

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

) DOCKET NO. 84-46
)
)

DARWIN HERRILL

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue here is a dispute over back pay due Darwin Merrill ("Grievant") as a result of his improper discharge. On October 3, 1985, the Labor Relations Board issued Findings of Fact, Opinion and Order granting the above entitled grievance and reinstating Grievant to the position of CRASH Program Chief. 8 VLRB 259. 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 improper discharge until his reinstatement.

The State and Grievant were unable to stipulate to a proposed order on the specific amount of back pay and other benefits due Grievant, and a hearing on that issue was held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on December 5, 1985. The parties filed a partial stipulation on December 10, 1985, which included a stipulation as to issues which needed to be decided by the Board. Grievant filed Proposed Findings of Fact and Back Pay Order on December 10, 1985. The State filed no memorandum. Portions of the following findings of fact are based on stipulations by the parties.

FINDINGS OF FACT

1. Grievant, if he had not been improperly discharged, would have earned, from October 7, 1984 to December 11, 1985, the sum of \$41,592.00.
2. Grievant, at the time of his wrongful discharge, was paid \$9,722.13 as payment for accumulated annual leave time (40 days) and compensatory time (220 hours).

3. Interest earned on the \$41,592.00 in earnings, minus interest on the \$9,722.13 given to Grievant at the time of separation, calculated at the rate of 12 percent per annum running from the date of each paycheck due Grievant, from October 7, 1984 to December 11, 1985, amounts to \$1,359.23. The method of calculating interest has been stipulated to by the parties and, without any determination by us that method is correct, we have adopted that method for purposes of this case.

4. Grievant, if he had not been discharged, would have had full coverage under the medical insurance plan provided by the State for its employees. Grievant would have paid medical insurance premiums of \$286.51 as part of this plan. Because he did not have the benefit of the plan, he had to pay \$2,500.11 in medical insurance premiums, had uninsured expenses of \$430.68 for medications and had uninsured physician's and dental bills of \$224.32. Grievant's net loss due to the loss of state benefits is \$2,868.60 (\$3,155.11 minus \$286.51) (Grievant's Exhibit 1b).

5. If Grievant had not been discharged, he would have earned, from October 7, 1984 to December 8, 1985, 18 days of annual leave and 5 days of personal leave.

6. Grievant had accumulated 206 1/4 days of accrued sick leave at the time he was dismissed. If he had not been discharged, he would have earned an additional 19 1/2 days, for a total of 225 3/4 days of sick leave.

7. Grievant received and has not paid back \$3,796.00 in unemployment compensation payments during the period February 10, 1985 to August 10, 1985.

8. Grievant, during the time of his separation from employment, applied for numerous jobs in Vermont. He received no interviews for

these jobs and refused no interviews. (Grievant's Exhibit 1a.)

9. Grievant is allowed to carry a maximum annual leave balance of 40 days.

10. Grievant's daily rate of pay is \$138.64. The monetary value of 18 days of annual leave at this pay rate equals \$2,495.52.

OPINION

The parties have presented four issues in dispute to be resolved by the Board. Each will be discussed in turn.

The first issue is whether Grievant has engaged in a good faith effort to mitigate damages by seeking or securing alternative employment. Generally, the proper remedy for improper dismissal is reinstatement with back pay and other emoluments from the date of discharge less the sum of money earned or that without excuse should have been earned from that date. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The evidence indicates Grievant made numerous applications for available jobs and refused no interviews. This, without any evidence indicating Grievant neglected to obtain income "that without excuse should have been earned", leads us to conclude Grievant's back pay award should not be reduced for failure to mitigate damages.

The second issue is whether the Board's back pay award should include payments actually made by Grievant from October 5, 1984, to the present for medical insurance premiums, medical bills, and other medical expenses. As we have stated elsewhere, 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 Benoir, 8 VLRB 165, 167-168 (1985). Grievance of Goddard, 4 VLRB 189, 190-191 (1981). cf. Kelley v The Day Care Center,

141 VT. 608,615-616 (1982). The medical payments claimed by Grievant would have been covered under his medical insurance policy if he had not been discharged, and thus he should be reimbursed for those payments to make him whole.

The third issue is whether the Board's back pay award should include a deduction for payment made to Grievant for accumulated annual leave and compensatory time. For the reasons stated in Grievance of Benoit, supra, at 167-168, Grievant should have his annual leave balance of 40 days and compensatory time balance of 220 hours restored and the accrued annual leave and compensatory time payment made to Grievant at the time of his dismissal should be used to offset the amount of back pay otherwise due Grievant.

The final issue is whether the Board's back pay award should include 18 days of annual leave and 5 days of personal leave that Grievant would have earned from October 5, 1984, to the present. To make Grievant whole is to place him in the position he would have been in had he not been dismissed. Grievance of Benoit, supra, at 168. Normally, this would mean placing the days of annual leave and personal leave Grievant would have earned in his respective leave banks. However, our decision today has restored 40 days of annual leave to his annual leave bank, the maximum he is allowed to carry. To place 18 more days in his bank would put him over the maximum. Given these circumstances and given the fact Grievant's annual leave balance was not reduced through no fault of his own, we believe it proper to award Grievant a payment representing the monetary value of those 18 days of annual leave.

ORDER

Now therefore, based on the foregoing findings of fact and the foregoing reasons, and consistent with the Board's Order of October 3, 1985, it is hereby ORDERED:

1. The State shall pay Grievant a back pay award covering the period from the effective date of his discharge until his reinstatement, which award, as of December 11, 1985, equals \$34,797.22; which sum represents the amount Grievant would have earned during this period (\$41,592), plus interest earned on these earnings minus interest on the annual leave and compensatory time payment made to Grievant at the time of dismissal (\$1,359.23), plus the net medical and dental payments Grievant made which would have been covered under the medical insurance plan if he had not been discharged (\$2,868.60), plus payment for 18 days of annual leave (\$2,495.52), minus the payment for accumulated annual leave and compensatory time made to Grievant at the time of his dismissal (\$9,722.13) and minus unemployment compensation payments received and not paid back by Grievant during this period (\$3,796);
2. 40 days shall be restored to Grievant's annual leave bank;
3. 220 hours of compensatory time shall be restored to Grievant's compensatory time bank;
4. 5 days shall be restored to Grievant's personal leave bank;
5. 225 3/4 days shall be restored to Grievant's sick leave bank; and
6. Grievant shall be restored to benefits under all group insurance plans to which he was entitled at the time of his dismissal.

Dated this 12th day of December 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

William G. Kearsley, Sr.

James S. Gilson