

**STATE OF NEW YORK
SECURITY SERVICES UNIT**

In the Matter of the Arbitration Between

**NEW YORK STATE CORRECTIONAL OFFICERS AND
POLICE BENEVOLENT ASSOCIATION, INC.**

(Dennis Nichols),

Grievant,

AND

**STATE OF NEW YORK – DEPARTMENT OF
CORRECTIONAL SERVICES – (Gowanda Correctional Facility)**

Employer.

OPINION AND

AWARD

NYSCOPBA File No. CONO4-0779
OER File No. 2004-01-839

APPEARANCES: For the Union

Sheehan Greene Carraway
Golderman & Jacques, LLP
By: Natalie Carraway, Esq.

For the State

Walter J. Pellegrini, General Counsel
Governor's Office of Employee Relations
Gary Simpson, Esq.
Of Counsel

BEFORE: Peter A. Prosper
 Arbitrator

In accordance with Article 7 of the parties' Collective Bargaining Agreement, the undersigned was selected as Arbitrator to hear and decide the grievance submitted by the parties to arbitration. Hearings were held in Albany, New York on May 10, 2006, at which all parties were given full opportunity to submit data, memoranda and other documentary evidence, provide oral arguments and testimony, examine and cross-examine witnesses, and otherwise support their respective positions. The parties submitted post-hearing briefs and upon receipt, the hearing was declared closed. This *Opinion* and its accompanying *Award* are based on the record as thus constituted.

ISSUE

The parties stipulated to the following statement of the issue:

Did the State of New York (Department of Correctional Services – Gowanda Correctional Facility) violate Articles 3 and 11.6 of the 1999-2003 Collective Bargaining Agreement when it did not pay grievant, Dennis Nichols, longevity payments beginning on or about October 11, 2003?

If so, what in accordance with the Agreement, is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

3.1 The Employer and the Union agree that the provisions of this Agreement shall be applied equally to all employees in compliance with applicable law against discrimination as to age, race, creed, color, national origin, sex, disability, marital status and political affiliation. The parties further agree that the provisions of this Agreement shall be applied equally to all employees in compliance with Executive Order 33 as to sexual orientation. The parties reaffirm their commitment to all applicable military laws and the rights of former and present members of the Armed Forces of the United States.

11.6 Longevity Payments (a) Longevity payments as set out in the salary schedule in Appendix "A" will be provided to employees upon completion of 10, 15, and 20

years of continuous service. Continuous service shall mean time in a titles or combination of titles which have existed and/or presently exist in the Security Services Unit. Such payment will be added to base pay effective on the payroll period which next begins following the actual completion of 10, 15, and 20 years of continuous service.

RELEVANT STATUTORY PROVISIONS

Title 38 United States Code ("U.S.C."), Chapter 43: Employment and Reemployment Rights of Members of the Uniformed Services

§ 43 16(a) and (b) (B) :

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person remained continuously employed.

(b) A person who is absent from a position of employment by reason of service in the uniformed services shall be entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy practice, or plan in effect at the commencement of such service or established while such person performs such service.

New York State Military Law §242 and §243

§242.4 Time during which a public officer or employee is absent pursuant to the provisions of two, three and three-a of this section shall not constitute an interruption of continuous employment and, notwithstanding the provisions of any general, special or local law or the provisions of any city charter, no such officer or employee shall be subjected, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any right or privilege, by reason of such absence, or be prejudiced, by reason of such absence, with reference to continuance in office or employment, reappointment to office, re-employment, reinstatement, transfer or promotion.

§ 243 (5). A public employee restored to his position after the termination of his military duty or after termination of his substitute appointment shall thereafter be entitled to the rate of compensation he would have received had he remained in his position continuously during such period of military duty. . .and shall be deemed to have rendered satisfactory and efficient service in such position during the period of

his leave of absence and shall not be subjected directly or indirectly to any loss of time service, increment, or any other right or privilege, or be prejudiced in any way with reference to promotion, transfer, reinstatement or continuance in office.

MEMORANDUM OF UNDERSTANDING

between

THE STATE OF NEW YORK

and

**NEW YORK STATE CORRECTION OFFICERS AND
POLICE BENEVOLENT ASSOCIATION**

This Memorandum of Understanding is entered into by the State of New York (hereinafter "the State") and the New York State Correction Officers and Police Benevolent Association (hereinafter "the Union"), representing employees in the Security Services Unit.

It has been the policy of New York State to support its employees in the National Guard and Reserves who are federally activated or activated by the Governor for military service related to the events of September 11, 2001. In light of the continuing evolution of the response to September 11, 2001 into a wider campaign against terror, including military action in Iraq, the parties hereby agree on the following measures to protect State employees activated for military duty in any aspect of that campaign:

- I.** The term of the Memorandum of Understanding between the parties executed November 22, 2002 (a copy of which is attached) is extended through December 31, 2004.

The terms and conditions of that agreement shall remain intact except for the changes or points of clarification noted herein.

II. SUPPLEMENTAL MILITARY LEAVE

Employees shall continue to be eligible to receive Supplemental Military Leave through December 31, 2004. However, in no event, regardless of the number of times an employee is activated between September 11, 2001 and December 31, 2004, shall more than one such grant of Supplemental Military Leave be credited to any employee for activation related to the war on terror.

III. LEAVE AT REDUCED PAY AND TRAINING LEAVE AT REDUCED PAY

- A.** Employees shall continue to be eligible to receive Leave at Reduced Pay through December 31, 2004.
- B.** Employees are eligible for Training Leave at Reduced Pay in calendar year 2003 following (1) any active military service in calendar year 2003 that is related to the war on terror; and (2)

exhaustion of their calendar year 2003 Military Leave entitlement under Section 242 of the New York State Military Law and any leave credits (other than sick leave) that they elect to use. During calendar year 2003 employees may use up to 30 calendar days or 22 workdays of Training Leave at Reduced Pay for any required military duty (including mandatory weekend and summer training or other activation) that is not related to the war on terror.

- C. Employees are eligible for Training Leave at Reduced Pay in calendar year 2004 following (1) any active military service in calendar year 2004 that is related to the war on terror; and (2) exhaustion of their calendar year 2004 Military Leave entitlement under Section 242 of the New York State Military Law and any leave credits (other than sick leave) that they elect to use. During calendar year 2004, employees may use up to 30 calendar days or 22 workdays of Training Leave at Reduced Pay for any required military duty (including mandatory weekend and summer training or other activation) that is not related to the war on terror.
- D. Leave at Reduced Pay and Training Leave at Reduced Pay used in calendar years 2003 and 2004 will be calculated in the following manner:
1. **For employees who utilized Leave at Reduced Pay or Training Leave at Reduced Pay prior to calendar year 2003, the rate of reduced pay for the first use of either leave category at any point between January 2, 2003 and December 31, 2004 shall be calculated as follows:**
 - a. **Those on Training Leave at Reduced Pay or Leave at Reduced Pay on January 1, 2003 shall have the calculation of reduced pay for either leave category based on State salary (base pay plus location pay plus geographic differential) as of January 1, 2003 reduced by the military pay rate used in calculating the most recent period in either reduced pay status prior to 2003.**
 - b. **For those whose first use of either reduced pay category occurs between January 2, 2003 and December 31, 2004, the rate of reduced pay shall be based on State salary (base pay plus location pay plus geographic differential) as of the last day in full pay status prior to first use of Leave at Reduced Pay or Training Leave at Reduced Pay after January 1, 2003 reduced by the military pay rate used in calculating the most recent period in either reduced pay status prior to 2003.**
 2. **For employees who have not utilized Leave at Reduced Pay or Training Leave at Reduced Pay prior to calendar year 2003, the rate of reduced pay for the first use of either leave category at any point between January 1, 2003 and December 31, 2004 shall be calculated as follows:**

The rate of reduced pay shall be based on State salary (base pay plus location pay plus geographic differential) as of the last day in full pay status prior to first use of Leave at Reduced Pay or Training Leave at Reduced Pay reduced by military pay (defined as base pay plus housing and food allowances) as of the first day in Leave at Reduced Pay or Training Leave at Reduced Pay status.

- 3. For all employees covered by sections (1) and (2) above, the rate of reduced pay calculated for first use of Leave at Reduced Pay or Training Leave at Reduced Pay in 2003 or 2004 shall be used for any subsequent period of leave under either category in 2003 or 2004.

- E. Leave accruals for employees eligible for both Leave at Reduced Pay and Training Leave at Reduced Pay have not changed but are clarified as follows: employees will be credited with vacation bonus days and personal leave days they otherwise would have received on their vacation and personal leave anniversary dates, should said dates occur during this leave. However, such employees will not be eligible to (1) earn bi-weekly vacation and sick leave accruals for any pay period in which they are not in full pay status for at least seven out of ten days; or (2) receive credit for holidays that fall during a period of Leave at Reduced Pay or Training Leave at Reduced Pay.

IV. HEALTH INSURANCE COVERAGE

The provisions of Article 12.2(b) of the 1999-2003 State/New York State Correction Officers and Police Benevolent Association Agreement shall be extended beyond the negotiated 12-month limit for an employee who continues to be or who will be federally activated or activated by the Governor for military service any time on or after September 11, 2001.

Contribution-free dependent health insurance coverage that has been extended beyond the 12-month limit will end at such time as the employee's active duty is terminated, the employee returns to State employment, or December 31, 2004, whichever occurs first.

- V. The provisions of this agreement shall not apply to those employees who have voluntarily separated from State service or who are terminated for cause.

FOR THE STATE:

 Governor's Office of Date
 Employee Relations

FOR THE UNION

 New York State Correction Date
 Officers and Police
 Benevolent Association

 New York State Correction Date Officers
 and Police
 Benevolent Association

BACKGROUND

The grievant, Dennis Nichols, has been employed by the Department of Correctional Services as a Correction Officer since October 1983. In 1987 he became a member of the New York Army National Guard, and has remained a member ever since. CO Nichols was ordered to active duty in December 1990 for duty during operation Desert Storm, and released in April 1991. He was activated again on September 11, 2001 and was stationed at ground zero for two weeks. He was reactivated for duty in Iraq in February 2003 and remained on military leave until June 2004 when he returned to his position as a correction officer at Gowanda Correctional Facility.

While he was activated, Nichols received the equivalent of his State salary. His compensation included his military pay plus an additional amount from the State which would bring his pay up to his State salary. After his return to Gowanda in June 2004, Nichols began to receive his twenty-year longevity payments in his biweekly check, although his twenty-year anniversary date was October 11, 2003. He did not receive longevity pay from October 11, 2003 to June 2004.

Officer Nichols filed a grievance [Joint Exhibit No. 2] through his union, NYSCOPBA, on July 6, 2004, protesting the action of the State and asking for back pay for his longevity from October 11, 2003 until June 2004. The grievance was denied at Step One on July 7, 2004 by J. Lempke, Deputy Superintendent for Security [Joint Exhibit No. 2]. The decision was appealed, and on September 9, 2004, Robert Pasquini, Labor Relations Representative denied the appeal at the Agency Level [Joint Exhibit No. 3]. Seren A. Hrachian, Associate Director of the Governor's Office of Employee Relations denied the grievance at the Step 3 level [Joint Exhibit No. 4]. The Union filed a Demand for Arbitration on November 4, 2004 [Joint Exhibit No. 5]. The undersigned was selected as arbitrator, and the issue is now properly before me for evaluation and binding decision.

POSITION OF THE UNION

The Union contends that denying the grievant his twenty-year longevity payment violated Article 11.6 of the Agreement. Article 11.6 states that longevity payments are contingent upon an employee's continuous service. Nichols would have to have been in the title of correction officer for twenty years on October 11, 2003 to be eligible for his twenty-year longevity payment. Nichols testified that he was never removed from his position as a correction officer even when he was activated and served in Iraq. His military leave did not terminate his employment. According to the Union, it is a clear violation of Article 11.6 to deny Nichols his twenty-year longevity payment beginning payroll period after October 11, 2003.

The Union further argues that the State Salary Manual promulgated by the New York State Comptroller's office provides a definition of "continuous service" for purposes of determining eligibility for longevity payments. It states, "Continuous service as used in determining eligibility for the longevity payments is actual paid service (including part-time annual salaried service and sick leave at half-pay) or time on Workers' Compensation leave or military leave."

Nichols was activated to serve in the military in February 2003, and returned in June 2004. His twenty-year anniversary was October 11, 2003. He was rightfully eligible to receive his longevity payment in the next payroll period after October 11, 2003. He did not receive longevity payments until June 2004. Therefore, argues the Union, he was denied his longevity payments from October 2003 to June 2004 because he was on military leave. But the Salary Manual, as well as the Agreement, states that military leave does not break an individual's continuous service with his employer. The Union asserts that the clear language of the Agreement was violated when Nichols was denied his longevity payments for the time period from October 2003 to June 2004.

The Union argues that denying the grievant his longevity payment on October 11, 2003 and thereafter violates Title 38 United States Code, Chapter 43, "Employment and Reemployment Rights of Members of the Uniformed Services" (USERRA) and New York State Military Law.

The Union states that Article 3.1 of the Agreement reconfirms the protections of the Federal and State military laws. Article 3.1 states that "The parties reaffirm their commitment to all applicable military laws and the rights of former and present members of the Armed Forces of the United States."

The Union notes that Federal and State rights for returning members of the military and National Guard are set forth under USERRA and New York State Military Law §§ 242, 243. A person who is re-employed under USERRA is entitled to seniority and other rights and benefits determined by seniority that the person had on the date of the beginning of service plus the additional seniority and rights and benefits that he or she would have attained if the person had remained continuously employed.

The Union states that according to the State, Nichols would have received his longevity increase on October 11, 2003, if it were not for his activation and service in Iraq. Failing to provide Nichols with his longevity increase during the payroll period after his twenty-year anniversary until June 2004 directly subjects Nichols to a loss of an increment and/or right by reason of his military service in violation of USERRA and the State Military Law.

POSITION OF THE STATE

The State argues that the Union failed to prove a violation of the Agreement under both Article 3 and Article 11.6.

The State notes that when grievant went on military leave as of February 1, 2003, he was on leave with pay for a total of thirty days within a 44 day period [State Exhibit No. 4]. Beginning March 17, 2003, and throughout the end of 2003, grievant was on military leave without pay. He returned to work at Gowanda Correctional Facility as of May 27, 2004. Despite grievant's status as being on leave without pay from May 17, 2003 going forward, grievant claims that as of October 20, 2003, he was entitled to receive a step increase reflecting a twenty-year longevity payment. The State argues that grievant is not entitled to that longevity payment as of October 20, 2003, and received all of the benefits to which he was entitled by law.

The State cites Article 11(6)(d) of the Collective Bargaining Agreement, stating that longevity payments are added to and considered part of base pay for all purposes.

The State argues that Article 3.1 consists of three sentences, the third of which is the only one for which the grievant seeks a contractual source of right, but argues that the three sentences must be taken as a whole. The State asserts that the Article enumerates a class of individuals against whom the parties agree that no discrimination will be allowed, and argues that only the groups that are covered within the four corners of the provision fall under its protection. If the parties had intended to include military personnel, they would have incorporated such individuals through plain wording.

The State further contends that it did not violate either federal or state law when it did not make longevity payments to grievant while he was on military leave. It argues that while the federal law "supercedes any State law, contract, agreement, policy, plan, practice or other matter that

reduces, limits or eliminates in any manner any right or benefit provided by this chapter..." USERRA excludes wage or salary from the definition of "benefit" or "right" due to employees who are on military leave. Because the Collective Bargaining Agreement and OSC Rules and Regulations as well as the various Memoranda of Understanding between the Union and the State relating to military leave rights classify longevity payments as additions to base salary, the grievant has no valid claim to payment.

The State asserts that New York State Law § 242 provides that employees who enter the military are to be paid full salary for 30 days or 22 working days. Between the payroll periods ending February 5, 2003 and March 19, 2003, grievant was classified as being on military leave for a total of 30 days, and was paid his full bi-weekly salary through the payroll period.

The State argues that not only did the grievant receive compensation to which he was entitled under NY Military Law, but upon exhaustion of § 242 leave, grievant received an additional 30 days paid leave under the Memorandum of Understanding.

In addition, argues the State, New York provides employees on military leave with a stipend at reduced pay. Such a stipend's purpose is to make whole the individual by filling the gap between the employee's lower military pay and his civilian salary.

The State asserts that based on federal and state law, the State properly discharged its statutory obligation to the grievant as it relates to payment of his salary, and therefore, the grievance must be denied.

DISCUSSION

The Union properly cited Article 3.1 as a basis for its position that the State improperly withheld longevity increases from the grievant. The last sentence of Article 3.1 states: "The parties reaffirm their commitment to all applicable military laws and the rights of former and present members of the Armed Forces of the United States." That sentence stands by itself. The sentence refers to the rights of "former and present" members of the military.

The State argues that wage or salary is not a benefit or right under USERRA. It then cites section (2) which states: The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account or interest (other than wage or salary for work performed)...." The State relies on the phrase "other than wage or salary" but apparently dismisses the rest of the phrase "or work performed." The Memorandum of Understanding signed by the parties states that its purpose is to "make whole" an employee who serves in the military, providing the difference between military pay and civilian salary. It is not for "work performed" *per se* because the individual is not performing any work for the State.

The Memorandum of Understanding [State Exhibit No. 1] states: "For those whose first use of either reduced pay category occurs between January 2, 2003 and December 31, 2004, the rate of reduced pay shall be based on State salary (base pay plus location pay plus geographic differential) as of the last day in full pay status prior to first use of Leave at Reduced Pay or Training Leave at Reduced Pay after January 1, 2003 reduced by the military pay rate used in calculating the most recent period in either reduced pay status prior to 2003." The section sets the pay reduction for the date the individual enters military service. There is nothing in that section, or any other section, that precludes adjustment of that reduced pay during the term of the military obligation. If there was to

be no reduction, the section would have made a statement such as, "this reduced pay amount shall be effective for the duration of the employee's military obligation," or words to that effect.

This is consistent with Federal and State Military Law. State Law § 242 states that a person absent from his position because of military service, "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person remained continuously employed." New York State Military Law states: "Time during which a public officer or employee is absent pursuant to the provisions of two, three and three-a of this section shall not constitute an interruption of continuous employment."

There is no question that grievant gained his twenty-year longevity while his was in military service. The State acknowledges that fact. The question is whether the State can withhold longevity payments from that twentieth year anniversary date until an individual returns to employment from military service. I find that the State cannot withhold the longevity payment. As indicated above, the employee is considered to be continuously employed while on active duty. The Memorandum of Understanding sets the starting pay for the employee entering military service, full pay minus the military pay rate. Nowhere does the Memorandum of Understanding state that the starting rate is to continue for the duration of military service. There is no statement in the Memorandum of Understanding that prevents an employee from receiving contractual additions to his base pay during his tenure with the military. Longevity increments are earned at intervals stated in the Collective Bargaining Agreement. In the instant case, the grievant reached twenty years with the Department of Correctional Services during his active military status, and had the contractual right to receive the twenty year longevity payment. As is acknowledged by all parties, and specifically stated in the

Collective Bargaining Agreement, longevity payments become part of an employee's base pay. In the instant case, the longevity pay should have been added to the grievant's base pay on the first pay period following his twentieth year anniversary date in accordance with the Collective Bargaining Agreement. By not beginning the payment at that time, the State discriminated against a class of employee, those in military service, violating Article 3.1 and 11.6 of the Collective Bargaining Agreement.


Therefore, as the duly selected arbitrator, after careful consideration and review of the testimony, evidence, arguments and submissions of the parties, I hereby make the following

AWARD

The State of New York (Department of Correctional Services - Gowanda Correctional Facility) violated Articles 3.1 and 11.6 of the 1999-2003 Collective Bargaining Agreement when it did not pay grievant, Dennis Nichols, longevity payments beginning on or about October 11, 2003.

The State shall compensate the grievant, Dennis Nichols, the amount of money he would have received had the State added longevity payments to his base pay beginning on or about October 11, 2003.

Guilderland, New York
September 12, 2006


Peter A. Prosper
Arbitrator