

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 97-63
RUSSELL PENKA)	

FINDING OF FACT, OPINION AND ORDER

Statement of Case

At issue here are the specific back pay and other benefits due Russell Penka ("Appellant") as a result of his improper discharge. On September 24, 1998, the Labor Relations Board issued Findings of Fact, Opinion and Order granting the above-entitled appeal and reinstating Appellant to his position as Vermont State Police Corporal in the Shaftsbury barracks. 21 VLRB 182. The Board left the case open for the purpose of determining the specific back pay and other benefits due Appellant from the date of his discharge until his reinstatement.

A hearing on the specific back pay and benefits due Appellant was held before Board Members Catherine Frank, Chairperson, and Leslie Seaver on November 19, 1998. Attorney Alan Biederman represented Appellant. Assistant Attorney General David Herlihy and Department of Public Safety Counsel Elizabeth Novotny represented the Employer. At the hearing, the parties presented a partial stipulation on the back pay and benefits due Appellant. The Employer continued to contest whether Appellant reported all income from all sources and reserved the right to present evidence to the Board on this issue. At the outset of the hearing, the Board granted a Motion in Limine filed by Appellant to limit the introduction of evidence.

The following Findings of Fact Nos. 1, 3, 4, 5, 6 and 7 are based on stipulations by the parties. Finding of Fact No. 2 is based partially on stipulations by the parties and partially on the evidence at the November 19 hearing.

FINDINGS OF FACT

1. Appellant would have earned \$31,724.18 from the time of his dismissal to the time of his reinstatement, not including the period of time from January 21, 1998, to April 9, 1998, pursuant to a stipulation between the parties.

2. For the periods included in the back pay calculation, Appellant earned the following income: \$4,661.33 from the American Skiing Company, \$744.00 from the Wobbly Barn, and 6,364.00 from Alpine Systems, Inc. Appellant also was paid \$5,313.79 by the State in wages and payment for leave (Appellant was dismissed during a pay period in which he had already earned wages).

3. Appellant received \$5,851.00 in unemployment compensation.

4. The parties agree that there is an additional deduction of \$600.00 from the amount due Appellant.

5. The total amount of back pay due Appellant is \$8,190.06. The interest due on that amount is \$191.22. The total due Appellant in back pay and interest is \$8,381.28. Grievant also is due \$457.30 for COBRA Dental premiums, making a total due of \$8,838.58.

6. The parties have reached agreement on the restoration of Appellant's annual and sick leave balances, and agreement on Appellant's usage of his annual leave balances. Such agreements are referenced in, and incorporated into, the following Board Order in this matter.

7. The period from Appellant's dismissal to his reinstatement will count as time as an employee of the State of Vermont for purposes of retirement calculation.

OPINION

The Employer contests whether Appellant has reported all income from all sources during the period between his dismissal and reinstatement. At the hearing, the Employer did not demonstrate that Appellant has not reported to the Board all income which he earned from all sources for the period included in the back pay calculation. Thus, we accept the earned income reported by Appellant for purposes of issuing a back pay award.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, and consistent with stipulations reached by the parties, it is hereby ORDERED as the final Order of the Labor Relations Board in this matter:

1. The Employer shall pay Appellant \$8,838.58 covering the period from the time of his dismissal to the time of his reinstatement, not including the period of time from January 21, 1998, to April 9, 1998. This sum represents the amount Appellant would have earned during this period (\$31,724.18), minus income earned by Appellant during this period (\$11,769.33), minus wages and payment for leave paid by the State to Appellant (\$5,313.79), minus unemployment compensation payments received by Appellant (\$5,851.00), minus an additional deduction agreed to by the parties (\$600.00), plus interest due Appellant (\$191.22), and plus reimbursement to Appellant for COBRA dental premiums (\$457.30).

2. The Employer shall restore to Appellant's annual leave balance the annual leave paid off to Appellant subsequent to his dismissal.

3. The Employer shall restore Appellant's sick leave balance.

4. Appellant shall be credited with leave that he would have earned during the period subject to the back pay award, excluding the period from January

21, 1998, to April 9, 1998. In the event that the restoration of Appellant's annual leave causes him to lose leave, he will be allowed to exceed the maximum balance for a period of 6 months during which he must use the amount in excess of the maximum, or lose the amount of leave hours in excess of the amount that may be carried pursuant to the collective bargaining agreement. Because the payroll system will not allow leave balances in excess of the maximum, excess leave balance and usage will be calculated by the Department of Public Safety Personnel Officer and will not appear on Appellant's leave and earnings statement.

5. The period from Appellant's dismissal to his reinstatement will count as time as an employee of the State of Vermont for purposes of retirement calculation.

Dated this 4th day of December, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank
Catherine L. Frank, Chairperson

/s/ Leslie G. Seaver
Leslie G. Seaver