

VERMONT LABOR RELATIONS BOARD

| | | |
|----------------------|---|------------------|
| GRIEVANCE OF: |) | |
| |) | DOCKET NO. 05-34 |
| LAWRENCE ROSENBERGER |) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over back pay and other benefits due Lawrence Rosenberg (“Grievant”) as a result of his improper dismissal by the State of Vermont Agency of Natural Resources, Department of Fish and Wildlife (“Employer”). On March 13, 2007, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order, concluding that Grievant was dismissed without just cause. 29 VLRB 56. The Board ordered that Grievant be reinstated with back pay and other benefits. Id. The Board left the case open for the purpose of determining the specific back pay and other benefits due Grievant from the date of his discharge to his reinstatement. Id.

The parties have entered into a partial stipulation concerning back pay and other benefits, but have not reached agreement on certain issues. Specifically, there are the following contested issues: a) whether Grievant may recover as part of his back pay award payments he made to purchase an automobile that he has used to commute to his interim job; b) whether Grievant may recover as part of his back pay award a cost of \$677.80 he incurred when he sold his portion of a pre-paid vacation package for a hunting trip scheduled to take place while he was working in his interim job; c) whether the Employer’s cash payout to Grievant at the time of his dismissal of his accrued annual leave balance should be used to offset the back pay award otherwise due Grievant; and

d) whether a cash payment awarded to Grievant for accrued annual leave in excess of the annual leave cap should be subject to interest.

An evidentiary hearing was held on the issues in dispute on June 14, 2007, in the Labor Relations Board hearing room in Montpelier before Board members Edward Zuccaro, Chairperson; and Richard Park. Carroll Comstock, who participated in the earlier decisions of the Board in this matter, retired from the Board prior to the back pay hearing and has not participated in the hearing and decision on back pay and benefits due Grievant. The Board has proceeded to decide this matter with two members without objection by the parties. Michael Casey, VSEA General Counsel, represented Grievant. Assistant Attorney General Julio Thompson represented the Employer. The parties stipulated to many of the relevant facts on these issues. The Findings of Fact contained herein consist of facts stipulated to by the parties and facts adduced from the June 14 hearing. The parties filed briefs on the disputed issues on July 2, 2007.

FINDINGS OF FACT

1. The parties' stipulated facts and specified agreements as to various back pay issues, filed with the Labor Relations Board on June 8, 2007, are incorporated herein by reference. Also incorporated herein are the parties' agreements read into the record at the June 14 hearing in this matter that: a) Grievant was entitled to payment for 6 hours of call-in time per pay period since his dismissal at a time and one-half overtime rate; and b) the odometer reading on the Grievant's Ford Taurus at the time of the June 14 hearing was 57,431 miles.

2. As a State Game Warden, Grievant worked out of his home and used a State vehicle for more than 18 years to perform his duties. Grievant was permitted to use

the State vehicle only for work purposes. Grievant was not permitted to allow any family or friends to drive the State vehicle.

3. Grievant and his wife owned only one car at the time of his dismissal, which Grievant's wife used to commute to work. Her regularly scheduled working hours at all times relevant have been from approximately 8:30 a.m. to 5:30 or 6:00 p.m., Monday through Friday.

4. Within days of his dismissal from employment as a State Game Warden, Grievant began interim employment on August 29, 2005, at Fletcher Allen Hospital in Burlington, Vermont, which is 12.5 miles from Grievant's home in Milton. Grievant's regularly scheduled working hours have been from 2:30 p.m. to 11:00 p.m.

5. On October 26, 2005, Grievant purchased a used 2003 Ford Taurus, with 40,631 miles on it, for \$10,379. Grievant has used the Taurus since that time to commute to work. Grievant has not used the Taurus exclusively to commute to and from work, but also has used it for personal reasons. Grievant's wife has used the Taurus for personal reasons as well. Since his purchase of the Taurus, Grievant has made payments each month of \$238 (Grievant's Exhibit 3).

6. The Employer has not reinstated Grievant to employment at this point, and Grievant continues to work at Fletcher Allen Hospital.

7. Prior to being dismissed by the Employer, Grievant had pre-paid \$2,576 in Canadian monies to go on a group hunting trip in Canada, scheduled to take place from October 8 to October 13, 2005. By the time of the October hunting trip, Grievant had been working at Fletcher Allen for approximately six weeks. At that time, he had not accrued sufficient leave time to use paid leave to go on the trip. Fletcher Allen does not

have a policy that offers leave time before an employee earns it. As a new employee, Grievant wished to make a good impression and avoid anything that would adversely affect his employment. He did not discuss going on the trip with his employer (Grievant's Exhibits 5, 10; State's Exhibit 10).

8. Grievant did not go on the group hunting trip. Instead, he sold his portion of the group package to another person for \$1,550 in United States funds.

9. The parties agree that, if the cancelled vacation is a recoverable back pay item, the amount owed Grievant would be \$677.80 in United States funds.

10. At the time Grievant was dismissed, the Employer paid Grievant in cash for all annual leave (380.73 hours) he had accrued up to the time of his dismissal, thus zeroing out his annual leave bank.

11. Grievant's rate of annual leave accrual has been 7.12 hours per a two-week pay period since his dismissal.

OPINION

The following issues regarding Grievant's back pay award are in dispute: a) whether Grievant may recover as part of his back pay award any portion of the payments he made to purchase a 2003 Ford Taurus that Grievant has used to commute to his interim job; b) whether Grievant may recover as part of his back pay award a cost of \$677.80 he incurred when he sold his portion of a pre-paid vacation package for a hunting trip that was scheduled to take place while he was working in his interim job; c) whether the Employer's lump sum payout of annual leave to Grievant at the time of his dismissal should be used to offset the amount of back pay otherwise due Grievant; and d)

whether cash payments to Grievant for accrued annual leave in excess of the annual leave cap established by the Contract should be subject to interest.

In resolving these issues, we are guided by the standard that 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 190-191 (1981). c.f., Kelley v. Day Care Center, Inc., 141 Vt. 608, at 615-616 (1982). To make employees whole is to place them in the position they would have been in had they not been improperly dismissed. Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591, 593 (2002). Grievance of Benoir, 8 VLRB 165, 168 (1985).

Automobile Payments

We first address whether Grievant may recover as part of his back pay award any portion of the payments he made to purchase a 2003 Ford Taurus that Grievant has used to commute to his interim job. The parties have agreed that the back pay order in this matter should include as an offset to Grievant's interim job earnings a mileage credit to account for the cost of Grievant's commute to and from his interim job at Fletcher Allen Hospital. The parties have agreed to the amount of commuting miles that will be credited and to use the mileage reimbursement rate set by the federal General Services Administration. In addition to mileage costs, Grievant also seeks reimbursement of monthly payments he has made on the vehicle he purchased to commute to and from his interim job.

Grievant contends that the Ford Taurus has been and continues to be used mostly to commute to his interim employment, and that he would not have purchased the car had

he not been dismissed as he would have continued to use his State vehicle to perform his duties. Grievant seeks an amount equivalent to 70% of the amount of each car payment he has paid on the car since purchasing it until he either sells the car or he is reinstated. He is willing to waive 30% of each of the car payments to account for personal use of the vehicle other than commuting to work.

The Employer contends that Grievant is not entitled to any award related to the purchase of the Taurus. The Employer maintains that providing mileage reimbursement to Grievant for his commute already compensates him for his fixed vehicle costs. The Employer further asserts that Grievant's position does not adequately account for the substantial personal benefits that have accrued to Grievant and his family by adding the vehicle to the household for personal use.

We concur with the Employer that reimbursing Grievant for his commuting miles based on the mileage reimbursement rate set by the federal General Services Administration ("GSA") appropriately compensates him for his increased traveling expenses due to his interim employment. We have previously recognized that commuting expenses which are a necessary component of interim employment are appropriately deducted from an employee's interim earnings. Chittenden South Education Association, Hinesburg Unit v. Chittenden School District and Hinesburg School Board, 10 VLRB 106, 118 (1987). The National Labor Relations Board, in issuing "make whole" back pay orders, has reimbursed improperly dismissed employees for increased transportation expenses to interim employment based on the amount of additional miles they drove to the interim employment compared to the job from which they were dismissed. Coronet Foods, Inc. and Teamsters Local 697, 322 NLRB 837, 844-45 (1997). Minette Mills, Inc.

and Amalgamated Clothing and Textile Workers Union, AFL-CIO, 316 NLRB 1009, 1011, 1014 (1995). We also conclude that reimbursing an improperly dismissed employee for increased transportation expenses to interim employment based on the amount of additional miles driven is an appropriate “make whole” remedy provided that the mileage rate adequately compensates employees for use of a personal vehicle.

The mileage reimbursement rate set by the GSA constitutes such adequate compensation. The GSA draws its mileage rates from the Internal Revenue Service’s analysis of the per mile cost of operating a private vehicle. *See* Grievant’s Exhibit 4, pages 19-20. The mileage rate is calculated by the IRS to include within it both fixed and variable costs. *See* IRS Rev.Proc. 2006-49 Section 2.02. “Items such as depreciation (or lease payments), maintenance and repairs, tires, gasoline (including all taxes thereon), oil, insurance, and license and registration fees are included in fixed and variable costs.” Id. at Section 5.03. Similarly, the GSA includes the following expenses in its mileage allowance: “charges for repairs, depreciation, replacements, grease, oil, antifreeze, towage and similar speculative expenses, gasoline, insurance, state and federal taxes”. 41 CFR Section 301-10.304. Since the GSA mileage rate includes both fixed and variable costs of operating a vehicle, the fixed costs incurred by Grievant of purchasing the Taurus are contemplated as being included within the rate.

Further, reimbursing Grievant for his interim employment traveling expenses based on the GSA rate is most feasible as a practical matter. Otherwise, we would be drawn into an indeterminate and inadequate exploration of issues such as whether Grievant should have purchased a less expensive car, what percentage of Grievant’s car payments should be credited to personal use, and what portion of the car’s value upon

resale should be returned to the State. The State and the Vermont State Employees' Association have provided in Article 54, Section 1, of the Contract that a State employee shall be reimbursed at the rate established by the GSA for mileage traveled in the performance of official duties, and it is appropriate that Grievant be reimbursed at the same rate for his interim employment travel.

Canceled Vacation

We next address whether Grievant may recover as part of his back pay award the cost he incurred when he sold his portion of a pre-paid vacation package for a hunting trip that was scheduled to take place while he was working in his interim job. Grievant contends that the cost to him of the canceled hunting trip is a recoverable back pay item. He asserts that the cost constituted a specific monetary loss as a direct result of his dismissal from employment, and resulted from him mitigating damages and limiting the Employer's liability by obtaining interim employment. Grievant contends that, if he truly is to be made whole for the Employer's improper dismissal, his back pay award should include the \$677.80 he lost on the canceled vacation.

The Employer disagrees, contending that Grievant has failed to carry the burden of proving that it was necessary for him to cancel the vacation in order to keep his interim job at Fletcher Allen. The Employer asserts that it should not be required to subsidize Grievant's choice to cancel the vacation when Grievant did not even approach his interim employer to discuss whether he could go on the hunting trip.

We agree with Grievant that the canceled hunting trip is a recoverable back pay item. The cancellation resulted from Grievant mitigating damages and limiting the Employer's liability by obtaining interim employment. By the time of the trip, Grievant

had been working at his interim job for only six weeks, and had not accrued sufficient leave time to use paid leave to go on the trip. As a new employee, Grievant wished to make a good impression and avoid anything that would adversely affect his employment. Under these circumstances, it was reasonable for Grievant to cancel the vacation rather than approach his interim employer to discuss whether he could go on the hunting trip. Grievant's cancellation of his vacation was ultimately caused by his improper dismissal, and the most appropriate "make whole" remedy is to reimburse him for the cancellation costs he incurred.

Annual Leave

The next issue is whether the Employer's lump sum payout of annual leave to Grievant at the time of his dismissal should be used to offset the back pay otherwise due Grievant. The Employer contends that, in order to make Grievant whole as though he never left employment, the accrued annual leave hours for which Grievant received payment upon his dismissal should be re-credited to his annual leave bank, and the amount paid by the Employer for the annual leave should be deducted from the Employer's back pay liability.

Grievant contends that the Employer's accrued annual leave payment should not be treated as interim earnings as they were earned prior to dismissal. Grievant maintains that his annual leave bank should merely contain the annual leave he has accrued since his dismissal, and that his annual leave bank should not be re-credited with the leave he was paid at the time he was dismissed.

The Board has previously held that, where an employer made a monetary payment to a dismissed employee of all accrued annual leave earned by the employee, the

employee's accrued annual leave balance should be restored and the payment made at the time of dismissal should be used to offset the amount of back pay otherwise due.

Grievance of Benoir, 8 VLRB at 166-168. Grievance of Carosella, 8 VLRB 178, 181 (1985). Grievance of Merrill, 8 VLRB 383, 386 (1985). The Board stated the rationale for this holding in Benoir, 8 VLRB at 168:

To make Grievant "whole" . . . is to place him in the position he would have been had he not been dismissed. If Grievant had not been dismissed, he would not have been given a lump sum payment for accrued annual leave and would have had his annual leave balance reduced only as authorized by his superiors and allowed by the Contract. Accordingly, Grievant should have his leave balance . . . restored and the annual leave payment made to him at the time of his dismissal should be used to offset the amount of back pay otherwise due Grievant. Otherwise, Grievant would be receiving more monetary compensation than he is entitled.

We continue to believe this reasoning is sound. Thus, we agree with the Employer that the Employer's lump sum payout of annual leave to Grievant at the time of his dismissal should be used to offset the amount of back pay otherwise due Grievant, and the accrued annual leave hours for which Grievant received payment should be re-credited to his annual leave bank.

Interest

Finally, we address whether cash payments to Grievant for accrued annual leave in excess of the annual leave cap established by the Contract should be subject to interest. Grievant contends that after his dismissal, once his annual leave accruals exceeded the 416.5 hour annual leave cap established by the Contract, he should receive the cash value of accrued leave in excess of the cap, and he should be paid interest on these amounts as they represent wages.

The Employer contends that the cash value of accrued annual leave above the cap should not be subject to interest. The Employer contends that such an award would be contrary to Board precedent, would constitute double dipping by Grievant, and would be at odds with the principle underlying interest of granting compensation for lost use of money.

In deciding this issue, we consider the purpose underlying awarding of interest as part of a back pay award. The Board has added interest, at the legal rate, to a back pay award to make an employee whole for income losses suffered as a result of an improper dismissal. Grievance of Warren, 10 VLRB 64, 65-66 (1987). By awarding interest, the Board is not imposing a penalty on management, but is simply compensating the employee for the loss of the use of the money represented by the wages not paid the employee due to the dismissal. Id.

In past cases, the Board has decided that improperly dismissed employees who were owed annual leave accruals upon reinstatement which have put them over the contractual limit of annual leave accrual were entitled to a payment representing the monetary value of the annual leave exceeding the contractual limit. Grievance of Merrill, 8 VLRB 383, 386 (1985). Grievance of Greenia, 22 VLRB 85, 87 (1999). The Board has not ordered the payment of interest on these payments.

This is consistent with the purpose of awarding interest on back pay awards to compensate employees for the loss of the use of money represented by the wages not paid the employee due to the dismissal. Unlike lost wages, there is no loss of use of money for annual leave accruals. This is because annual leave does not involve payment of money to an employee; instead the benefit to an employee is time off work. Interest is not

awarded on lost time; interest is only paid on lost money. Thus, we conclude that cash payments to Grievant for accrued annual leave in excess of the annual leave cap established by the Contract should not be subject to interest.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The terms and conditions of paragraphs 1 – 6 of the previous order of the Labor Relations Board in this matter dated March 13, 2007, are incorporated herein by reference;
2. The Employer shall forthwith pay to Grievant an amount representing back pay, said sum being calculated in accordance with the terms of the stipulation entered into by the parties (the terms of which are incorporated herein by reference) and the provisions of this order;
3. The Employer shall reimburse Grievant for the \$677.80 cost he incurred when he sold his portion of a pre-paid vacation package for a hunting trip that was scheduled to take place in October 2005 while Grievant was working at Fletcher Allen Hospital;
4. The back pay due Grievant shall be offset by the accrued annual leave payment received by Grievant at the time of his dismissal, and 380.73 hours shall be restored to Grievant's accrued annual leave bank; and
5. Grievant shall be paid the cash value of accrued annual leave for all such hours in excess of the 416.5 hour annual leave cap established by the Contract. Grievant shall not be paid interest on such amount.

Dated this ____ day of August, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

Richard W. Park