VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-43
FRANCES TAYLOR	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This matter is before the Vermont Labor Relations Board on remand from the Vermont Supreme Court for a determination as to back pay and benefits due Frances Taylor ("Grievant").

On February 8, 1991, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order wherein the Board concluded that Grievant had voluntarily resigned from her position with the State Department of Environmental Conservation. Thus, the Board dismissed the grievance filed by Grievant contesting her purported dismissal and requesting that she be reinstated to the position which she held with the State Department of Environmental Conservation. 14 VLRB 1.

On January 6, 1992, the Vermont Supreme Court reversed the Board decision. The Court decision stated in pertinent part:

> We conclude that Grievant's resignation was the result of undue influence and was, therefore, involuntary. Cf. In re Bushey, 142 Vt. 290, 296-98, 455 A2d 818, 821-22 (1982) (no constructive discharge where resignation was premeditated and employee failed to show that involuntariness of resignation was due to purposeful conduct of employer). Further, we deny the State's request that, in the event we find that the resignation was invalid, we remand the case to the Board to determine whether there was just cause for dismissal. There was no dismissal pursuant to the procedure provided by the personnel rules and the contract. There was no notice of dismissal, no opportunity for grievant to respond to the allegations, and no hearing. Under these circumstances, the Board is not in a position to determine whether there was just cause for the dismissal.
>
> The order of the Board dismissing the grievance is reversed. Plaintiff is reinstated to her former position, and the cause is remanded to the Board for determination of back pay and benefits.

The Employer filed a Motion for Reargument on the basis that the Court overlooked or misapprehended points of law and fact which would affect the result. The State referred to the above-cited language from the Court's decision in support of its position that the Court overlooked some of the evidence. On March 27, 1992, the Court denied the State's Motion. The Court stated that the motion "fails to identify points of law or fact misapprehended or overlooked by this Court."

On May 18, 1992, the Board conducted an evidentiary hearing on the specific amount of back pay and benefits due Grievant. Grievant presented evidence on this issue. The State presented no evidence except a May 18, 1992, letter relating to discussions concerning Grievant's reinstatement and the possible settlement of this matter. At the conclusion of the hearing, the Board provided the parties with an opportunity to file memoranda of law. The State filed a memorandum of law on May 22, 1992. Grievant filed no memorandum.

Also, on May 22, 1992, the State filed a letter with the Board "in response to VSEA's proposal for a back pay award." In the letter, the State disputed back pay and interest calculations presented by Grievant at the May 18 hearing. We conclude that the issues raised by the State in the May 22 letter were untimely made. The Board made it clear both prior to and at the May 18 hearing that any evidence relevant to the amount of back pay had to be presented at the hearing. Thus, the Board has not considered the May 22 letter of the State, and has based its Findings of Fact on the issues herein on evidence presented at the May 18 hearing and the decision issued by the Board on February 8, 1991.

FINDINGS OF FACT

1. The involuntary resignation of Grievant occurred on June 15, 1990. The State provided Grievant with two weeks pay for the two weeks following June 15, 1990 (Finding of Fact #21, 14 VLRB at 11). Grievant was reinstated to state service on May 4, 1992.

2. If Grievant had not been separated from state service, the gross pay, plus benefits and interest, which Grievant would have received in her position with the Department of Environmental Conservation between the date she separated from state service and her reinstatement on May 4, 1992, was $35,410.32 minus the two weeks pay she received at the time she was separated from state service in 1990.

3. During the period she was separated from state service, Grievant received $9,037.64 in gross income from employment with the McKerley Health Center. Grievant could not have maintained this job had she not been separated from state service because her work hours in this job overlapped her former work hours with the State.

4. During the period Grievant was working in a daytime job with the State prior to her separation from state service, Grievant supplemented her income with an evening job. After leaving state service, Grievant continued with her evening job. Grievant subsequently left this job, but then worked at two subsequent evening jobs. Grievant's total income from these jobs was $4038.54.

5. The State currently is paying Grievant at a rate not giving her credit for the period in which she was separated from

state service. If Grievant were given such credit, she currently would be on Step 4 of the pay plan.

6. On April 3, 1992, William Brierly, Chief of Operations for the Department of Environmental Conservation, sent a letter to Grievant informing her that she was to be reinstated but that she should not report to work until April 20, 1992, so as to allow for settlement discussions. The letter gave Grievant no instructions about where to report to work, nor did it indicate that the State had any intention of restoring Grievant to anything other than her former position in the Hazardous Material Management Division in Waterbury. Between April 4 and April 17, the attorneys for the State and Grievant had a number of discussions regarding the potential settlement of the case. The parties were unable to resolve the case, and on April 17, the attorney for the State informed Grievant's attorney that the State had just mailed Grievant a letter telling her to report for work the following Monday, April 20, at a position in the Water Supply Division of the Department of Environmental Conservation, not at her former position in Waterbury. The State had not mentioned earlier that Grievant may be placed in this position in Burlington. Grievant's attorney informed the State's attorney on April 17 that it was unreasonable to expect Grievant to report to work the following Monday under such circumstances. On April 21, Grievant's attorney informed the State's attorney that Grievant would report for work on May 4, 1992. Grievant did report for work that date at the position in Burlington.

OPINION

At issue is the amount of back pay and benefits due Grievant. Grievant contends that she should receive full back pay, plus benefits and interest, for the period of her separation from state service, minus appropriate deductions for income earned during that period. The State, on the other hand, contends that the back pay award should be limited to the period between Grievant's separation from state service and July 25, 1990, when, after Grievant filed her grievance contesting a purported dismissal, the State sent Grievant a letter informing her that she was dismissed.

The State contends that there was a mutual breach of the employment contract by the State and Grievant, and thus the Board should employ the equitable doctrine of recoupment to reduce the amount of back pay due Grievant because Grievant damaged the State by breaching the employment contract in failing to perform satisfactorily. The State contends that reinstatement with full back pay and benefits, which is the usual remedy for an improper termination, should not be applied here. The State argues that if Grievant had not resigned, the State would have dismissed her and ample evidence existed that dismissal would be for just cause.

In essence, the State is requesting that the Board fashion a remedy which the Supreme Court has prohibited the Board from ordering. To accept the State's argument, the Board would have to conclude both that Grievant would have been dismissed by the State and that there was just cause for her dismissal. The Court,

in its decision remanding this matter to the Board, prohibited the Board from reaching such conclusions. In its decision, the Court explicitly denied the State's specific request that the Court remand to the Board to determine whether there was just cause for dismissal. The Court stated:

> There was no dismissal pursuant to the procedure provided by the personnel rules and the contract. There was no notice of dismissal, no opportunity for grievant to respond to the allegations, and no hearing. Under these circumstances, the Board is not in a position to determine whether there was just cause for dismissal.

This statement by the Court is an apparent reference to Article 17, Section 4 of the applicable collective bargaining agreement at the time of Grievant's involuntary resignation, which contract article is in compliance with the constitutional requirements of a pre-termination meeting set forth by the US Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Article 17, Section 4, provides:

> Whenever an appointing authority contemplates dismissing an employee from his/her position, the employee will be notified in writing of the reason(s) for such actions, and will be given an opportunity to respond either orally or in writing, normally within three workdays. At such meeting the employee will be given an opportunity to present points of disagreement with the facts, to identify supporting witnesses or mitigating circumstances, or to offer any other appropriate argument in his/her defense.

Given these provisions, the State acts in compliance with the contract only by keeping an open mind and allowing the possibility of not dismissing an employee if the employee presents convincing points of disagreement with the facts or persuasive argument at the pre-termination meeting. Thus, the

State's contention that Grievant would have been dismissed is something the State or this Board cannot presume under the contract given that a pre-termination meeting had not occurred at the time of Grievant's involuntary resignation. The Supreme Court recognized this in its decision, and explicitly prohibited the Board from engaging in any consideration of whether just cause existed for dismissal. There is no independent cause of action arising from the circumstances of this case that could be maintained by the State. Thus, we conclude that the equitable doctrine of recoupment does not apply here.

Accordingly, it is appropriate to grant Grievant the remedy which is generally granted, in addition to reinstatement, for improper terminations of employment: back pay and other emoluments from the date of the improper termination less sums of money earned or without excuse should have been earned from that date. In re Grievance of Brooks, 135 Vt. 563, 570 (1992).

In calculating a back pay award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole." Grievance of Goddard, 4 VLRB 189, at 190-91 (1981). To make employees whole is to place them in the position they would have been in had their employment not been improperly terminated. Grievance of Benoir, 8 VLRB 165, 168 (1985).

Where an employee is claiming an exception to the general rule that post-dismissal earnings are deducted from an employer's back pay liability, it is then the employee's burden to justify such exception. Grievance of Sullivan, 10 VLRB 71, 75 (1987). The employee must establish that the employment was truly

"moonlighting" and that he or she would have been employed in the non-state employment if still employed by the State. Id. Earnings for work which could be performed outside the hours that the employee would have worked for the State are not properly deductible from a back pay award. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 10 VLRB 106, 121 (1987).

In applying these standards to this case, we conclude that the income Grievant received from her employment with the McKerley Health Center should be deducted from her back pay award. She could not have worked this job if she had not been separated from state service because her work hours in that job overlapped her former work hours with the State. However, the income Grievant received from her evening jobs should not be deducted from her back pay award. Grievant had worked an evening job, in addition to her daytime job with the State, prior to being separated from state service. Grievant could have performed this evening work outside the hours that she would have worked for the State and, thus, earnings which she received from this evening employment should not be deducted from the back pay award.

Also, we conclude that Grievant should be paid at a rate giving her credit for the period in which she was separated from state service. This is necessary to make her "whole" since it places her in the position which she would have been in had her employment not been improperly terminated. Finally, we conclude that Grievant should be provided back pay for the period April

20, 1992, until May 4, 1992, where a questions exists as to whether she should have reported to work. Under the circumstances, where Grievant was told on April 17 for the first time that she was to report to work on April 20 at a location and in a position other than that from which she was terminated, it was unreasonable for the Employer to expect Grievant to report to work prior to May 4.

ORDER

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

1. The State of Vermont, Department of Environmental Conservation, shall forthwith pay to Grievant the sum of $26,372.68, minus the two weeks pay which Grievant received at the time of her involuntary resignation. This amount includes all back pay and benefits, plus interest, to which Grievant is entitled, through May 4, 1992, minus appropriate deductions for income earned prior thereto.

2. Interest shall accrue on the amount indicated above in paragraph 1, at the rate of 12 percent per annum, beginning on May 4, 1992, and shall continue to accrue until Grievant is paid in full.

3. The State shall forthwith adjust Grievant's pay so that she is paid at Step 4 of the current compensation plan. The State shall forthwith pay Grievant back pay, plus interest at 12 percent per annum, for the amount by which the State failed to pay Grievant at Step 4 of the compensation plan since May 4, 1992.

Dated this 30th day of June, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

Louis A. Toepfer