

VERMONT LABOR RELATIONS BOARD

APPEAL OF:

THOMAS REVENE

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DOCKET NO. 03-2

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this appeal over the dismissal of Thomas Revene (“Appellant”) is whether to grant a motion filed by the State of Vermont Department of Public Safety (“Employer”) on August 1, 2005, to stay the award of back pay and benefits in this matter. Appellant filed an opposition to the Employer’s stay motion on August 19, 2005. The Employer filed a reply memorandum in support of its motion on September 1, 2005.

In determining whether to grant a stay, the Board and the Supreme Court 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 the issuance of the stay will substantially harm the other party, and 3) by what result will the interests of the public best be served.

In applying this three-part test in previous state employee dismissal cases, the Board has denied employer requests to stay Board orders reinstating employees pending appeal, but granted employer stay requests of the parts of Board orders that the employees be granted back pay. Grievance of McCort, 16 VLRB 248, 252-53 (1993); *Affirmed* (Unpublished decision, Sup.Ct.Doc.No. 93-370, April 5, 2004). Grievance of Gregoire, 18 VLRB 217 (1995). The Board previously has denied a motion by the Employer in this matter to stay the Board order reinstating Appellant pending appeal; 28 VLRB 71 (June 8, 2005); and the Vermont Supreme Court has denied the Employer request to stay Appellant’s reinstatement (Sup.Ct.Dock.No. 2005-290, August 29, 2005).

This leaves as the only remaining question whether the award of back pay and benefits should be stayed.

The Employer contends that it will suffer irreparable harm if the order of back pay and benefits is not stayed by requiring substantial payment from public funds in back pay and interest, leave time compensation and contributions to Appellant's retirement fund. The Employer maintains that it will be next to impossible to recoup any of these funds if the Supreme Court reverses the Board order, resulting in irreparable harm to the Employer and a profound detriment to the public interest. By contrast, the Employer contends that staying the order of back pay and benefits will not prejudice Appellant because the amount of the award of back pay plus interest can be held in escrow until the resolution of the appeal and Appellant can collect the amount ordered should he prevail in the appeal. Similarly, the Employer points out that contributions to Appellant's retirement fund and leave time compensation can be made to Appellant if he prevails on appeal.

Appellant contends that the Employer's motion should be denied because its claim of irreparable harm is a speculative assertion with no factual basis. Appellant submits that the Board in McCort, supra, incorrectly decided the issue of irreparable harm because it did not require the employer to show an actual and imminent threat of injury. Appellant maintains that a possibility that the Employer may have difficulty recouping funds from Appellant is insufficient to rise to the level of irreparable harm. Given the inability of the Employer to demonstrate irreparable harm, Appellant contends that the equities in this case weigh heavily in favor of denying the Employer's request for a stay because Appellant will suffer substantial economic harm by being deprived of his salary

after his employment was wrongfully terminated over two and one-half years ago.

Appellant also maintains that it would be contrary to the public interest in ensuring that the State treats its employees with fairness, respect and dignity to allow the Employer to continue depriving Appellant of funds he otherwise is owed.

We adhere to the precedent established in the McCort case and grant the Employer's motion to stay our back pay and benefits order. We disagree with Appellant's argument that the irreparable harm to the Employer if the stay is not granted is speculative and lacks a factual basis. If the stay is not granted, the Employer will be required to pay Appellant over \$125,000 with no assurance that it will be able to recover those sums if the Employer prevails on appeal. The Employer would be in the position of seeking to recover substantial sums paid Appellant which he may have spent and for which Appellant may be in no financial position to reimburse the Employer. McCort, 16 VLRB at 252. Appellant has offered no persuasive argument to address this serious recoupment problem where such a significant amount of money is involved.

We further conclude that the irreparable harm to the Employer outweighs the harm to Appellant. We recognize that Appellant will suffer significant economic harm by staying the back pay order since we believe he is being denied a large amount of back pay to which he is entitled under the Contract. However, he will be able to recover back pay with interest in the event that the Board decision is upheld. Id. at 253.

Moreover, we conclude that the public interest is best served by staying the back pay order. The Employer has agreed to place the disputed amounts in escrow pending the outcome of the appeal. This will ensure that public monies not be spent where serious recoupment problems potentially exist while protecting Appellant's right to

compensation to which he is entitled. Id. In sum, requiring the Employer to reinstate Appellant, but not paying him back pay, during the pendency of the appeal best balances the respective interests in this matter. Id. Grievance of Gregoire, 18 VLRB at 222.

Based on the foregoing reasons, it is ordered:

1. The Employer's request for a stay pending appeal of the part of the Board order in this matter that Appellant be awarded back pay and benefits is granted; and
2. The Employer forthwith shall place into escrow the amount of the back pay and benefits that the Board awarded to Appellant. The Employer shall notify the Board in writing when the amount of back pay and benefits is placed in escrow.

Dated this 27th day of September, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Carroll P. Comstock

John J. Zampieri