VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-46
DARWIN MERRILL	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the motion of the State of Vermont to reopen this matter. On December 20, 1989, the State, pursuant to Section 12.1 of the Board's Rules of Practice, V.R.C.P. 60(b) and 3 VSA §924(b), moved that the Board reopen the record in this matter to reconsider its November 2, 1989, back pay order in light of significant interest calculation errors in the back pay award stipulation entered into by the parties which was incorporated into the November 2 Order.

The November 2 Order was the final Board Order in this matter, which originated in 1984 when Darwin Merrill ("Grievant") filed a grievance concerning his October 5, 1984, dismissal from the State position of CRASH Program Chief. On October 3, 1985, the Board issued Findings of Fact, Opinion and Order granting the grievance and reinstating Grievant to the position of CRASH Program Chief. 8 VLRB 259. On December 12, 1985, the Board issued a back pay order in this case. 8 VLRB 383. The State appealed the Board decision to the Vermont Supreme Court. The Court affirmed the Board decision on December 16, 1988, and on March 24, 1989, denied in relevant part, the State's Motion for Reargument. ___ Vt. ___. Following the Supreme Court decision, the parties were unable to stipulate to the specific amount of back pay and other benefits due Grievant for the period subsequent to the Board's December 5, 1985, back pay order. On

October 5, 1989, following a hearing on that issue, the Board issued Findings of Fact, Opinion and Order concerning the back pay due Grievant. 12 VLRB 222. The November 2, 1989, Order of the Board constituted the specific amount of back pay and other benefits due Grievant pursuant to the October 5, 1989, order.

On November 30, 1989, the State appealed to the Vermont Supreme Court from the "Board Order dated November 2, 1989, finalizing the terms of the Opinion and Order dated October 5, 1989". Thus, the Motion to Reopen pending before us, filed on December 20, 1989, was filed while this case was on appeal. On December 29, 1989, the Vermont Supreme Court remanded this matter to the Board to rule on the State's Motion to Reopen.

On January 8, 1990, Grievant filed an Objection to the State's Motion to Reopen. A hearing on the motion was held before Board Members Charles H. McHugh, Chairman; Catherine L. Frank and Leslie G. Seaver on March 22, 1990. Attorney Norman Blais represented Grievant. Michael Seibert, Assistant Attorney General, represented the State.

The State makes its motion to reopen on either, or both, of the following two provisions:

> Vermont Rules of Civil Procedure 60(b)
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> On motion and upon such terms as are just, the (Board) may relieve a party... from a final... order... for the following reasons: 1) mistake, inadvertence, surprise or excusable neglect... or 6) any other reason justifying relief from the operation of the judgment.
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> 3 VSA §924(b)
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> Until a transcript of the record is filed in a court under this chapter the board at any time upon reasonable notice and in such manner as it considers proper may modify or set aside wholly or partially a findings made or order issued by it.

In its October 5, 1989, decision, the Board issued the following order, in pertinent part:

> 1. The State shall pay Grievant a back pay award covering the period from the effective date of his discharge until his reinstatement; which award represents the amount Grievant would have earned during the period minus interim income earned by Grievant... plus interest earned on those earnings.[1]
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> ... 7. The State shall submit to the Board by October 16, 1989, a proposed order indicating the specific amount of back pay and other benefits due Grievant pursuant to this Order. Grievant shall inform the Board in writing by October 26, 1989, whether he agrees with the proposed order, and, if not, shall notify the Board of specific areas of disagreement. 12 VLRB, at 228-229.

Pursuant to the directives of this Order, the State calculated the amount of back pay, including interest, and the parties entered into a stipulation agreeing that the amount of "net pay" owed to Grievant was $104,690.28. On November 2, 1989, a final order incorporating the stipulation and ordering the parties to comply therewith, was issued by the Board.

The State contends that, approximately one month later, the State Director of Payroll, in reviewing the documents submitted in support of the Board Order, discovered that the interest calculation submitted in support of the payment contained substantial errors for the period

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[1]The interest due Grievant on back pay was to be at the rate of 12 percent per annum and was to run from the date each paycheck was due during the period commencing with Grievant's dismissal, and ending on the date of his reinstatement. The interest for each paycheck was to be computed from the amount of each paycheck minus unemployment compensation received by Grievant during the payroll period. While this requirement was not stated explicitly in the October 5, 1989, Order, that Order was issued "consistent with the Orders of the... Board dated October 3, 1985, and December 5, 1985", 12 VLRB, at 228; and the October 3, 1985, Order contained this specific requirement. 8 VLRB, at 292.

between April 1, 1989, to November 11, 1989. The interest calculated for the period was $33,865.86, and the State submits it should have been $4,280.26, resulting in an error in the amount of $29,585.60. The State requests that the Board reopen its back pay order in light of these significant errors in the interest calculation discovered by the State subsequent to stipulating to the back pay award.

Grievant contends that the claimed error in this matter can only be attributed to the State's incompetence, negligence or carelessness, and that a motion to set aside a judgment claiming a mistake is not intended to relieve a party of the consequences of its own negligence or mistakes. Grievant contends that the State and Grievant, by stipulating to the back pay due Grievant, entered into a contract by which they are now bound.

At the March 22 hearing in this matter, Grievant stated that, if the Board granted the Motion to Reopen, the Board also should reopen on the issue of whether interest should be calculated on gross pay, rather than net pay. In calculating the back pay due Grievant which led to the November 2 Board Order, the State calculated interest on the net pay amount, after deductions had been made. The parties agree that, with respect to calculations leading to the "first" final back pay order issued by the Board on December 5, 1985, interest was calculated on the gross pay amount. At the March 22 hearing, the State admitted that this was the first instance in any case where back pay was calculated that interest was calculated on net pay, rather than gross pay. Grievant contends that the interest should be calculated on gross pay as was done by the Order of December 5, 1985.

There is a notable absence of specific guidelines in deciding motions filed under VRCP(60)(b), but it is clear that the power to grant relief from a final judgment rests solely in the sound discretion of the Board. Goshy v. Morey, 149 Vt. 93 (1987). Rule 60(b) is designed to give the Board flexibility to serve the ends of justice. Id, at 99.

In exercising our discretion in this case, we choose not to base a decision to reopen on the reasons stated in VRCP 60(b)(1) - "mistake, inadvertence, surprise or excusable neglect". We would only comment that we would expect the State to exercise more care and diligence in calculating back pay awards than was evident in this case.

However, we do choose to exercise our discretion to reopen this case to correct the obvious error made by the State in calculating interest due on back pay, and to require that interest be calculated on gross pay instead of net pay, based on VRCP 60(b)(6). This provision allows for relief from a final order based on "any other reason justifying relief from the operation of a judgment".

Relief from judgment under VRCP 60 (b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied. Greenmoss Builders v. Dun and Bradstreet, 149 Vt. 365, 368 (1988). However, it may not be used to relieve a party from a free, calculated and deliberate choice. Id. A determination whether unfair prejudice to the opposing party would result is a relevant consideration under (b)(6). Id, at 369.

Here, we believe the ends of justice would best be served by reopening this case to ensure that the final backpay order in this case is consistent with the previous orders issued by the Board in

this case. As it now stands, the November 2, 1989, Order, which incorporated the back pay stipulation entered into by the parties, is inconsistent with prior Board orders in two respects.

First, previous Board orders in this case provided for interest to be paid on back pay at a rate of 12 percent per annum. Through incorporation of the back pay stipulation of the parties, the November 2, 1989, Order, provides for the paying of $33,865.86 of interest for a seven month period on a principal of $61,146.70. Obviously, the effective rate of interest here is vastly greater than 12 percent per annum. This calculation by the State was a serious error in contravention of the Board Order, and certainly did not constitute a "deliberate, free and calculated choice" by the State. It serves the ends of justice for this error to be corrected. Otherwise, Grievant would receive an unfair windfall. Trustees of Net Realty v. Avco Financial Services, 147 Vt. 472 (1986).

The November 2, 1989, Board Order also is inconsistent with prior Board orders in a second respect. It has been the practice before the Board that interest calculations on back pay determinations have been based on gross pay, rather than net pay. In fact, in the "first" final back pay order issued by the Board in 1985 in this case, interest was calculated on gross pay. In issuing its October 5, 1989, Order herein, it was the intent of the Board that this past practice be followed. Thus, the November 2, 1989, Order, through incorporation of the back pay stipulation which calculated interest on net pay, was inconsistent with prior Board orders in this case, as well as other cases.

We conclude that the ends of justice are best served by requiring interest in this matter, as well as other back pay cases, to be calculated on gross pay, not net pay. This is so because to do otherwise would be inconsistent with prior Board orders, and because it is most fair to an improperly discharged employee and is most feasible administratively. Logic and past practice dictate that it be done that way.

By our ruling here, it is evident that Grievant will receive a smaller back pay award than if we allowed the November 2, 1989, Order to stand. However, this does not mean he is unfairly prejudiced by our decision. Grievant has not demonstrated that he acted in reliance on receiving the amount of monies provided for in the November 2 Order. Moreover, he will receive no less than the Board intended for him to receive to make him "whole".

Now therefore, based on the foregoing reasons, it is hereby ORDERED:

1. The Motion to Reopen filed by the State of Vermont in this matter is granted, and the November 2, 1989, Order issued by the Labor Relations Board is rescinded;

2. The State shall pay Grievant a back pay award fully consistent with this Memorandum and Order, and the Orders of the Labor Relations Board in this matter dated October 3, 1985; December 5, 1985; and October 5, 1989; and

3. The State shall submit to the Board by June 11, 1990, a proposed order indicating the specific amount of back pay and other benefits due Grievant pursuant to this Order. Grievant shall inform the Board in writing by June 18, 1990, whether he agrees with the proposed order, and, if not, shall notify the Board of specific areas of disagreement. If necessary, a hearing on these issues will be held at 11:00 a.m. on June 21, 1990, in the Board hearing room.

Dated this 31st day of May, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Leslie G. Seaver