

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

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DOCKET NO. 15-30

JOHN LEPORE

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MEMORANDUM AND ORDER

MAJORITY OPINION

The issue before the Labor Relations Board in this grievance over the dismissal of Vermont Agency of Transportation employee John Lepore (“Grievant”) is whether to grant a motion filed by the State of Vermont Agency of Transportation (“Employer”) to stay the entirety of the Board’s decision in this case pending appeal of the decision to the Vermont Supreme Court. On February 22, 2016, the Board issued a decision reducing the dismissal of Grievant to a 30-day suspension and ordering the reinstatement of Grievant to his position as an Environmental Biologist with the Employer. 33 VLRB 290. In that decision, the Board also ordered that Grievant receive back pay and benefits from the date commencing 30 working days from the date of his dismissal until his reinstatement for all hours of his regularly assigned shift, minus any income received by him in interim. Id. Subsequently, the parties entered into a stipulation agreeing to the back pay and other benefits due Grievant pursuant to the Board decision. The Board issued a final order in this matter on April 8, 2016, incorporating the terms of the stipulation by reference and directing the parties to comply therewith.

On April 13, 2016, the Employer filed a motion requesting that the Board order that Grievant be reinstated to his position and receive back pay be stayed pending appeal. On April 26, 2016, Grievant filed a response to the Employer’s motion, opposing the motion to stay reinstatement and back pay pending appeal.

3 V.S.A. Section 1003 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, the Board and the 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. Grievance of McCort, 16 VLRB 248, 249-251 (1993).

In applying this three-part test in five state employee dismissal cases, the Board denied employer requests to stay Board orders reinstating employees pending appeal, but granted employer stay requests of the parts of the Board orders that the employees be granted back pay. Id. Grievance of Gregoire, 18 VLRB 217 (1995). Grievance of Camley, 25 VLRB 147 (2002). Appeal of Revene, 28 VLRB 71, 28 VLRB 79 (2005). Grievance of Greenia, 23 VLRB 12 (2000). These Board decisions concerning stays were appealed to the Supreme Court. The Court affirmed the Board decision in all five cases. Grievance of McCort, Unpublished decision, Sup. Ct. Doc. No. 93-370 (April 5, 1994). Grievance of Gregoire, Unpublished decision, Sup. Ct. Doc. No. 95-228 (June 5, 1995). Greenia v. Department of Corrections, Unpublished decision, Sup.Ct. Doc. No. 00-004 (February 23, 2000). Camley v. Department of Corrections, Unpublished decision, Sup.Ct.Doc.No. 2002-176 (August 2, 2002). Appeal of Revene, Unpublished decision, Sup.Ct.Doc.No. 2005-290 (August 29, 2005).

Nonetheless, in this case the Employer contends that each part of the three-part test favors a stay of the Board’s reinstatement order. The Employer contends that it would suffer irreparable harm, and the interests of the public will not be served, if the stay is not granted. The Employer asserts that the public and the State have a strong interest in maintaining the integrity of the State workforce, and that Grievant’s repeated dishonesty results in his reinstatement being

contrary to the public interest and causing irreparable harm to the integrity of the workforce. The State further contends that, by contrast, Grievant will not suffer substantial harm if his reinstatement is stayed because he has been able to secure employment elsewhere and, should the Supreme Court rule in his favor, he will receive a back pay award that will compensate him for any loss of earnings since his dismissal.

We are not persuaded by the Employer's contention that it would suffer irreparable harm if the stay is not granted. The Employer's claim of irreparable harm is substantially undercut by the evidence in this case indicating that the Employer unreasonably delayed its investigation of Grievant's alleged offenses, and left him on the job for nearly a year after his alleged misconduct came to light with no change in job duties and with whom he interacted. 33 VLRB at 322-324. The Employer's claim of concern for the integrity of the workforce is belied by this evidence which demonstrates inconsistency between the Employer's words and actions and do not indicate a distrusted employee. Id.

The Employer's claim of irreparable harm also disregards factors we found significant in ordering Grievant's reinstatement. The Employer presented no evidence to indicate that Grievant has exhibited dishonesty while on duty. 33 VLRB at 322. Also, Grievant had no previous discipline, and his overall performance was always rated satisfactory. 33 VLRB at 323. Further, there is no evidence that his off-duty misconduct affected his performance on the job. Id. It is apparent that his offenses have not completely compromised his ability to adequately perform his job. Id.

Under these circumstances, we conclude that the Employer will be able to obtain productive work from Grievant during the appeal period, and such productive work will

outweigh any harm to the Employer caused by Grievant's reinstatement. Grievance of Gregoire, 18 VLRB at 220. Grievance of Camley, 25 VLRB at 150.

Further, issuance of a stay with respect to Grievant's reinstatement will substantially harm Grievant. His dismissal occurred nearly a year ago, and the appeal may take a year or more to be completed. Although Grievant is presently employed, his earnings have been substantially reduced from what he earned in state employment and he is not employed in a comparable position. Obviously, an employee is substantially harmed economically and professionally by removal from a job for such an extended period without a comparable interim job. McCort, 16 VLRB at 252. Gregoire, 18 VLRB at 221. Camley, 25 VLRB at 150. Revene, 28 VLRB at 73-74.

Finally, the interests of the public will best be served by reinstating Grievant pending appeal. The public will gain the benefit of productive work during this period, instead of potentially having to pay a large back pay sum at the conclusion of the appeal for which no work was performed. McCort, 16 VLRB at 252. Gregoire, 18 VLRB at 221. Camley, 25 VLRB at 151. Revene, 28 VLRB at 74.

We turn to deciding whether to stay the payment of the back pay award to Grievant pending the appeal in this matter. The Employer requests that the Board stay the payment of the back pay award consistent with our precedents. Grievant requests that the back pay award not be stayed because: 1) there is little likelihood that the State will succeed on appeal and need to recoup any back pay that it pays out; 2) the Employer initially told Grievant he would be returning to work and then told him he would not be reinstated; and 3) the State should be held to the stipulation it entered into with Grievant to pay him back pay.

We adhere to our precedents established in previous cases and grant the Employer's motion to stay our back pay and benefits order. If the stay is not granted, the Employer would be in the position of seeking to recover substantial sums paid Grievant which he may have spent and for which Grievant may be in no financial position to reimburse the Employer. McCort, 16 VLRB at 252. Revene, 28 VLRB at 80. Grievant has offered no persuasive argument to address this serious recoupment problem where such a significant amount of money is involved. Revene, 28 VLRB at 80.

Grievant's contention that the Employer should be held to the stipulation which it entered into with Grievant concerning the back pay and benefits due him also is not persuasive. The Employer entered into such stipulation pursuant to the Board decision on the merits reinstating Grievant with back pay. In the decision, the Board ordered the parties to seek to agree on the specific amount of back pay and benefits due Grievant. 33 VLRB at 329. The fact that the Employer agreed to the back pay and benefits due Grievant pursuant to such decision does not result in a conclusion that the Employer bound itself to now pay Grievant the back pay and benefits. This would be inconsistent with the Employer appeal of the Board decision and the Employer's request to stay the back pay pending appeal. It also would frustrate future efforts by parties to jointly agree to the back pay amounts which are due as a result of Board decisions.

We further do not find persuasive Grievant's contention that his back pay award should not be stayed because of initial representations made to him by the Employer that he would be reinstated to his job, followed by the Employer telling him that he would not be reinstated. Grievant has not made a logical connection between such representations and entitlement to immediate payment of the back pay due him since his dismissal.

We further conclude that the irreparable harm to the Employer outweighs the harm to Grievant. We recognize that Grievant 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 collective bargaining contract. However, he will be able to recover back pay with interest in the event that the Board decision is upheld. McCort, 16 VLRB at 253. Revene, 28 VLRB at 81.

Moreover, we conclude that the public interest is best served by staying the back pay order. We will require the Employer to place the ordered 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. McCort, 16 VLRB at 253. Gregoire, 18 VLRB at 222. Revene, 28 VLRB at 81.

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. McCort, 16 VLRB at 253. Gregoire, 18 VLRB at 222. Revene, 28 VLRB at 81.

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

CONCURRING OPINION

Although I disagree with the majority on the merits of the case, I support the precedent of not staying reinstatement and staying the back pay until an appeal is resolved. Thus, I concur.

/s/ Alan Willard

Alan Willard

ORDER

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 that Grievant be awarded back pay and benefits is granted;
2. The Employer forthwith shall place into escrow the amount of the back pay and benefits that the Board awarded to Grievant; and
3. The Employer's request for a stay pending appeal of the part of the Board order that Grievant be reinstated is denied.

Dated this 26th day of May, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard