STATE OF VERMONT

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	Docket No. 77-31S
KENNETH E. SHARP	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case.

This is a grievance brought by Kenneth E. Sharp, a Correctional Officer at the St. Albans Correctional Institution in St. Albans, Vermont and member of the non-management unit of the Vermont State Employee's Association. Grievant contends that he is entitled to pay for his lunch periods because he was restricted from leaving the grounds of the correctional facility during those lunch periods by virtue of a bulletin issued by the State in November, 1976. The State contends that the mere requirement that an employee stay on State grounds during his lunch period does not amount to a sufficient encumbrance of the lunch period to entitle the affected employee to pay under the terms of the collective bargaining agreement.

This Board issued a Notice of Decision on January 27, 1978, in which it concluded that until a special area is set aside for employees for their lunch, employees situated in the position of the Grievant should be paid for their one-half hour lunch period. However, the Board refused to grant its decision retroactive effect and denied Grievant his back pay. This opinion elaborates on that Notice of Decision.

Findings of Fact.

1. Grievant was a Correctional Officer at the St. Albans Correctional and Diagnostic Facility in St. Albans, Vermont, from November, 1974 to March, 1977.

2. In November, 1976, there was posted at the St. Albans Facility Correctiona: Bulletin No. 200.28 which provides, in pertinent part:

> All employees will have a one-half (1/2) hour off their shift to eat a meal or relax, with the exception of the positions designated for encumbered lunch. During this one-half (1/2) hour period, the employee may eat the meal in the main caferteria, staff dining room, or on the Facility grounds. However, the employees will not leave the property without specific permission, for unusual circumstances, from the Superintendent or his authorized representative....

3. There is no "staff dining room" at the St. Albans Correctional Facility or areas suitable for this purpose which would, with assurance, free guards from contact with residents during guards' meals.

4. In its consideration of this grievance, the State has applied the same policy that it applies generally in questions of this kind, specifically that an employee is not considered to be entitled to compensation if he is freed from his normal work duties during the meal period, even if he is restricted to certain areas or buildings during the meal.

5. The Grievant was not usually assigned any duties during the meal period. The principal evidence of service for the State performed by the Grievant during his meal periods was evidence that his presence may have been viewed by residents of the Facility as a deterrent to trouble making. Also, Grievant occasionally performed bar-checks, control desk duties or opened the canteen although it is unclear whether Grievant performed these services at mealtime to accommodate his own or the State's purposes.

6. The collective bargaining agreement between the State of Vermont and the Vermont State Employee's Association applicable to this dispute includes a definition of the term "time actually worked" as follows:

> Authorized time spent by an employee in the actual performance of assigned job-related duties....

There also exists a memorandum of agreement entered into between the State and the union during July, 1976, which applies to the Grievant which provides:

> Employees who are regularly and normally required to work eight (8) hours per day rather than seven and one-half (7-1/2) hours per day by virtue of not having an unencumbered meal period shall receive an additional one-half (1/2) hour of pay at straight-time rates on those days when their meal periods are encumbered.

Conclusions of Law and Opinion.

7. In this proceeding, the Grievant has the burden of proof, by a preponderence of the evidence, that the State has as to him breached the collective bargaining agreement or that the State has discriminated against him in the application of a rule or regulation. After careful consideration of all the evidence in this case, the Board concludes that the Grievant has failed to bear his burden of proof.

8. As quoted above, the collective bargaining agreement defines the term "time actually worked". The agreed upon definition requires that assigned services be performed. The Board is not convinced that any duties which may have been performed were assigned.

9. Nor is the Board persuaded, after considering all of the evidence, that the Grievant has sustained his burden of proof that he is the victim of the discriminatory application of a rule or regulation by the State. The evidence appears to establish that the Correctional Bulletin discussed above was enforced against all correctional personnel to whom it was addressed. Moreover, the refusal of the State to grant pay for lunch periods unless specific duties were assigned is consistent with the policy of the State applied to correctional personnel and to personnel in State service generally.

10. Notwithstanding the foregoing, the Board must condemn the lunchtime practices as applied to guards in the position of the Grievant. The Bulletin quoted above contains an inherent contradiction in light of present conditions at the St. Albans Facility. Although the Bulletin grants a one-half hour to "relax" there is, as a practical matter, no place to do so under the terms of the Bulletin. By prohibiting departure from the grounds and providing no location where guards could eat in privacy from residents, the Bulletin assured, in practice, that guards' meals would generally involve contact with residents. Since such contact required the guards' attention to fulfill their obligations as correctional officers, the Board does not believe relaxation is likely in such circumstances in a correctional institution. Hence the contradiction, granting the guards a half-hour to relax but requiring that time to be spent in an area where guards cannot relax.

11. Such a contraditory result was not apparently intended by the State. Rather, the Bulletin seems to be a response to a perceived discipline problem. There was evidence that the policies of the Bulletin were adopted in response to concerns that guards who left the Facility occasionally returned to work late. It seems to the Board that this perceived problem could have been more directly addressed by docking pay or otherwise disciplining late-returning guards.

12. Although originally unintended, the results of the Bulletin's promulgation without providing private dining areas for guards are now clear. If the State, with the benefit of this perspective, were to continue the Bulletin's policy without providing private dining for the guards, the Board would conclude that its purpose was to exploit the guards' deterrent presence during meal periods. This conclusion seems compelled to the Board by the Bulletin's inappropriateness to effect its originally intended purpose, together with the practical results obtained by its implementation.

13. In summary, the Board does not conclude that Grievant has satisfied his burden of proof to entitle him to retroactive back-pay. But the gaps in Grievant's proof would be filled if the State fails to provide in the future a private dining area for guards, in light of the now known results of the Bulletin's implementation.

Order.

The State shall have sixty (60) days from its receipt of the Notice of Decision dated January 27, 1978 in this matter within which to set aside for guards' lunches an area free from routine intrusion by Facility residents or to rescind the prohibition against guards leaving the Facility for lunch. Thereafter, if neither course of action is taken, the Grievant should be paid for his one-half hour lunch period just as are State employees whose lunch period has previously been deemed by the State to be encumbered. No award of back pay is made and this Order shall be prospective in effect, not retroactive.

DATED at the City of Montpelier, County of Washington and State of Vermont this 22nd day of December, 1978.

VERMONT LABOR RELATIONS BOARD

John S. Burgess

William Kemsley

Appeal Dismissed pursuant to Stip. Dec 1979