

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 06-06
JOEL DAVIDSON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This appeal is on remand from the Vermont Supreme Court pursuant to its decision reversing the Labor Relations Board's decision on the back pay due Joel Davidson ("Appellant") as a result of his improper dismissal.

This matter originated in 2006 when Appellant filed an appeal with the Board concerning his January 17, 2006, dismissal from his position as Sergeant with the Vermont State Police. On May 4, 2007, the Board issued Findings of Fact, Opinion and Order sustaining the appeal and reinstating Appellant to his position. 29 VLRB 105. Thereafter, the Board issued a decision on September 26, 2007, on specific back pay and benefits due Appellant. 29 VLRB 243. Appellant appealed to the Vermont Supreme Court the decision of the Board denying Appellant back pay for a period of eight months. In a May 1, 2009, decision, the Court concluded that the Board erred in denying Appellant the eight months of back pay, reversed the Board, and remanded the case.

Following the Court decision, the parties were unable to reach complete agreement on the specific amount of back pay and other benefits due Appellant. The Board held a hearing on this issue on August 6, 2009 before Board Members Edward Zuccaro, Chairperson; Leonard Berliner and James Kiehle. VSEA Attorney Abigail Winters represented Appellant. Special Assistant Attorney General William Reynolds

and Vermont Department of Public Safety (“Employer”) Attorney Howard Kalfus represented the Employer. The parties filed post-hearing briefs on September 3, 2009.

FINDINGS OF FACT

1. The May 4, 2007, Board decision in this matter sustaining Appellant’s appeal and reinstating Appellant to his position provided in pertinent part:
 3. Appellant shall be awarded back pay and benefits from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Appellant would have worked, minus any income (including unemployment compensation received any not paid back) received by Appellant in the interim;
 4. The interest due Appellant shall be computed on gross pay, shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period beginning with Appellant’s dismissal, and ending on his reinstatement; interest shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Appellant during the payroll period;
 5. The parties shall file with the Board . . . a proposed order indicating the specific amount of back pay and other benefits due Appellant; and if they are unable to agree on such proposed order, shall notify the Board in writing by that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. . .
- 29 VLRB at 143-44.

2. The parties were unable to agree on all components of a proposed order concerning the back pay and benefits due Appellant. On June 8, 2007, the parties filed a statement of facts and issues agreed to by the parties and a statement of issues which the Board needed to decide. One of the remaining contested issues was “(w)hether Appellant’s mandatory payments into the retirement system should be subject to an interest calculation”.

3. One of the issues agreed to by the parties was as follows:

The employer and employee agree to pay to the Retirement System their respective contributions in order to restore Appellant’s salary and service credit to the level it would be at had he not been dismissed. The parties agree that they will

each pay the Retirement System their respective shares of contributions to Appellant's retirement account as determined by the Retirement System, which contributions shall be calculated as though Appellant maintained his employment.

4. The Labor Relations Board held a hearing on June 25, 2007, on the issues in dispute between the parties. Immediately prior to the hearing, there were settlement discussions at Board offices on outstanding issues. As a result of these discussions, the parties entered into an agreement that resolved some but not all of the contested issues. The partial agreement of the parties was read into the record at the start of the hearing. There was no mention of the parties reaching an agreement concerning whether monies deducted from Appellant's pay towards retirement should be subject to an interest calculation. During the back pay hearing, Appellant introduced no evidence supporting his contention that this retirement deduction should be subject to an interest calculation.

5. The parties submitted post-hearing briefs after the hearing. In the brief filed by Appellant on July 17, 2007, Appellant listed issues on which the parties continued to disagree. The issue whether monies deducted from Appellant's pay towards retirement should be subject to an interest calculation was not listed. Appellant attached to his brief a spreadsheet setting forth in detail how he "should be made whole for all financial losses flowing from his wrongful termination". The spreadsheet calculated the interest on back pay due Appellant based on gross wages minus Appellant's retirement contributions.

6. The Board issued a decision on specific back pay and benefits due Appellant on September 26, 2007. 29 VLRB 243. The Board decision contained no discussion on whether monies deducted from Appellant's pay towards retirement should be subject to an interest calculation. Appellant filed a motion to reconsider the decision.

In his motion, Appellant did not raise the issue of whether his retirement contributions should be subject to an interest calculation. The Board issued an order on December 13, 2007, denying the motion. Appellant filed an appeal of the Board decision to the Supreme Court. On appeal, the Court did not address the issue of whether Appellant's retirement contributions should be subject to an interest calculation.

7. The Employer reinstated Appellant in January, 2008. In February, 2008, the Employer paid Appellant back pay for the time period August 2006 through January 19, 2008, pursuant to the back pay order of the Board. The Employer did not pay Appellant interest on the portion of his gross wages which would have been paid into his retirement account as his statutorily-mandated employee retirement contribution.

8. In June and July of 2009, subsequent to the Supreme Court decision concerning the back pay due Appellant, the Employer made additional back pay payments to Appellant. The Employer did not pay Appellant interest on the portion of his gross wages which would have been paid into his retirement account as his statutorily-mandated employee retirement contribution (State's Exhibits 1 & 6; Appellant's Exhibits 4, 5).

9. The retirement benefit for Vermont State Police officers, i.e., Group C members, such as Appellant is calculated by the State Retirement Division pursuant to statute and is based on the officer's two largest consecutive years of earnings and the number of years of service. Employees contribute a statutorily-determined percentage of their gross wages into their retirement accounts each pay period. Employee retirement accounts are credited on an annual basis at the end of the fiscal year with 5% compounded interest. An employee's retirement benefit is not dependent on the amount

of his or her retirement contributions plus interest in the retirement account. The only way for an employee to actually receive his or her retirement contributions plus interest would be to terminate employment, take a refund of the monies, and give up his or her State pension benefit.

10. At the time of Appellant's dismissal in January of 2006, the Employer paid him \$4,978.80 in accrued annual leave in accordance with the collective bargaining agreement. When the Employer made the first back pay payment to Appellant in February of 2008, Appellant was credited with back pay starting with the pay period beginning August 20, 2006, and running through Appellant's reinstatement. This was consistent with the Board's determination that Appellant was not to receive back pay from January 22, 2006 – August 19, 2006. The Employer deducted the \$4,978.80 accrued annual leave payment made to Appellant upon his dismissal from the back pay calculation and re-credited Appellant's annual leave account starting with the pay period beginning August 20, 2006 (Appellant's Exhibit 3).

11. When the Employer made the additional back pay payments to Appellant in June and July of 2009 subsequent to the Supreme Court decision, the Employer calculated Appellant's back pay beginning starting with the pay period beginning January 22, 2006, and through Appellant's reinstatement. This was consistent with the decision of the Supreme Court that Appellant should receive back pay beginning January 22, 2006. The Employer deducted the \$4,978.80 accrued annual leave payment made to Appellant upon his dismissal from the back pay calculation starting with the January 22, 2006, pay period (State's Exhibits 1 & 6; Appellant's Exhibits 4, 5).

12. The back pay payment made by the Employer to Appellant in June 2009 contained an error. Appellant improperly received back pay for the pay periods beginning January 20, 2008, and February 3, 2008, and part of the pay period starting January 6, 2008. Appellant was reinstated and began receiving regular pay effective January 15, 2008. Thus, the July 2009 back pay payment resulted in Appellant receiving double payment from January 15 – February 16, 2008. The error resulted in an overpayment to Appellant in the amount of \$7,036.73 (State's Exhibits 1, IA).

OPINION

Appellant contests the back pay payments made by the Employer in two respects. We will discuss each of these contentions in turn.

Appellant first contends that the Employer failed to make him whole by not paying him the legal rate of interest of 12% on his entire gross wages, including contributions which would have been made into his employee retirement account. Appellant asserts that a make whole remedy necessarily includes interest on these contributions because if he had not been wrongfully terminated his retirement account would have earned 5% compounded interest annually on these contributions. The Employer responds that Appellant has waived the right to contest this issue because he did not pursue this issue during back pay proceedings subsequent to the Board decision in 2007 reinstating Appellant.

We concur with the Employer to the extent that Appellant has waived his right to contest the Employer not directly paying him the legal rate of interest of 12% on amounts from his wages which would have been paid into his retirement account had he not been

dismissed. In the 2007 back pay proceedings following the Board decision sustaining Appellant's appeal of his dismissal, Appellant initially contested whether mandatory payments into the retirement system from his back wages should be subject to an interest calculation.

However, Appellant introduced no evidence at the 2007 back pay hearing before the Board supporting his contention that this retirement deduction should be subject to an interest calculation. Further, he did not brief the issue subsequent to the hearing. In fact, his brief attached a spreadsheet setting forth in detail how he should be made whole for all financial losses resulting from his dismissal, and the spreadsheet calculated the interest on back pay due Appellant based on gross wages minus Appellant's retirement contributions. When Appellant subsequently filed a motion with the Board for reconsideration of the Board back pay decision, which contained no discussion of interest on the retirement contributions, Appellant did not raise the issue of whether his retirement contributions should be subject to an interest calculation. Also, this issue was not addressed when the Board's back pay decision was appealed to the Supreme Court.

Given the failure of Appellant to pursue in the initial back pay proceedings the issue of whether the Employer failed to make him whole by not directly paying him the legal rate of interest of 12% on amounts from his wages which would have been contributed into his retirement account had he not been dismissed, it would be inappropriate to allow him to resurrect it on remand from the Court. Remand proceedings are not intended to allow parties to litigate issues they had the opportunity to pursue prior to the case being appealed to the Court. To rule otherwise would be unfair to the other party and result in inefficient disposing of cases.

Nonetheless, there is an aspect of the issue concerning interest on contributions to Appellant's retirement account which is appropriate to address at this stage of the back pay proceedings. The evidence indicated that Group C members of the State retirement plan such as Appellant contribute a statutorily-determined percentage of their gross wages into their retirement accounts each pay period, and that employee retirement accounts are credited on an annual basis at the end of the fiscal year with 5% compounded interest. In the initial back pay proceedings in this matter, Appellant and the Employer agreed to pay to the Retirement System their respective contributions to restore Appellant's salary and service credit to the levels they would have reached had he not been dismissed.

In so agreeing, the parties evidently were seeking to act consistent with the standard in calculating back pay awards that the award should make the employee "whole"; that is to place employees in the positions they would have been in had they not been improperly dismissed. Grievance of Goddard, 4 VLRB 189, 190-91 (1981). Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591, 593 (2002). The parties did not specifically indicate in their agreement whether the annual credit of 5% compounded interest would apply to Appellant's retirement account once their respective contribution were made, but we hold that such credit needs to be applied annually for all the pertinent years covered by the back pay award for Appellant to be made whole.

The issue of whether the annual credit of interest would apply would not necessarily have been evident to the parties until at least the end of June 2008, which was the end of the first fiscal year in which back pay payments were actually made to Appellant. This did not occur until the Board's initial back pay decision was on appeal to

the Supreme Court. Accordingly, it is appropriate to clarify and act on this issue now to ensure that our final order in this matter serves to make Appellant whole for his improper dismissal.

We note that it is more appropriate to proceed this way in fashioning a make whole remedy than it would be to directly pay an employee at the legal rate of interest for retirement contributions. In adding interest at the legal rate to a back pay award, the Board is compensating the employee for the loss of the use of money represented by the wages not paid the employee due to his dismissal. Grievance of Warren, 10 VLRB 154, 155-56 (1987). Grievance of Rosenberger, 29 VLRB 194, 204 (2007). Such purpose would not be served by directly paying interest to the employee on the retirement contributions since the employee does not have access to the contributions. Instead, the contributions automatically go into the employee's retirement account. It is better that the annual credit of 5% interest be applied to the employee's retirement account since this places the employee in the position he or she would have been in had the improper dismissal not occurred.

The remaining contention made by Appellant concerning the back pay payments made by the Employer is that the Employer has unfairly reduced its back pay liability in the payments made to Appellant subsequent to the Supreme Court decision by moving the \$4,987.80 credit for accrued annual leave, which the Employer originally took in the pay period starting August 20, 2006, up to the January 22, 2006 period. We conclude that there is no merit to this claim.

In moving the credit for annual leave to the pay period beginning January 22, 2006, the Employer appropriately responded to the Supreme Court decision holding that

Appellant should receive back pay beginning January 22, 2006, rather than the August 20, 2006, date determined by the Board. In making an employee whole, the annual leave credit is appropriately applied beginning the first pay period the improperly dismissed employee is entitled to receive back pay. In moving the annual leave credit to that date, the Employer placed Appellant in the position he would have been in had he not been improperly dismissed. It is true that this reduced the back pay liability of the Employer since it meant the Employer paid less interest on the back pay award. Nonetheless, this result was not unfair but consistent with a make whole remedy.

The final issue before us is whether to correct an error made by the Employer in back wages paid to Appellant subsequent to the Supreme Court. The Employer incorrectly overpaid Appellant \$7,036.73 in back pay for a period where he already had received regular pay due to his reinstatement. We will order that Appellant reimburse the Employer for this overpayment. Otherwise, Appellant would be made more than whole for his improper dismissal.

ORDER

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

1. Appellant shall reimburse the Employer \$7,036.73 for the back pay overpayment made to Appellant;
2. The back pay payments made by the Employer to Appellant are affirmed in all other respects; and
3. Appellant's retirement account shall be credited annually with 5% compounded interest for all the pertinent years covered by the back pay award applicable to Appellant in this matter.

Dated this 21st day of December, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle