

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 94-17
CYNTHIA GREGOIRE)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is whether the Labor Relations Board should grant the Request For Stay Pending Appeal filed in this matter by the State of Vermont, Department of Employment and Training. By such request, the Employer is seeking to stay, pending appeal by the Employer, the Board Orders of January 27 and April 27, 1995. Therein, the Board sustained the grievance of Cynthia Gregoire ("Grievant"). The Board ordered that the dismissal of Grievant be rescinded and replaced with a 30 day suspension without pay; and that Grievant be reinstated with back pay plus interest, reduced by wages earned by Grievant and wages which should have been earned in the interim, and benefits from the date commencing 30 working days from the date of her discharge until her reinstatement. 18 VLRB 78, 108; 18 VLRB 205.

The Employer filed a memorandum in support of its request for a stay. Grievant filed a memorandum in opposition to such request. A hearing on the stay request was held before Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on May 4, 1995. David Herlihy, Assistant Attorney General, represented the Employer. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. The Findings of Fact, Opinions and Orders issued by the Board in these matters on January 27, 1995, and April 27, 1995, are incorporated herein by reference.

FINDINGS OF FACT

1. The Employer's Contribution Section, in which Grievant worked, collects approximately \$50 million from employers annually in unemployment insurance contributions. There is presently \$1.5 million in delinquent contributions by employers. The three delinquent tax compliance officers in the section, which was the position occupied by Grievant, are involved in the collections process.

2. A monthly report on the status of employer unemployment insurance contribution accounts is provided to the three delinquent tax compliance officers and their supervisor.

3. An individual has been hired as a delinquent tax compliance officer as a replacement for Grievant.

4. Neither Grievant nor her husband presently have health insurance coverage. It would cost Grievant approximately \$300 per month in health insurance premiums to obtain coverage for herself and her husband if she is not reinstated by the Employer.

MAJORITY OPINION

We consider the Employer's request for a stay pursuant to 3 V.S.A. §1003, which provides that a Board order "shall not automatically be stayed pending appeal", and that the Board "may stay the order or any part of it". In determining whether to grant a stay, we apply the following three-part test: 1) whether the party seeking the stay will suffer irreparable harm if the stay is not granted, 2) whether issuance of the stay will substantially harm the other party, and 3) by what result will the interests of the public best be served. Grievance of McCort, 16 VLRB 248, 249-51 (1993).

In applying this test, we discuss separately Grievant's reinstatement and the payment to her of back pay. The Employer contends that returning Grievant to duties in which she must be trusted with collection of public funds, despite the conclusion of the Board that Grievant committed an act of dishonesty in the course of performing those duties, poses potential for irreparable harm both within the Department of Employment and Training and to the public at large. The Employer contends that actions would have to be taken to oversee closely the accounts assigned to Grievant and protect the security of all other accounts, and that a larger harm looms of injury to public confidence that taxes are collected fairly and honestly. The Employer also claims harm because Grievant has been replaced, and there is no work for her. The Employer contends that these considerations outweigh any harm to Grievant.

We disagree, and conclude that the Employer will not suffer irreparable harm by Grievant being reinstated pending appeal. In our decision on the merits reducing Grievant's dismissal to a 30 day suspension, we concluded that Grievant committed a serious offense by shielding the delinquent account of Downtown Auto, a business primarily operated by her husband and in which she had some involvement, from the normal procedural collection process for employer unemployment insurance contributions. 18 VLRB at 101-102. The Board concluded that her act of handling the Downtown Auto account, in violation of conflict of interest policies which were known to her, compromised her integrity and the trust placed in her. 18 VLRB at 102.

This conclusion by us, however, does not result in the Employer suffering irreparable harm if Grievant is reinstated pending appeal. We also concluded in our decision on the merits that Grievant's strong prior work record of good performance over 13 years of employment, and no previous discipline, meant she is a good candidate for rehabilitation, once a strong message is sent to her that future misconduct similar to that engaged in here will not be tolerated. 18 VLRB at 103. We concluded that a 30 day suspension was an adequate and effective sanction to deter Grievant in the future from engaging in the misconduct demonstrated by her offense. 18 VLRB at 303. Under these circumstances, we conclude that the Employer will be able to obtain productive work from Grievant during the appeal period, and such productive work will outweigh any harm to the Employer caused by any additional security measures or diminishment of public confidence.

We are not persuaded by the Employer's claim that additional burdensome measures will have to be taken to accommodate Grievant's return to work. We also are not persuaded by the Employer's claim that there will be no work for Grievant if she is reinstated pending appeal because she has been replaced. Such an argument taken to its logical conclusion would result in an improperly discharged employee never being reinstated pending appeal since, presumably, the work previously performed by discharged employees has to be performed by other individuals in the discharged employee's absence. We are not inclined to promote such a result. In our decision on the merits, we ordered that Grievant "be reinstated to her position as a Delinquent Tax Compliance Officer with the Employer". 18 VLRB at 108. If we

were to accept the Employer's argument in this regard, we would contravene our previous order.


On the other hand, issuance of the stay with respect to Grievant's reinstatement will substantially harm Grievant. Her dismissal occurred more than a year ago, and the appeal may take more than a year to be completed. Although Grievant is presently employed, her interim wages are much less than what she earned in state employment; 18 VLRB at 206; and she is without health insurance. Obviously, an employee is substantially harmed economically and professionally by removal from a job for such an extended period without a comparable interim job. Grievance of McCort, 16 VLRB at 252.

Finally, the interests of the public will best be served by reinstating Grievant. The public will gain the benefit of productive work during this period, instead of potentially having to pay a large back pay sum at the conclusion of the appeal for which no work was performed. McCort, 16 VLRB at 252. We are not persuaded by the Employer's claim that there will be a significant diminishment in public confidence in taxes being collected fairly and honestly if Grievant is reinstated pending appeal.

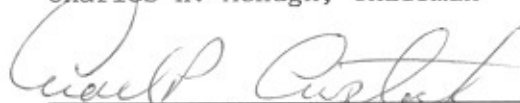
We reach a different conclusion with respect to staying our order granting Grievant back pay. In a previous case on a stay of a back pay order stemming from an improper dismissal, we concluded that an employer may suffer irreparable harm and the public interest would not be served if the employer prevailed on appeal, thus presenting a significant risk of the employer being unable to recoup the back pay award from the employee. McCort, 16 VLRB at 252-53.

In this case, the Employer has agreed to place the disputed amounts in escrow pending the outcome of the appeal. In light of the McCort decision and the Employer's agreement to hold the amount of back pay in escrow, Grievant has indicated that she does not oppose the Employer's request to stay the back pay award. This will ensure that public monies not be spent where serious recoupment problems potentially exist while protecting Grievant's right to compensation to which she is entitled. McCort, 16 VLRB at 253.

In sum, requiring the Employer to reinstate Grievant, but not pay her back pay, during the pendency of the appeal best balances the respective interests in this matter.



Charles H. McHugh, Chairman




Carroll P. Comstock

DISSENTING OPINION

I disagree with my colleagues' denial of the Employer's request to stay the Board order reinstating Grievant pending appeal. I concur with the Employer that the potential of irreparable harm to the Employer, and the best serving of the public interest, outweigh any harm to Grievant.

Grievant's act of handling the delinquent account compromised her integrity and the trust placed in her to an unsalvageable degree. 18 VLRB at 106. The offense understandably destroyed supervisors' confidence in Grievant responsibly performing her fiduciary duties as a Delinquent Tax Compliance Officer. Id. Under these circumstances, I conclude that supervisors' loss of trust in

Grievant is irreparable, and the workplace atmosphere would be adversely affected to a significant degree if she is reinstated pending appeal. This is detrimental to a well-functioning department of state government, and would cause irreparable harm to the Employer. This harm outweighs any harm to Grievant.


Leslie G. Seaver

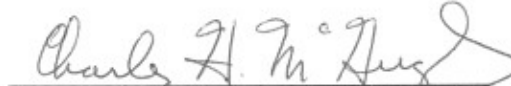
ORDER


NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, and consistent with the January 27, 1995, and April 27, 1995, Board Orders in this matter, it is hereby ORDERED:

1. The Employer's request for a stay pending appeal of the part of the Board's orders that Grievant be awarded back pay, plus interest, in this matter, is GRANTED;
2. The Employer forthwith shall place into escrow the amount of back pay, plus interest, in dispute as a result of the orders of the Board in this matter; and
3. The Employer's request for a stay pending appeal of the part of the Board's order that Grievant be reinstated is DENIED.

Dated this 5th day of May, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Carroll P. Comstock