circumstances.

Many of the cases where less than full back pay is awarded draw a distinction between failure to bargain over a decision itself, and the failure to bargain over the impact or effect of an otherwise lawful unilateral action. In Transmarine Navigation Corp., supra, the employer closed one of its facilities as a result of a major corporate reorganization. The determination to eliminate the facility was found not to be a mandatory subject of collective bargaining. The employer, however, failed to give notice to the union or opportunity to bargain over the impact of the decision to close the facility. This latter failure to bargain was found to be unlawful. Under these circumstances, the NLRB ordered that the employees laid off as a result of the closing be given back pay from a date five days subsequent to the NLRB decision to the date the employer satisfied its bargaining obligation, that is, the earliest of the following events: completion of bargaining agreement with the union; good faith impasse; the failure of the union to request bargaining within five days; the subsequent failure of the union to bargain in good faith.[8] A similar remedy was applied under similar circumstances in Saint

[7]The employer's action in Town & Country was also motivated by anti-union animus and therefore violated Section 8(a)(3) of the NLRA as well. The NLRB noted, however, that the employer's conduct would have violated the bargaining duty even if it had not been discriminatorily motivated, as the decision to subcontract department operations was a mandatory subject of bargaining. The NLRB thus relied upon its choice of remedy in this case in a later unilateral subcontracting case, involving no anti-union discrimination. Fibreboard Paper Products Corp., 138 NLRB 550, 51 LRRM 1101 (1962), aff'd. sub nom Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609, 2614 (1964). Fibreboard itself served as a precedent in future cases of this type. See Kronenberger d/b/a American Needle & Novelty Co., 206 NLRB 534, 84 LRRM 1526 (1973); and Stone & Thomas, 221 NLRB 573, 90 LRRM 1570 (1975).

[8]The Committee in its briefs refers to a "Transmarine" remedy as if Transmarine were th first Board case to order limited back pay. To avoid confusion we will follow the same terminology, although we note that the Board ordered limited back pay at least as early as Royal Plating & Polishing Co., Inc., 160 NLRB 990, 63 LRRM 1045 (1966).

Patrick Mining Co., Inc., supra, and Automation Institute of Los Angeles, supra. In each of these cases the NLRB found the action to be economically motivated,[9] and in each the violation was the failure to bargain over the impact of a management decision, not the decision itself. We followed Transmarine in City of Quincy, 8 MLC 1217 (1981), where the order of layoff was established and the identity of the laid off employees would not be affected by bargaining.

Common to both lines of cases is the requirement that the employer return the employees to the payroll prospectively and commence bargaining with the union in an effort to "recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the (employer)." Transmarine, supra, 390, 64 LRRM at 1421. The payroll obligation for the employer cannot end until the employer has satisfied its bargaining obligation, hence the incentive for the employer to bargain in good faith.

The distinction between these two lines of cases which is relevant here is the point in time at which back pay liability begins: the date of the layoff or the date of the Board decision. The distinction is most readily understandable if one considers the position of the employees in each type of case had the employer bargained in a timely manner. When the decision to contract out bargaining unit work, for instance, is mandatorily bargainable, a layoff is not a foregone conclusion. The employees are assured of the jobs at least until the employer satisfies its bargaining obligation and, if the Union is able to convince the employer not to contract out the work, the employees may keep their jobs indefinitely. Thus, it may fairly be said that the employees incur damages measured by their entire period of unemployment. See, e.g., Winn-Dixie, supra 147 NLRB at 792. When, however, the decision to close and lay off is not mandatorily bargainable, the employees will keep their jobs only for as long as it takes the union and employer to complete their impact bargaining; there is no chance of indefinite employment. Thus, full back pay would give the employees something they never could have achieved through bargaining. In such cases, then, a "limited" back pay remedy is appropriate as in Transmarine, supra, on the theory that the employees will be on the payroll pending bargaining for approximately as long as they would have been had the employer bargained in the first place.

The Committee's argument is that such a limited back pay remedy is appropriate in this case. We disagree. The violation here can only be remedied by full back pay dating from the day of layoff. The violation was the failure to bargain over the means and manner of accomplishing a reduction in force, as well as the impact of the reduction in force on terms and conditions of employment. The Union was proposing that the workforce be reduced at least in part by means other than layoff, perhaps through natural attrition or early retirements. An additional major disagreement between the parties was whether employees would be selected for layoff by straight seniority or whether there would be a merit component as well. Thus, the identity and number of employees to be laid off was not an inevitable consequence of the management decision to reduce the force. Perhaps through bargaining

[9] If the action is motivated by anti-union animus the Board will order even a closed plant reopened and the employees reinstated with full back pay. See, e.g., Weather Tamer, 253 NLRB No.56 105 LRRM 1569 (1980).

fewer employees would have been laid off, perhaps different employees. These possibilities distinguish this case from the Transmarine line of cases, where all of the employees' terminations are certain and the union can bargain only to ameliorate the terms of the departure. Rather, this case is more akin to Town and Country line of cases where the Union can require bargaining over the decision to retrench and may in the process save some or all of the jobs. Where it is impossible to determine which, if any, of the seven laid off custodians would have been laid off, either through a smaller layoff or a different order of layoff, the costs of such uncertainty must be taxed to the wrongdoer, not the victims of the wrong. NLRB v. Don Juan Co., 185 F.2d 393, 27 LRRM 2110 (2d Cir. 1950).

There is always a degree of imprecision in such remedies. Perhaps even good faith bargaining could not have eliminated the need for seven layoffs or altered the layoff list. Perhaps, however, it could, for the union proposals created that opportunity. This opportunity was foreclosed by the failure of the committee to bargain for several months, and the unreasonably abbreviated bargaining immediately preceding the layoffs. The Committee cannot now defend against back pay liability by concluding that the result it unilaterally mandated was inevitable. As the U.S. Supreme Court stated in Fibreboard,

> The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded on the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective bargaining. Fibreboard Paper Products Co. v. NLRB, supra at 2613.

See also, City of Boston, 4 MLC 1202, 1209-10 (1977). For these reasons, we conclude that the full back pay remedy originally ordered is appropriate.

b. The End Point of Back Pay Liability

We turn then to the Committee's argument that the back pay liability should terminate in accordance with the conditions set by the Board in Transmarine. In that case, the Board ordered the employer to bargain with the union about the effects on employees of the shutdown of a facility, and to pay the employees at the rate of their normal wages when last employed commencing five days after issuance of the Board decision and continuing until the earliest of the following conditions: (1) an agreement between the employer and union on the subject matter in dispute; (2) a bona fide impasse in bargaining; (3) the failure of the union to request bargaining within five days of the Board's decision, or to commence negotiations within five days of the employer's offer to bargain; or (4) the subsequent failure of the union to bargain in good faith.

We note at the outset that these conditions are typically set by the Board both in limited back pay cases like Transmarine and full back pay cases like Winn-Dixie. These conditions have both theoretical and practical justifications. Since the employer's obligation at the time of the layoff was to maintain the status quo until satisfaction of its bargaining obligation, the employer's obligation under a remedial order should be no greater. Such conditions also have the practical effect of preventing dilatory bargaining by the union. Royal Plating &

Polishing, Inc., 160 NLRB 990, 63 LRRM 1045 (1966). These conditions by their terms, however, pertain only to the bargaining after entry of the Board's order, and assume that the employer has fulfilled its obligations by returning the laid off employees to the payroll. The conditions would be directly relevant here only if the Committee sought to reinstitute the layoff after it had reinstated the employees, and thereby cut off its payment obligations. Thus, the Committee's direct reliance on the Transmarine line of cases is misplaced.

These restrictions are not entirely irrelevant to our inquiry, however, for we have held that a union cannot ignore an employer's attempt to fulfill its bargaining obligations. See Franklin School Committee, 5 MLC 1297, 1301, fn.5 (1979). An employer should have the opportunity to show that, after it had substantially remedied the unfair labor practice, the union frustrated attempts at resolution of the matter. The School Committee here has not, however, made the necessary showing.

The Committee's primary argument is that the Union did not pursue bargaining over the layoffs in the months immediately after they were implemented. The facts show that the Union was insisting that the Committee roll back the layoffs; the Committee adamantly refused. The Union saw no point in bargaining while the layoff decision stood. As the Board said in Town and Country, supra, "No genuine bargaining over a decision to terminate a phase of the operations can be conducted where that decision has already been made and implemented." 136 NLRB at 1030. Until the Committee reversed the layoffs, or in some other way restored the substantial equivalent of the status quo ante, the Union would be forced to bargain from a significantly weakened position. We do not find the Union's conduct impermissible. In any event, by the end of the summer, the Committee attorney and the Union attorney agreed that bargaining would not resolve the matter, and the parties should proceed to litigation.

Other Committee arguments seeking to shorten the back pay period are without merit. The Committee argues that the parties were at impasse on June 30, 1976, resulting in no liability. This argument was rejected in the underlying case, and is not before us now. The Committee also argues that the Union failed to request bargaining "within five days" of the Committee's July 2 offer to bargain, as the Committee asserts is required by Transmarine. Even were Transmarine applicable to the July 2 offer, the Committee failed to comply with its concomitant obligation to restore the employees to the payroll. Finally, the negotiations for a 1977-1980 contract do not support an earlier cut-off date. The employees remained laid off throughout the negotiations. The July 1976 layoff was not discussed during these negotiations, and in the resulting agreement both sides reserved all rights with respect to the litigation. Any impasse reached in these negotiations under these circumstances does not exinguish the back pay liability on a Transmarine theory, or any other theory of which we have been made aware. The Committee specifically disclaims that the resulting agreements establish a cutoff point for back pay liability.

Thus we find, upon all the facts, that the original order directing that the laid off employees given compensation from the date of their unlawful termination to the date when the employer made an unconditional offer of reinstatement was appropriate under all of the circumstances. We reaffirm that order here, and base our computation of back pay on that time period.

III. Computation of Net Back Pay

A. Factual Background

Hearings on issues relative to the computation of back pay for the seven employees laid off in July of 1976 were held on February 26, 27, 28 and March 3, 1980. The evidence received at those hearings is summarized below.

1. Gross Back Pay

The parties are in agreement as to the rates of pay which would have been earned by each of the seven individuals in question had they been employed continuously by the Newton School Committee. Those rates of pay were set forth in a joint exhibit and are reflected in the appendices to this decision. In addition, the parties have stipulated to the number of vacation days each individual would have been entitled to, although they disagree as to whether such vacation days should be an item of compensation in this case.

a. Overtime

Each of the claimants seeks compensation for overtime pay opportunities lost during the back pay period. Several kinds of overtime were available to custodians within the Newton School system. Of approximately one hundred thirty (130) employees in the bargaining unit represented by the Association, twenty were senior custodians; six were shop or maintenance employees; and the remainder were junior or building custodians. All of the claimants in this case were junior or building custodians at the time they were laid off, and all were assigned to the night shift.

For each school building there is a senior custodian who works the day shift. These employees have some scheduled overtime. During the heating season they check the buildings on Saturday and Sunday, earning two hours' overtime each day. They are also paid five hours' overtime per week for their administrative duties. Each senior custodian is responsible for the equitable distribution to junior custodians of other overtime opportunities within his building. Night shift custodians have fewer opportunities for this kind of overtime since it occurs disproportionately on the shift they are assigned to work. Other overtime (snow shoveling, for instance) is assigned through a call-in system. Each week, any custodian who wishes to be called for available work calls in and leaves her or his name on the answering machine. The employees who call in are offered overtime in the order in which they have called.

The record lists overtime for each employee from 1974 through 1979. The average for the entire bargaining unit is $2007.35 in fiscal year 1977; $2004.00 in fiscal year 1978; and $1596 in fiscal year 1979. Actual figures are available for overtime earned by the claimants before and after their termination in July, 1976.

Overtime Pay by Fiscal Year

Claimant	Date Returned	FY-75	FY-76	FY-77	FY-78	FY-79	FY-80
Walsh	10/3/78	$195	$602	N/A	N/A	$371[a]	0
Carmichael	b	$ 38	$648	N/A	N/A	N/A	N/A
Morris	11/15/76	$323	$896	$720[c]	$1142[d]	N/A	N/A
DiStefano	10/3/78	$1303	$1095	N/A	N/A	$3037[a]	$873
O'Brien	10/3/78	$912	$958	N/A	N/A	$1018[a]	$302
Carvelli	11/15/76	$1065	$1075	$433[c]	$1118	$956	$480
Thibault	b	$608	$196	N/A	N/A	N/A	N/A

a From October 3 through June 30 (9 months)
b Did not accept reinstatement
c From November 11 through June 30.
d Voluntarily quit February 15, 1977.

b. Vacations and Holidays

Had they not been laid off, each of the claimants in this case would have been entitled to fifteen days (three weeks) vacation per year. Upon reinstatement, each individual was credited with an appropriate fraction of the fifteen-day amount for the remaining portion of that fiscal year. Thus, those reinstated on October 3, 1978 were credited with eleven and one-quarter (11¼) vacation days for that year (Walsh, O'Brien and DiStefano). They received no credit for the time during which they did not work for the Newton School Committee. Morris and Carvelli, who returned on November 15, 1976, received credit for ten (10) vacation days of a possible fifteen days in that fiscal year.

The contract between the Association and the School Committee calls for twelve regular holidays during the year. There is also a provision for certain religious holidays. Custodians do not normally work such holidays and to be paid must work the day preceding and following a holiday.

c. Clothing Allowance

During fiscal year 1977 each claimant would have been entitled to a clothing allowance of $90.00. For subsequent years the allowance was $125.00.

d. Health Insurance

While employees of the Newton School Committee, the claimants were eligible to participate in a group helath insurance plan. The record indicates that individual coverage under the plan was approximately $9.92 per month. Family coverage was $25.44 in fiscal years 1977 and 78, and $29.79 per month for fiscal year 1979. Evidence was introduced on behalf of DiStefano, O'Brien, and Thibault that during the back pay period they incurred expenses for health insurance in excess of the amounts which they would have paid if still employed by the Newton School Committee. The amounts claimed are: DiStefano, $403; O'Brien, $880. Thibault's claim has apparently been dropped.

2. Mitigation and Set-Off

Each of the claimants has submitted documentation of interim earnings. These amounts are not disputed.[10] Each of the claimants received some form of unemployment compensation during the back pay period. In all cases except that of Thibault the amounts have been determined from records or testimony and are not disputed. In the case of Thibault, the parties stipulated to his rate of compensation. The total amounts of unemployment compensation paid are as follows: Walsh, $7474; Morris, $808; DiStefano, $4185; O'Brien, $525; Carvelli, $1919; Thibault, $3621; Carmichael, $464.

a. Lawrence Walsh

Lawrence Walsh is a high school graduate who has taken an automotive program. He spent four years in the Air Force working on a crash rescue squad. Walsh testified that following his layoff from the Newton School Committee in July, 1976, he applied for employment in a number of places, e.g., Raytheon, Polaroid, Mayflower Trucking, General Motors (Framingham), and the Laboratory of Electronics. He was unsuccessful in obtaining employment until March or April of 1977. During this period of time he collected unemployment compensation and was required to report to the Division of Employment Security Office bi-weekly for counseling and referrals, and to report on his efforts to obtain employment.

In March or April, 1977 Walsh went to work for Fraser Engineering Company where he worked until approximately December of the same year, earning $5865.18. He was then laid off, and he went back on unemployment. Walsh testified that during this period of unemployment he sought jobs at various places, including the Needham Public Schools, Sears, Roebuck and Company, McGuire Plumbing, Paolini Construction, and Barry Controls. He was able to obtain employment in the fall of 1978 at Cambridge City Hospital just prior to his offer of reinstatement by the Newton Public Schools on October 3, 1978. He earned six hundred dollars ($600) with the hospital.

There was extensive testimony concerning a School Committee offer to Walsh of re-employment in the Fall of 1977. The supervisor of custodians, Mr. Sweeney, testified that he had a conversation with Walsh at the direction of Dr. O'Conor, Assistant Director of Perosnnel, to inquire if Walsh was interested in returning to work. Sweeney recalls Walsh indicating that he did not wish to return to work under the circumstances, but would await the decision of the Labor Relations Commission, then still pending. Walsh was recalled as a witness, and asked about the incident. Walsh testified that there had been a previous meeting in September, 1977 at which he believed that he, O'Conor, Cornelius (Director of Support Services), and Sweeney were present. Walsh said that he was offered a job on the training shift with a review of his performance after thirty days.

In Walsh's version, a general discussion ensued wherein he indicated his dis-

[10] Morris worked at the Hyatt Regency Hotel during the back pay period. He testified that he did not receive any tips. The Employer would have us infer that he did receive additional income from tips.

pleasure with returning at anything other than his previous status. Walsh recalled an understanding that he would get back to Sweeney with his decision. He recalled that subsequent meeting with Sweeney as being 10 to 15 minutes (Sweeney's recollection was that it lasted an hour). Walsh says that he indicated to Sweeney that to return under those circumstances would be to admit that he was let go for cause. Cornelius was called and denied being at any such meeting as Walsh described. Walsh then returned to the stand and identified two documents. One exhibit is a letter from O'Conor to Walsh dated September 19, 1977 which refers to a meeting on September 15 to discuss Walsh's "present work status and to review your past performance when you were employed by the Newton Public Schools." The letter suggests in the first paragraph that Cornelius was also present.[11] The second document is a memorandum from Sweeney to Cornelius, dated September 20, 1977, reporting on an "interview" with Walsh on September 19. Sweeney reports Walsh as indicating that he did not wish to come back except at his previous level. The implication is clear that the offer to return was at some level less than that which Walsh previously held.

b. Donald R. Carmichael

In August, 1976, approximately one month after his termination by Newton, Donald R. Carmichael moved to Prince Edward Island, Canada, where his wife had relatives. He testified that before leaving he had sought employment with McLean Hospital, the Perkins School,[12] DeVerrn & McDonald Contracting, Waltham Schools, and Thomas Belqui Contracting, among others. After moving to Canada, he sought employment at King's Building Supply, Handy Andy Auto Supply, General Auto, Square K Construction, and the Georgetown Shipyard. In these attempts he was unsuccessful, being told on at least one occasion that Canadian citizens would be preferred for jobs. During this period of time, Carmichael lived with his brother-in-law, paying one hundred and fifty dollars ($150) per month and doing some work around the house. He collected unemployment compensation and was required to report to the Canadian Manpower Office, the equivalent of our Division of Employment Security.

He first obtained interim employment in January, 1977 at the Kingsford Center, where he taught woodworking to the handicapped. The job lasted until roughly May of that year and earned him $2974.40. Carmichael left Kingsford to work for James Campbell as a carpenter. The work lasted through December, and Carmichael earned $4151.25. He was again unemployed until April or May of 1978, at which time he obtained work at Serafin's Construction Co., earning $1647.50 before being laid off. Around September of 1978 he was hired by Williams, Muphy and McLeod, a construction company, and earned $1556.57.

In the Fall of 1978, Carmichael was informed that he was being offered his

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[11] "This is to acknowledge your response to our request to appear for an interview on September 15 with the Director of Support Services regarding custodial vacancies." (Union Exhibit 7.)

[12] Carmichael testified that he filed an application with Perkins. That testimony is brought into question by later evidence offered by the School Committee. See p.32, 33 infra.

old job with the Newton School Committee effective October 3, 1978. He flew in from Prince Edward Island and made an appointment to see Dr. O'Conor, the Assistant Director of Personnel. Shortly after arriving, he was called back to Prince Edward Island because of a family emergency. He never kept his appointment with O'Conor and made no effort to resume his employment with the Newton School Committee.

Carmichael took a general course in high school and received two years of training as a machinist at Wentworth. He had no degrees. He had been in the reserves, holding an E-5 rating and working in supply.

c. Timothy M. Morris

Timothy Morris was offered and accepted reinstatement with the Newton School Committee on November 15, 1976. Between July 1 of that year and September 1, he collected unemployment compensation. During this period of time, he had sought work at the Copley Plaza and Marriot Hotels, having worked as a hotel doorman for six years prior to coming to the Newton schools. In September he obtained employment with the Hyatt Regency Hotel as a chauffeur. Between that time and his reinstatement with Newton, he earned $1295.80, all in salary, from Hyatt. Both before and after his layoff, Morris worked occasionally (5-6 hours per week) as a bartender at the local Veterans of Foreign Wars Post.

Morris had taken a college course in high school. Previous employment included the Air Force Reserve (radio operator) and a company which repaired background music systems.

d. Frank A. DiStefano

DiStefano received unemployment compensation for the period July, 1976 through May, 1977, when he finally obtained employment in the Town of Lexington through the CETA program. He listed Farina Construction, Boston University, Wallboard Construction, Charles Construction, Sylvania Corporation, Biotti Construction, St. Elizabeth's Hospital, Ratheon Corporation, University Hospital, Honeywell Corporation, and McLean Hospital as among the places where he sought employment in this period.

The CETA job lasted approximately one year, during which time DiStefano earned $9682. After a break of approximately two weeks, he went back on the Lexington payroll, earning another $2786.40 before being offered and accepting reinstatement at Newton effective October 3, 1978. During his CETA employment, DiStefano earned two weeks' vacation.

DiStefano's job training and skills included a high school education (machine shop and drafting), and four years of college in a business program. He was six hours short of a bachelor's degree.[13] He had also done some sales and carpentry work.

[13]DiStefano may have represented to possible employers that he had a degree. He had a resume prepared which so indicated.

e. Stephan J. O'Brien

Following his separation from the Newton schools, O'Brien obtained employment in a maintenance position with Newton-Andover Theological Seminary in September of 1976. He held this position until September, 1978, when he left to return to Newton effective October 3. Prior to obtaining the position with Newton Andover, O'Brien collected unemployment. During this period, O'Brien indicated that he made work inquiries at, inter alia, Needham Public Schools, John Seufort & Sons, Dana Foley Plumbing and Heating, Bentley College, Brandeis University, and Canteen Corporation.

During his employment with Newton Andover, O'Brien sought better positions from the Town of Sudbury and Boston College. His interim employment earned O'Brien $20,610.

O'Brien had taken a business program in high school and had three additional semesters of business courses at Newbury Junior College. He is a disabled veteran of the Navy, service composed entirely of sea duty. He had worked in various plumbing and heating jobs and as a general inspector for the Metropolitan District Commission prior to his employment with the Newton School Committee.

Both before and after his layoff in July, 1976, O'Brien's wife worked for the School Committee, beginning as a lunch mother and moving to other cafeteria positions and increasing her hours from 16 to 20.

f. John D. Carvelli

After being laid off in July, 1976, Carvelli was offered reinstatement effective November 15, 1976. He had no interim employment during this period. Carvelli testified that he sought employment at Standard Electric, George W. Moore Corp., Main Street Ford, Sears, Roebuck & Co., the Waltham School Committee, Watertown School Committee, and Sacco Brothers during this period.

Carvelli worked a few hours per week (3½) for a friend, covering his service station certain nights and weekends. He received no compensation, but was allowed the use of his friend's car and used the station premises to work on his own car.

Carvelli had a high school education. He had no special training and had worked previously in sales jobs.

g. Kenneth Thibault

At the time of this hearing, Kenneth Thibault was reported to be in Nebraska and unable to testify because of work commitments. The testimony in this case relative to Thibault comes from affidavits and from the testimony of his mother. The School Committee objected to both kinds of evidence.

From the record it may be inferred that following his layoff from the Newton Public Schools in July, 1976, Thibault was unable to find work until April of 1977. At that time he began working at a service station and continued there until September of that year. Thibault's mother testified that during

his period of unemployment he was living at home. She indicated that he would frequently tell her that he had been out seeking work. She also confirmed that he signed up for and collected unemployment compensation during this period. In September, 1977 Thibault left Massachusetts for California to attend Los Angeles Technical Institute to study motorcycle mechanics. He is currently employed in Nebraska by the Kawasaki Company.

Thibault was offered reinstatement in October, 1978.

h. Employer Evidence on the Search for Employment

The Committee introduced a series of exhibits representing employment advertisements from the Boston Globe and Newton-Waltham Times/Herald for the period of July 1, 1976 through September 19, 1976. The vacancies included: custodians in the Needham public schools; Lincoln public schools custodian; a private school in Lexington, maintenance position; Neelan Management Co., building maintenance, Brae Burn Country Club, general cleaning and service; ADP Corp, janitor; Staff Builders, general laborers; Grover Cronin, morning cleaners; Office Cleaners, Newton-Waltham area.

The Director of Buildings and Grounds for the Needham Public Schools testified that he had no application on file from any of the claimants and had no memory of any of them applying. His records went back to 1978. Needham filled a number of custodial positions during the back pay period and generally had approximately 30 applications for each. O'Brien, Walsh, and Thibault indicated that they had contacted Needham seeking employment.

The Secretary to the Personnel Director of the Perkins School testified that she logged all applications and that her records showed no record of an application from Carmichael. This conflicts with Carmichael's testimony that he completed an application which was kept on file at Perkins.

3. Expenses of Earning Interim Earnings

Carmichael testified that he spent approximately $150.00 on carpentry tools during the back pay period. He concedes that his employer gave him some money for these tools, but the record does not indicate how much. Thibault claims $966.55 for purchase of tools and equipment. The receipts attached to his affidavit indicate that these expenses were all incurred in California. No interim earnings from California have been credited to Thibault. O'Brien claims between one hundred fifty and two hundred dollars for tools and clothing associated with his employment at Newton-Andover Theological Seminary.[14] Carmichael testified to and claims approximately $245.00 as compensation for his air fare round trip from Prince Edward Island in October, 1978, when he came to Boston to discuss re-employment with the Newton School Committee. As noted above, he did not accept that offer of reinstatement but returned to Canada without meeting with O'Conor.

[14]Note the relationship between this Item and the claim for a clothing allowance for the same years.

Both Carmichael and Thibault make a claim for "relocation expenses" associated with their moves to Canada and California, respectively, to seek employment. The figure for Thibault includes shipping his motorcycle to California and his wife's expenses. Thibault married after his termination by Newton. Carmichael's expenses of $780 consist of mileage expenses for three round trips from Newton to Prince Edward Island by car to move his belongings.

4. Litigation Expenses

Carmichael claims that he spent approximately $245 for air fare in coming to Boston to testify at the back pay hearings. He also lost two days' pay, approximately $50.00. The Association seeks compensation for this amount.

B. Analysis

1. General Considerations

In concurrence with the NLRB, the Commission has held that the amount due an unlawfully discharged employee is to be computed by the following formula:

Net Back Pay = Gross Back Pay - (Interim Earnings - Expenses)

Town of Townsend, 1 MLC 1450 (1974); Plymouth County House of Correction, 6 MLC 1523 (1979). As used in the formula, "Expenses" indicates costs incurred in earning the Interim Income.

2. Gross Back Pay

The parties are in agreement as to the gross back salary which would have been earned by each of the claimants had they not been laid off in July, 1976. These amounts listed in Appendix "A" through "G" as Gross Back Salary. There is disagreement, however, as to the proporiety of including certain other aspects of total employee compensation within Gross Back Pay.

a. Vacations. The Commission addressed the issue of how to compensate employees for lost vacation benefits in Plymouth County House of Correction, supra at 1529-30. In that case the Commission rejected arguments by the Employer that the claimants were entitled to no compensation for lost vacations on the theory that such fringe benefits are part of total employee compensation and should be compensable in some form. The Commission also rejected, however, the position of the claimants that they were entitled to an additional day's pay for each lost vacation day. This view was rejected in spite of support in cases under the National Labor Relations Act.[15] In place of these alternatives the Commission directed that employees who accepted reinstatement be credited with the amount of vacation which they would have accrued if they had not been unlawfully terminated. Replacing the lost benefit in kind seemed the least speculative way of restoring the employees to status quo. No arguments have been presented to us to cause us to

[15] Sioux Falls Stockyards Co., 236 NLRB No. 82, 99 LRRM 3163 (1978).

depart from the view expressed in Plymouth County.[16]

In the instant case we are asked to offset vacation earned in interim employment[17] against the vacation benefit which the employees would have earned if employed by Newton. We believe that this position has merit, and we adopt it. It is analogous to the principle of offsetting interim income which would not have been earned but for the unlawful discharge. To allow the employee to receive a vacation benefit from both employers is as unjust as declining to offset the salary from the interim employment.

In addition, the employer argues that only employees who accept reinstatement are entitled to any compensation for vacation benefits lost during the back pay period. The Union argues that employees who do not accept reinstatement are nonetheless entitled to some form of compensation for the lost benefit if they are to be made whole. We find the view advanced by the employer the more appropriate. We have adopted the principle of replacing such benefits in kind because of the difficulty of placing a monetary value on the loss. When the employee declines reinstatement the employer's liability for such benefits should terminate.

b. Holidays. Relying on our decision in Plymouth County, the Union seeks additional compensation for paid holidays to which the claimants would have been entitled had they continued to work for the Newton Public Schools during the back pay period. The Committee argues that Plymouth County is distinguishable. We agree. In Plymouth County, the employees worked on a seven day per week, 24 hour per day schedule. Thus, it could be determined with certainty that some of the employees would have worked on contractual paid holidays, thus earning premium pay in addition to their regular week's salary. 6 MLC at 1323. There is no such factual record in this case upon which to base a conclusion that any of the employees in question would have been permitted to work on contractual holidays. Consequently, there is no inference that they would have earned compensation in addition to gross back salary for which they have already been compensated. To the extent that this assumption is inaccurate, it should be corrected by our treatment of the employees' entitlement to payment for lost overtime opportunities.

c. Overtime

We have previously held that unlawfully discharged employees are entitled to be compensated for lost overtime opportunities during the back pay period.

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[16]Other solutions, not argued here, may provide a more acceptable solution in other cases. The problem is to determine the economic value of being paid for a day on which one is not required to work. The parties may have determined that value by providing for premium pay for employees who must work on scheduled holidays or vacation days. Thus, if an employee who does not work on a vacation day is paid for one day and an employee who does work that day is paid time and one-half, it could be argued that the value of the vacation benefit is an additional half-day's pay.

[17]Walsh received one week vacation during his interim employment; DiStefano received two weeks; O'Brien three weeks.

Plymouth County House of Correction, supra at 1526. The problem in all such cases is the proper method of estimating the value of the lost overtime. Two methods of computing the overtime entitlement are presented in this case. The Union argues for a formulation based on the average overtime throughout the bargaining unit.[18] The Employer argues that the overtime should be computed based upon each employee's overtime earnings both before and after the back pay period. Each method involves uncertainties, an inevitable consequence of attempting to determine what would have transpired had other events not intervened. The Employer argues that any computation based on average overtime throughout the unit is inflated to the extent that it includes overtime earnings of more highly paid employees. In addition, such a formulation fails to take into account each individual's propensity to accept overtime when available. The Union argues that individual overtime earnings prior to the back pay period are an inadequate measure as the formula for distribution of overtime was altered during the back pay period.

In the instant case we believe that the overtime entitlement should take into account the overtime earnings of the individual employees. Averaging throughout the unit would include employees whose positions were not comparable to the dischargees'. Further, the actual overtime earnings figures for the claimants demonstrate a wide disparity among them, and between their earnings and the unit-wide averages. These factors convince us that in this case the unit-wide average overtime figures are not a reliable guide to determining what the individual claimants would have earned during the back pay period. For the back pay period we will award each employee the average overtime earned during the years for which we have data. We concede that such a method may produce inaccuracies. We are aware, for example, that the total overtime available varied from year to year. We are also aware that during some of those years the availability of overtime may have depended largely on the empoyee's job assignment, a factor which could have changed with increased seniority. We believe, however, that, of the available assumptions, the assumption of continuity from year to year is the fairest and least speculative method of computation.[19]

d. Health Insurance

Certain of the employees have submitted bills for costs of health insurance coverage during the back pay period. We have previously held that an employee who incurs increased health insurance costs by his unlawful termination should be permitted to recover the increased costs actually expended in obtaining comparable coverage. Plymouth County House of Correction, supra at 1530. O'Brien, DiStefano and Thibault claim that they purchased such coverage at increased costs during the back pay period.[20] These employees will be compensated for this increased expense

[18]The NLRB has used the average earnings of comparable unit employees to determine the overtime entitlement. See, Rice Lake Creamery Co., 151 NLRB 1113 (1965), enf'd. in part, 365 F.2d 388, 62 LRRM 2332 (D.C. Cir. 1966); Controlled Alloy, Inc., 208 NLRB 882, 85 LRRM 1494 (1974).

[19]Actual earnings figures will be converted to an annual figure for those years when the employees worked less than the full fiscal year.

[20]O'Brien would be entitled to $797.00; DiStefano is entitled to $370.00; Thibault is not entitled to back pay for the reasons discussed in part of this opinion, infra.

by computing the difference between the cost of comparable coverage and the amount the employees would have contributed to health insurance costs if employed by the Newton Public Schools during this period.

e. Clothing Allowance

Had the employees continued working for the Committee they would have been entitled to a clothing allowance of $125 per year under the collective bargaining agreement. The payment was in cash, and the employees did not have to show that it was used for purchase of uniforms. The parties disagree as to whether the claimants are entitled to the cash amount of the uniform allowance as an addition to gross back pay. There are also two related issues: (1) may the claimants offset against interim income the costs of clothing, tools or other equipment used in the interim employment, and (2) should the money Carmichael received for tools during his interim employment be set off against his Newton clothing allowance.

We find that the contractual clothing allowance should be considered as part of gross back pay. There was no requirement that it be used for any particular purpose, and is indistinguishable from a situation where the employees' salary is simply increased by the same amount. Similarly, any clothing allowance received during interim employment should be considered as interim income.

We have previously indicated that some expenses incurred as a result of seeking and continuing interim employment may be deducted from interim earnings. Such expenses must be directly related to securing the interim employment, however. Tuition costs during the back pay period are not normally deductible. Plymouth County House of Correction and Jail, supra at 1528. Similarly, non-specialized kinds of clothing and equipment of general utility should not be compensable even if used on the job. Similarly, the Internal Revenue Service will permit a taxpayer to deduct the cost of clothing only if it is specialized and not suitable for general use.[21] The claimant has the burden of establishing the legitimacy of such expense of earning interim employment, both as to the purpose and the amount.

In the instant cases, we conclude that Morris and O'Brien should not be permitted to deduct the costs of clothing purchased and used in the interim employment. This is the same kind of clothing for which these employees have already been compensated by including their Newton clothing allowance with gross back pay. To the extent that they incurred expense over and above the amount of the Newton clothing allowance, we find that these items were of general utility, not specifically related to the particular employment producing the interim income.

Carmichael claims approximately one hundred fifty dollars for carpentry tools used in his interim employment in Canada. This is the kind of item which might be considered an offset against interim income if properly established. On this record there is inadequate information concerning the amount of these expenditures. In addition, Carmichael concedes that his employer contributed some part

[21] This issue is actually one of mitigation. Because of its relationship to the clothing allowance issue we have discussed it in the portion of this opinion dealing with inclusion within Gross Back Pay.

of the cost of these tools. On this evidence we find that Carmichael has failed to satisfy his burden of establishing the amount of expenses incurred in earning interim income.

DiStefano claims additional offsets against interim income for travel and mileage costs in pursuit of interim income, and for increased mileage costs attributable to commuting to his interim employment in Lexington. We believe that these costs are properly offset against interim earnings. O'Connell and Macarelli, 7 MLC 1983 (1981).

f. Expenses of the Litigation

In Town of Townsend, supra and Plymouth County House of Correction, supra, we held that in order to make the employees whole for losses as a result of the prohibited practice they would be awarded the reasonable litigation costs incurred in litigating the prohibited practice case. Such costs do not include attorneys' fees, and do not include costs incurred in litigating the back pay award. The burden of establishing such expenses would be on the claimants.

On this record, only Carmichael makes a claim for "litigation expenses." The claimed expense relates to either the back pay hearing, or to Carmichael's trip from Canada to Boston in October, 1978 following which he declined the Committee's offer of reinstatement at the Newton Public Schools. Neither of these expenses is properly includable in gross back pay.

3. Mitigation and Set-off

a. Unemployment Compensation

Each of the claimants received unemployment compensation for some portion of the back pay period. The Employer argues that all such monies should be set off against gross back pay. In effect, such a position would treat unemployment compensation as if it were part of interim earnings. The Union asserts that such a setoff is unwarranted and might result in the employees being made less than whole, as there is the possibility of the Division of Employment Security recouping some or all of the payments. In previous cases, we have held that such amounts should not be deducted from gross back pay. We have made the Division of Employment Security aware of back pay awards in cases where claimants have received unemployment compensation, and have left the determination of whether to seek recoupment to that agency. Plymouth County House of Correction, supra. In the instant case the Committee has argued that the ability of DES to recoup overpayments (through the mechanism of a redetermination) is limited to the period within one year of the date of the final determination. G.L. c.151A, §71 provides in pertinent part:

> The director may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith; or (2) wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered;...provided, however, that with respect to (1) and (2) no such redetermination shall be made after one year from the date of the original determination....

There is no doubt that under the statutory authority cited above, the Director of the Division of Employment Security could, within one year of the original determination, move to recoup overpayments without respect to whether such sums had been deducted from the back pay award or not. Myers v. Division of Employment Security, 341 Mass. 79, 167 N.E.2d 160 (1969). The Commission is free to either deduct or not deduct such sums from gross back pay as part of its authority to fashion remedies which best effectuate the purposes of the law. Failure to make such deductions would not be considered to make the remedy excessive or void as a penalty or fine on the employer. NLRB v. Gullet Gin Co., 340 U.S. 361, 27 LRRM 2230 (1956).

On the facts presented, we have been persuaded to modify the views expressed in Plymouth County House of Correction, supra. The statutory provision cited by the Employer seems to preclude recoupment of any amounts paid as unemployment compensation. If this is indeed the case, failure to deduct these sums would result in employees being made more than whole. Such a result does not comport with the compensatory nature of our remedy. Even if we should be proved wrong in our interpretation of G.L. c.151A, §71 and DES is empowered to seek recoupment of such sums, we trust that another agency of the Commonwealth, which administers an employee benefit program, would consider the fact that we have made our determination based upon our belief that such recoupment cannot be made. We shall deduct from gross back pay all amounts paid to the claimants as unemployment compensation.[22]

b. Search for Interim Employment

The Committee argues that the back pay of the claimants should be reduced or eliminated because of their failure to make reasonable efforts to secure interim employment. Some general discussion on the issue of the duty to mitigate is warranted.

Both the Commission and the National Labor Relations Board have held that employees discharged in violation of the law have an obligation to mitigate back pay liability by seeking appropriate interim employment. Plymouth County House of Correction and Jail, supra; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941). Under the NLRA, "This duty requires only an honest, good faith effort to obtain employment, in which success is not the measure of the sufficiency of the search." The burden of proof on this issue is on the employer. Although the Supreme Judicial Court of Massachusetts has never passed on the duty to mitigate in a case arising out of G.L. c.150E, it has found that a public school teacher discharged in violation of the tenure laws has an obligation to seek interim employment. In Ryan v. Superintendent of Schools of Quincy, 374 Mass. 670, 373 N.E.2d 1178 (1976), the court stated that a discharged employee has a duty "to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to make honest, earnest, and intelligent efforts to this end." Id. at 1181, quoting from Maynard v. Royal Worcester Cement Co., 200 Mass. 1, 85 N.E.2d 877 (1908).

While the Ryan decision is not binding precedent in a case arising under

[22]Carmichael received $464 in compensation from Canadian sources during the back pay period under reciprocal agreements between the U.S. and Canada. We will deduct this amount from the gross back pay of Carmichael.

G.L. c.150E, there is little reason to follow a different approach to the mitigation doctrine in a prohibited practice setting. The Committee argues, however, that, where the back pay liability arises out of a violation of the duty to bargain, the burden of proof should be shifted to the employee to demonstrate the adequacy of the search for employment. We disagree. Whether the liability for back pay arises out of a violation of Section 10(a)(3) or of Section 10(a)(5) of the Law, the remedy should compensate the employees for actual damages suffered as a result of unlawful employer action. There is no reason to shift the burden of proof to the employees based solely on the fact that their termination arises out of a violation of one particular section of the Law rather than another.

An employer seeking to diminish its back pay liability must make an affirmative showing that: 1) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment; 2) the employee unreasonably made no attempt to apply for any such job; and 3) it was reasonably likely that the former employee would obtain one of those comparable jobs. Black v. School Committee of Malden, 369 Mass. 657, ____, 341 N.E.2d 896, 900 (1976). As the Supreme Judicial Court has stated, an employer need not prove conclusively that the former employee would have obtained employment. Its burden would appear to be to establish that the employee had "a reasonable prospect of being hired" Black v. School Committee of Malden, supra, 369 Mass. at ____, 341 N.E.2d at 900-901, or, stated slightly differently, that "it was reasonably likely that (the employee) could have obtained a comparable job." Ryan v. Superintendent of Schools of Quincy, 374 Mass. at ____, 373 N.E.2d at 1182. As we have noted earlier in this section, an employee's obligation is to use his time reasonably, honestly, and earnestly in an effort to find employment.

We hold that, with the exception of Thibault, the Committee did not meet its burden of proving that these employees failed to mitigate their damages. We conclude that the Committee owed Thibault no back pay for the reasons discussed below in the section entitled "Abandoning the Search for Employment."

The Committee introduced a series of newspaper advertisements indicating vacancies in custodial or janitorial positions. Almost all of these ads were limited to the period between July and mid-September of 1976. These notices appeared in papers which the claimants allege they read regularly in their search for jobs. In addition, the Committee produced evidence from the Director of Buildings and Grounds for the Needham Public Schools. He testified that Needham had advertised for six vacancies between July 1, 1976 and October of 1978 when the last of the claimants was offered reinstatement, and that the Town's advertisements for custodial jobs at the end of this period were similar to the ones introduced from July of 1976. Director Houlihan did not have records of job applications prior to January 1, 1978. His records after that time showed no applications from any of the claimants.

The Committee contended that its advertisements and testimony showed that comparable jobs for which these employees were qualified were available, that the employees did not apply, and that they could have obtained these jobs. The Union's view of the matter is different.

As to all of the laid off custodians, the Union makes a basic argument. It

alleges that the employees received unemployment compensation benefits, a fact which could not exist had they not satisfied the Division of Employment Security that they were vigorously searching for work. The Union argues that the Commission should view the receipt of unemployment compensation benefits as prima facie evidence that an employee has diligently searched for work. It is well-established that the Commission may take evidence of relevant proceedings in other agencies when hearing a case under G.L. Chapter 150E but that we will not forego the examination we are required to undertake under our law. Town of Dedham v. Labor Relations Commission, 365 Mass. 392, 312 N.E.2d 548 (1974); Lexington Taxi, 4 MLC 1677, 1688 (1978). Accordingly, evidence on these employees' receipt of unemployment compensation was received into this record and considered in reaching our conclusions. It is not, however, determinative of even a prima facie case of mitigation under Chapter 150E.

The Union raises a second basic argument as to many of the claimants. Essentially the argument is an equitable one. The Union established that during the two-year layoff period applicable to most of these employees (July 1, 1976 - reinstatement on October 3, 1978), the Committee hired a number of new custodians. Yet, the Union points out, the Committee's defense to this case throughout has been that the decision to terminate these seven employees was a purely economic one. The Committee has maintained that fiscal constraints mandated seven fewer custodians in Newton, and that it had no duty to bargain over the issue of which employees were to go. The Union asks us to rule that the Committee could have mitigated its own losses during the layoff period by rehiring claimants here instead of hiring new employees. Its failure to do so precludes it from presenting a mitigation defense.

Although the Union's argument cannot be said to lack merit or equity, if in reality the layoff was not an economic one, it is not dispositive. The employer offered reinstatement to two of these employees within five months of their terminations. Its failure to make the same offer to the other employees must be seen as a conscious decision to assume the risks of this litigation. This decision does not nullify the application of the mitigation doctrine to this case as a matter of law.

In terms of the individual cases of these employees, the Union established that each of them had made a significant number of attempts to find comparable employment. With a couple of exceptions, the claimants did not apply for the jobs mentioned in the advertisements and testimony introduced by the Committee. The Committee argues that their failure to do so is dispositive of the mitigation issue, a position which cannot be sustained. To the extent that the Committee's evidence covered only the three-month period in the summer of 1976 and several Needham jobs at a later point, it was inadequate for a layoff period of two years. It must also be observed that by January of 1978, claimants here had found one, and often several jobs. Additionally, we do not understand the case law to mean that an employer who has terminated employees in violation of law can, in the mitigation context, select the jobs to which employees must apply, and then disqualify them from receiving back pay because they have chosen to apply for other reasonable positions. In this connection, we find it particularly compelling that the Committee introduced no evidence which rebutted the individual employees' testimony as to

where they sought employment.[23]

There is a final problem with the Committee's mitigation case. An employer must establish that former employees had a reasonable prospect of being hired at available jobs offered. On this record, we cannot find that the Committee met this aspect of its burden. Testimony established that in the case of the Needham openings there were twenty-five to thirty applicants for each position. Although numbers are not dispositive, it cannot be said that this testimony helps the Committee, absent further evidence from its own witness, Director Houlihan, that the claimants had a reasonable chance of securing the jobs at issue. Some attempt was made to meet this point in Houlihan's statements that certain of the individuals who were hired had a single qualification which was also characteristic of one or more of the claimants. These few isolated examples cannot be found to satisfy the Committee's burden of proving that claimants here had a reasonable likelihood of securing the Needham jobs. Director Houlihan's testimony was the only evidence the Committee submitted on claimants' chances of securing alternative employment. It did not meet its burden on this point.

Thus, we are left with unrebutted evidence that several employees applied for jobs brought to our attention by the Commission, and that all of the employees applied for other positions which, on this record, seem reasonable in light of their training and experience. It must be noted that the employees' recollections in February, 1980 of their job searches between July, 1976 and October, 1978 were not as detailed or as documented as one would wish in an ideal world. It must also be acknowledged, however, that the fading of witnesses' memories with the passage of time is a concern in all aspects of litigation. In the absence of rebuttal evidence by the party with the burden of proof, we cannot find the employees' testimony of events several years prior to heaaring to be so vague as to lack credibility. This is especially true where, as here, all the employees named businesses to which they applied, often named specific individuals to whom they spoke, and in all cases secured at least one and often several jobs. In finding the employees' case sufficient and credible, we must also consider the context in which these claimants sought work. As the record amply establishes, these employees make their living at occupa-

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[23]The only Committee rebuttal evidence of significance was the testimony of Director Houlihan from Needham and that of Gladys Bolton, a secretary in the personnel office at the Perkins School.

Employee Carmichael had testified that he applied for a job at Perkins. Ms. Bolton testified that she had no application on file from Carmichael. She also stated that she did not know whether the individual in charge of maintenance at the time Carmichael allegedly applied to Perkins had maintained job applications or spoken with applicants. This gentleman had retired and gone to Hawaii so was unable to testify. The absence of the former maintenance superintendent's testimony makes it impossible for us to reject Carmichael's testimony that he had applied to Perkins.

Messrs. O'Brien and Walsh testified that they had responded to ads for Needham Public School jobs prior to January of 1978. Director Houlihan testified in rebuttal that he had no applications from either of these individuals. It was established that his records dated back only to January 1, 1978, and that there was no practice in his office of keeping applications prior to that date. Thus, Houlihan's testimony cannot serve to rebut the employees' statements.

tions characterized by frequent layoffs and consequent job searches, facts which might well cause some lack of specificity in attempts to remember very particular points in their employment history. Additionally, we note that their area of work is, on this record, characterized by less than formal application procedures.[24]

c. Abandoning the Search for Employment

1. Donald Carmichael

Approximately one month after his separation from the Newton Public Schools, Carmichael moved to Prince Edward Island, Canada. The Committee argues that by this action Carmichael made himself unavailable for reinstatement, or that he abandoned the search for interim employment. Carmichael argues that the move increased his opportunities for employment and reduced his expenses while unemployed. On this record we conclude that the mere fact of the move does not establish either unavailability for re-employment, or abandonmnent of the search for interim employment. There is no evidence on this record as to the relative availability of jobs for persons with Carmichael's skills as between Canada and Massachusetts. It is rational to assume that Carmichael was able to reduce his living expenses by virtue of the move. As the Employer has the burden of proof on any issue of mitigation, we decline to disqualify Carmichael or reduce Carmichael's back pay entitlement because of the move. We shall not, however, award Carmichael any expenses for relocation. On issues of establishing expenses incurred in interim employment, the claimants have the burden of proof. O'Connell and Macarelli, d/b/a North Shore Legal Clinic, supra at 1487. Carmichael has failed to relate these expenses directly to any interim position. Nor has he shown that the move would substantially increase his opportunities of obtaining employment. These expenses will not be offset against his interim income.

2. Kenneth Thibault

Thibault did not appear or testify at any of the hearings in the supplemental proceedings in this case. The hearing officer admitted his affidavit and the testimony of his mother conditionally pending a ruling by the Commission. We find that there is good reason to sustain the objection of the Committee to the introduction of the affidavit of Thibault. Thibault was aware of the pending proceedings and chose not to attend. His absence from the hearing left the Committee without opportunity to cross-examine on the issues covered by the affidavit, such as his interim earnings and efforts to secure employment during the back pay period. We think that it is inappropriate for a party having a direct financial interest in the litigation to fail to attend the hearings, and attempt to testify by affidavit. There is no suggestion that it was impossible for Thibault to attend, only that it would be inconvenient. He was at the time employed in Nebraska. Carmichael, on the other hand, traveled from Canada in order to give testimony in these proceedings. While the Commission is not bound by the rules of evidence prevailing in the courts of the Commonwealth, we may exclude evidence which is not competent or relevant, or which may not be verified. We decline to consider Thibault's affidavit.

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[24]For example, one witness testified without rebuttal that there is no written application process in the construction industry.

We see no need to strike the testimony of Thibault's mother. She testified in person, and was subjected to cross-examination. It is true that she lacked personal knowledge with respect to many of the issues relative to back pay. The extent of her personal knowledge is apparent from the testimony, however, and it may be given appropriate weight. The Committee's objection to the testimony of Mrs. Thibault is overruled.

With these evidentiary rulings, we examine the claim of Thibault for back pay for the period of July 1, 1976 through October, 1978. The parties have stipulated to his gross back salary during this period. There is evidence that in September of 1977, Thibault left Massachusetts to attend motorcycle mechanics' school in California. As we have indicated above, the mere fact of leaving the area of employment does not, in and of itself, indicate that the employee is no longer available for suitable employment. On this record, however, we find that Thibault's actions in September of 1977 amounted to a decision to withdraw from the job market to return to school and train for another career. He may no longer be considered as available for reinstatement or other interim employment. Thus, any liability for back pay on the part of the Committee would terminate as of September of 1977 at the latest.

The School Committee also argues that Thibault should be disallowed any back pay in the period July 1, 1976 through September, 1977. The Union argues that gross back pay has been stipulated. As the Committee has the burden of proof on issues of offset, Thibault should not be disqualified simply because of his failure to appear. We find the position of the Committee the more acceptable. Thibault alleges in his affidavit that he earned only $2002.00 during the back pay period. It may be inferred that he collected $3521.00 in unemployment compensation during that period. Thibault's failure to appear deprived the Committee of any opportunity to examine his efforts to secure work during that period or ask other questions relative to other income or matters in mitigation of their back pay obligation. Although the Committee has the burden of proof on such issues, it was effectively deprived of any opportunity to satisfy that burden by Thibault's failure to appear. For these reasons we find that Thibault is not entitled to back pay for any portion of the time following his termination on July 1, 1976.

d. Income from Second Jobs

Claimants Morris and O'Brien argue that certain income earned during the back pay period should not be considered as interim income and should not, therefore, be deducted from gross back pay. In both cases the income was derived from part-time bartending. Both employees engaged in this work both before and after their termination by the Committee. Their income from such work did not increase substantially following the termination. In Town of Townsend, supra at 1453 we stated:

> Any income during the back pay period not the result of the availability for employment caused by the discharge is not includable in the interim earnings figure. Thus, if the employee worked two jobs prior to the discharge, and continues to work a second job after the discharge, amounts earned on the second job do not reduce the back pay owed by the employer.

We believe this principle directly applicable to the amounts earned by Morris and O'Brien in their part-time bartending. These amounts will not be included in interim earnings.

The Employer also suggests that John Carvelli must have received some compensation for part-time work at a friend's gas station during the back pay period. The Union argues that any such compensation should be excluded on the grounds that they did not result from Carvelli's increased availability foremployment following his termination by the Newton Public Schools.[25] We need not reach this issue as it was not established that Carvelli received any money or other compensation for his work at the station. Carvelli denied receiving any money. No contradictory evidence was introduced.

e. Refusal of Reinstatement

In the fall of 1977, Walsh was contacted by School Department officials concerning a job opportunity with the Newton Public Schools. He declined the offer. The Committee now argues that this declination should disqualify Walsh from any back pay after the date of the offer. We disagree.

It is well settled that to qualify as a bona fide offer of reinstatement, the position offered must be the same, or an equivalent position. From the facts found above it is clear that Walsh was offered a lower paying job on the training shift, on a probationary basis. This was not an offer of the same or of substantially equivalent employment. National Labor Relations Board Casehandling Manual, Part III, Compliance Proceedings, sec.10530.1; Red Rock Co., 84 NLRB 521, 24 LRRM 1317 (1949). The offer does not toll the back pay obligation.[26]

IV. Conclusions and Order

Based upon the foregoing, and pursuant to the authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the Newton School Committee shall:

1. Pay to Lawrence Walsh the sum of fifteen thousand, one hundred thirty-eight dollars and eighty-eight cents ($15,138.88) together with interest[27] at the rate of seven percent (7%) per annum, com-

[25]The work was performed nights and Sundays.

[26]Such a job offer, if made by another employer, might well be suitable interim employment, and declination of such an offer, after a period of fifteen months unemployment might be considered a failure to mitigate damages. We decline, for obvious reasons, to apply this doctrine to the offer of a less favorable position by the original employer.

[27]The question of the Commission's authority to award interest on a back pay award is currently before the Appeals Court on appeal of the Superior Court decision in this matter. Consequently, the amount of interest due has not been computed. If permitted by the Court, interest is to be awarded and calculated in accordance with our decision in O'Connell and Macarelli d/b/a North Shore Legal Clinic, supra at 1987.

pounded quarterly; and, in addition, credit Lawrence Walsh with an additional 28 3/4 days vacation leave;

2. Pay to David Carmichael the sum of sixteen thousand, nine hundred and twenty-seven dollars and nineteen cents ($16,927.19) together with interest at the rate of seven percent (7%) per annum compounded quarterly;

3. Pay to Timothy M. Morris the sum of two thousand, eight hundred and thirteen dollars and fifty-three cents ($2813.53) together with interest at the rate of seven percent (7%) per annum compounded quarterly;

4. Pay to Frank DiStefano the sum of seventeen thousand, four hundred and ninety-five dollars and twenty cents ($17,495.20), together with interest at the rate of seven percent (7%) per annum compounded quarterly; and, in addition, credit DiStefano with an additional 28 3/4 days of vacation leave;

5. Pay to Stephen O'Brien the sum of eleven thousand and fifty-six dollars and twenty-six cents ($11,056.26), together with interest at the rate of seven percent (7%) per annum, compounded quarterly; and, in addition, credit O'Brien with an additional 18 3/4 days of vacation leave;

6. Pay to John Carvelli the sum of two thousand, nine hundred and sixty-seven dollars and thirty-three cents ($2967.33), together with interest at the rate of seven percent (7%) per annum compounded quarterly; and, in addition, credit Carvelli with an additional 5 days of vacation leave.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

APPENDIX "A"

LAWRENCE WALSH

Back Pay period from 7/1/76 to 10/3/78

Gross Back Salary	$26,433.33
10% differential	2,643.33
Gross Back Wages	$29,076.66
Overtime	968.66
Clothing	250.00
Gross Back Pay	$30,294.66
Interim Wages	6,465.78
Unemployment Comp.	7,474.00
Interim Earnings	$13,937.78
NET BACK PAY	$15,138.88

APPENDIX "B"

DAVID CARMICHAEL

Back Pay Period from 7/1/76 to 10/3/78

Gross Back Salary	$26,433.33
10% differential	2,643.33
Gross Back Wages	$29,076.66
Overtime	730.25
Clothing	250.00
Gross Back Pay	$30,129.72
Interim Wages	$10,329.72
Unemployment comp.	2,800.00
Interim Income	$13,129.72
NET BACK PAY	$16,927.19

APPENDIX "C"

TIMOTHY M. MORRIS

Back Pay Period from 7/1/76 to 11/5/76

Gross Back Salary	$4132.12
10% differential	413.21
Gross Back Wages	$4545.33
Overtime	392.00
Gross Back Pay	$4937.33
Interim Wages	$1315.80
Unemployment comp.	808.00
Interim Income	$2123.80
NET BACK PAY	$2813.53

APPENDIX "D"

FRANK DISTEFANO

Back Pay Period from 7/1/76 to 10/3/80

Gross Back Salary	$26,433.33
10% differential	2,643.33
Gross Back Wages	$29,076.66
Overtime	4,111.00
Clothing	250.00
Health Insurance	403.00
Gross Back Pay	$33,840.66
Interim Wages	$12,468.40
Unemployment comp.	4,185.00
Interim Eaernings	$16,653.40
Expenses	308.00
	$16,345.40
NET BACK PAY	$17,495.20

APPENDIX "E"

STEPHEN O'BRIEN

Back Pay Period from 7/1/76 to 10/3/80

Gross Back Salary	$26,433.33
10% differential	2,643.33
Gross Back Wages	$29,076.66
Overtime	1,983.00
Clothing	250.00
Health Insurance	880.00
Gross Back Pay	$32,189.66
Interim Wages	20,609.50
Unemployment comp.	525.00
Interim Income	$21,134.90
NET BACK PAY	$11,055.26