VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-20
COURTNEY LILLY	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant a motion to stay a Board Order, pending an appeal of the Board Findings of Fact, Opinion and Order filed in this matter on June 6, 2000, by the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"). By such motion, the Employer is seeking to partially stay, pending appeal by the Employer to the Vermont Supreme Court, a Board decision dated May 11, 2000, concerning back pay and other benefits due Grievant due to his improper dismissal. 23 VLRB 129 (2000). Therein, a majority of the Board ordered the Employer to pay Courtney Lilly ("Grievant") the sum of $18,364.81, plus interest at the rate of 12 per cent. The sum of $18,364.81 represented gross back pay of $33,000.48 for the period April 12, 1999 through March 11, 2000, plus roll call pay of $302.01, reduced by 1) $2756.88 for annual leave and compensatory time paid Grievant at the time of his dismissal; 2) $7,414.00 of unemployment compensation; 3) $34.80 of interim wages; and 4) $4732.00 as a deduction of wages paid.

The Employer is appealing two portions of the Board Order. In calculating the back pay award, the Board awarded Grievant back pay for the four weeks following his dismissal until he became eligible for unemployment compensation benefits. The Employer is appealing that portion of the Board Order which awarded the sum of $2650.22 plus interest, which represents four weeks of wages.

The May 11, 2000, Board Order also deducted from Grievant's back pay award one-half of Grievant's regular wages for the period of December 4, 1999, to March 11, 2000, to reflect the fact that Grievant only looked for part time work during this period of time. The Employer is also appealing this portion of the Board Order and seeks to reduce the award by the sum of $4820.71 plus interest. This figure represents one-half pay for the period of time in question, plus roll call pay for that period.

The Employer is seeking a stay of the Board order only as it relates to these two issues. It has paid Grievant $10,893.88 plus interest and is withholding $7,470.93 until the Board rules on its motion to stay.

The Employer filed a memorandum in support of its motion. Grievant filed a memorandum in opposition to the Employer's motion.

We consider the Employer's request for a stay pursuant to 3 V.S.A. Section 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. Chauffeurs, Teamsters, Warehousemen, Helpers Union Local 507 and University of Vermont, 19 VLRB 326; *Affirmed*, Sup.Ct. Doc. No. 96-254. Grievance of McCort, 16 VLRB 248, 249-51 (1993); *Affirmed*, Sup.Ct. Doc. No. 93-370, April 5, 1994 (unpublished decision). Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO and Vermont State Colleges, 11 VLRB 1 (1988); *Affirmed*, Sup.Ct. Doc. No. 87-224, April 5, 1988 (unpublished decision).

We discuss each issue separately. First, we consider the Employer's request that we grant a stay of payment to Grievant of the four weeks' wages in the amount of $2650.22 plus interest. A review of the record reveals that, in appealing this portion of the Board Order, the Employer is appealing an issue which it failed to raise at the hearing. Vermont Department of Personnel Human Resources Director Thomas Ball testified on behalf of the Employer at the back pay hearing on March 30, 2000. Ball explained a column in the exhibits the Employer had pre-filed with the Board in preparation for the hearing (Employer Exhibits 8, 9, 10); the exhibits set forth three scenarios each of which depicted Grievant's back pay and the biweekly amount which the Employer contended should be deducted from his back pay. The column is entitled "Other income, Suspension and Reported Income to the [Department of Employment and Training]". In explaining this column, Ball stated:

> . . . We did leave out the six week period at the very beginning before he collected unemployment comp, or the four week period. We didn't charge a penalty for those four weeks.

The Board awarded Grievant back pay for the four week period in question in its back pay order. The Employer now contends in its appeal that the Board should have deducted four weeks' pay for that period. The Employer's present position is inconsistent with the position it took during the previous back pay proceedings and thus we decline to grant the Employer's motion to stay this portion of our order.

We next consider the portion of the Board decision relating to the half pay deducted from Grievant's back pay award from the period December 4, 1999, to March 11, 2000, in the amount of $4,820.71 plus interest. In previous cases dealing with requests for stays of back pay orders stemming from improper dismissals, 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 from the employee. Grievance of McCort, 16 VLRB at 252-253. Grievance of Gregoire, 18 VLRB 217 (1995). The irreparable harm to the Employer and the public interest outweigh any possible harm to Grievant. We recognize that Grievant may potentially suffer some economic harm. However, he will be able to recover this portion of his back pay with interest, in the event that the Board's decision is upheld with respect to this issue.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED:

1. The Employer's request for a stay pending appeal of the part of the Board Order relating to the four weeks after Grievant's termination is DENIED and the Employer shall pay Grievant $2650.22 plus interest; and

2. The Employer's request for a stay pending appeal of the part of the Board Order relating to the half pay deducted from Grievant's back pay award from the period December 4, 1999, to March 11, 2000, which also includes roll call pay for the period of time, an amount of $4,820.71 plus interest, is GRANTED.

Dated this 28th of July, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro
Edward R. Zuccaro, Acting Chairperson

/s/ Carroll P. Comstock
Carroll P. Comstock