

VERMONT LABOR RELATIONS BOARD

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

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This grievance is on remand from the Vermont Supreme Court concerning a continuing dispute over back pay due Darwin Merrill ("Grievant") as a result of his improper discharge.

This matter originated in 1984 when 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 18, 1988, and on March 24, 1989, denied in relevant part, the State's Motion for reargument. 151 Vt. 270. 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. On November 2, 1989, the Board issued an Order which constituted the specific amount of back pay

and other benefits due Grievant pursuant to the October 5, 1989, Order. On May 31, 1990, the Board, pursuant to a Motion to Reopen filed by the State, amended its November 2, 1990, Order.

The State appealed the Board back pay order to the Vermont Supreme Court. Among the issues appealed by the State was the Board conclusion that the State did not meet its burden of demonstrating that an agreement, providing for Grievant to receive \$14,000 from the sale of his interest in the partnership, should be deducted from his back pay award. In a decision issued July 5, 1991, the Vermont Supreme Court reversed the Board on the issue. (Slip Opinion, Supreme Court Docket No. 89-603). The Court stated:

In disregarding the \$14,000, the Board ruled, in effect, that the note grievant received for his interest in the partnership was worthless. The record does not support that conclusion. It appears that the note is collateralized by a second mortgage on the former partner's house, though the former partner's equity in the property does not appear in the record.

Other than this erroneous statement, the Board gave no reasons for its conclusion that the \$14,000 was not "money earned". Since we will not be left to speculate about the effect of the Board's erroneous determination on its decision, we must reverse and remand for further findings regarding the nature of the \$14,000. See Saufroy v. Town of Danville, 148 Vt. 624, 626, 538 A.2d 168, 169 (1987). Grievant's back pay award should be reduced by any portion of the \$14,000 that the Board determines constitutes net profits to grievant from his self-employment in the partnership. The Board's decision is otherwise affirmed (Slip Opinion, page 7).

A hearing on that issue was held before Board Members Louis A. Toepfer, Acting Chairman; Catherine L. Frank and Leslie G. Seaver on December 16, 1991. Attorney Norman Blais represented Grievant. Michael Seibert, Assistant Attorney General, represented the State. Grievant filed Proposed Findings of Fact and Memorandum of Law on December 23, 1991. The State filed no brief.

FINDINGS OF FACT

1. In April, 1989, Grievant was involved with another person in a partnership that sold, distributed and serviced breath testing equipment and other supplies used in the detection of alcohol in the human system.

2. Although Grievant had been involved with this partnership for some time before April, 1989, monies were not available from the business to pay Grievant any salary up to that time. Also, money was not available to repay Grievant a \$21,000 loan he had made to the partnership.

3. In April, 1989, Grievant was preparing to return to his work with the State following the Supreme Court affirming the Labor Relation Board's reinstatement order in this grievance. Grievant was concerned that, if he remained in this partnership, that relationship would be viewed by the State as a conflict of interest. Thus, Grievant decided to sever his relationship with the partnership.

4. Grievant consulted with a law firm to assist him in disassociating himself from the partnership. In accordance with the legal counseling that he received, Grievant conveyed his partnership interests in the business to his partner. In consideration of this transfer, Grievant received a promissory note from the partner which promised to pay him \$21,000 over a five-year period as the refund of his original \$21,000 investment in the partnership, and an additional \$14,000 for his interest in this business. The promissory note was secured by a second mortgage on the partner's home. The note provided that

Grievant's partner would pay Grievant interest on the note. There is no evidence before us of the partner's equity in her home.

5. Neither Grievant nor his partner ever consulted with an appraiser or other expert to assist them in the valuation of their business as of April, 1989. The figures that they used in the valuation were not arrived at following any indepth analysis of the business.

6. Grievant presented a witness who provided expert testimony on the value of the business. Based on this testimony, which was unrebutted, we conclude by a preponderance of the evidence that: 1) as of April, 1989, value in the business was limited to assets minus liabilities, 2) there was no other intrinsic value to the business, and 3) the business had no positive fair market value.

OPINION

This matter is on remand from the Vermont Supreme Court for a determination whether any portion of the \$14,000 constituted net profits to Grievant from his partnership, and thus constituted "money earned" which should be deducted from his back pay award.

In making an employee whole, interim sums of money earned or that without excuse should have been earned are generally deducted from a back pay award. Grievance of Hurlburt, 9 VLRB 229 (1986). Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue

is on the employer. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District, 10 VLRB 106, 119 (1987). Liability for back pay arises out of the employer's improper action and, accordingly, an employer must establish any claim of a lack of mitigation. Id.

Thus, the State has the burden of establishing that any portion of the \$14,000 constitutes net profits from his self-employment in the partnership. In remanding this case, the Supreme Court directed the Board to make "further findings regarding the nature of the \$14,000" (Slip Opinion, page 7). At the hearing on remand, the State elected to present no further evidence on the "nature of the \$14,000". In so doing, the State has failed to meet its burden of establishing that any portion of the \$14,000 constitutes net profits to Grievant.

As a result of not producing additional evidence, the State has elected to rely solely on the fact that Grievant received a promissory note, secured by a second mortgage on his former partner's house, providing that Grievant was to receive \$14,000 from his former partner. The State's reliance on this note was insufficient, absent any further evidence as to the value of the note.

The State could have met its burden by demonstrating that the promisor under the note was a person who had the financial ability to meet the terms of the obligation. However, such evidence is not before us. There is no evidence before us of the partner's equity in the property, the second mortgage on which

was securing the \$14,000 note. Also, the State presented no evidence indicating that the breathalyzer business itself had any fair market value as of the time Grievant received the \$14,000 note for his interest in the partnership in April, 1989. Instead, Grievant presented un rebutted expert evidence indicating that the business had no positive fair market value at that time.

Thus, the State has not met its burden of demonstrating that any portion of the \$14,000 constitutes net profits to Grievant from his self-employment in the partnership.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The \$14,000 shall not be deducted from Grievant's back pay award; and

2. The parties shall submit to the Board by February 14, 1992, a proposed order indicating the specific amount of back pay due Grievant pursuant to this Order, and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific areas of disagreement.

Dated this 27th day of January, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Louis A. Toepfer, Acting Chair


Catherine L. Frank


Leslie G. Seaver