

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

RANDY HURLBURT

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DOCKET NO. 85-47

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue here is a dispute over backpay due Grievant as a result of his improper discharge. On October 9, 1986, the Labor Relations Board issued Findings of Fact, Opinion and Order sustaining the above-entitled grievance and reducing Grievant's dismissal to a 13-day suspension. The Board left the case open for the purpose of determining the backpay and other benefits due Grievant.

On October 30, 1986, the State of Vermont and Grievant filed a partial stipulation concerning the backpay award due Grievant. However, the parties were unable to agree on the resolution of certain issues and submitted them to the Board for its determination. A hearing on those issues was held before Board Members Charles McHugh, Acting Chairman; William G. Kemsley, Sr., and Catherine Frank on December 4, 1986. Grievant filed a Memorandum Concerning Backpay Award on December 11, 1986. The State filed no memorandum. Portions of the following findings of fact are based on stipulations by the parties.

### FINDINGS OF FACT

1. Grievant was dismissed on October 2, 1985. At the time he was dismissed, Grievant was paid two weeks' wages in lieu of notice and was paid one day of annual leave. Taking these factors into consideration, and taking into consideration that the Board ordered a 13-day suspension was appropriate to impose upon Grievant, then the Employer's backpay liability began on November 5, 1985.

2. If Grievant had not been improperly dismissed, his gross wages for the period November 5, 1985, to December 18, 1986, would have been \$11,700. The applicable deductions for \$11,700 gross pay would have totalled \$2,891.80, leaving a net pay of \$8,808.20 (Stipulation Exhibits 1, 2).

3. Grievant has received \$2,835 in Unemployment Compensation for the period he has been unemployed since his dismissal.

4. On October 3, 1985, the day after he was dismissed, Grievant began working for the Pizzagalli Construction Company. Between October 3 and October 30, 1985, Grievant earned \$438 gross pay working for Pizzagalli. Due to a lack of work, Grievant was laid off on October 30.

5. While he was in the employment of the State, Grievant worked one weekend per month in the National Guard.

6. During the period February 8, 1986, to June 6, 1986, Grievant was employed by the National Guard on a training project. Grievant worked every week, except one, during the period. Grievant received a net pay of \$2,811.90 for the National Guard duty, among which there were 13 days which fell on a weekend. The pay attributable to each day was \$38.51.

7. \$378.41, which equals 11 of the days between May 17 and May 27, 1986, in National Guard income shall not be deducted from the backpay award because Grievant could have taken 11 days of paid military leave if he had been working for the State.

8. In addition to his employment with Pizzagalli and the National Guard, Grievant worked a few odd jobs between October 1985 and the present. Grievant earned \$75 for those odd jobs.

9. While unemployed, Grievant contacted a minimum of three employers a week to seek employment. Grievant went to Job Service on several occasions to review a listing of available jobs, and pursued a job referral given him by Job Service. Grievant receives the Burlington Free Press, a daily newspaper. He reviewed the newspaper's help wanted ads to find work. Grievant visited several employers to inquire about work. Grievant refused no job offers he received during this time.

10. Grievant, if he had not been dismissed, would have accrued 12 days of annual and sick leave which shall, in connection with the backpay award, be credited to his leave banks.

11. Due to the Board-ordered rescission of Grievant's one-half day suspension, which had been imposed by letter dated May 14, 1985, Grievant is entitled to be paid a total of \$20.43, which is calculated as follows:

\$18.64	gross wages
<u>1.33</u>	deductions
\$17.31	net pay
<u>3.12</u>	interest
\$20.43	

### 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 discharged his obligation to make reasonable efforts to find work. Under precedent established by the Vermont Supreme Court, this is a general duty imposed on discharged employees. The proper remedy for improper dismissal is reinstatement with backpay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned since that date (emphasis added). Grievance of Brooks, 135 Vt. 563, 570 (1977).

We conclude Grievant made a good faith, diligent effort to find work in the interim between his dismissal and the present. It is noteworthy that he did, in fact, work five months during this period. Moreover, for the period he was unemployed the evidence indicates he diligently sought other employment. He pursued the normal routes of reviewing newspaper help wanted ads, personally visiting employers and using Vermont Job Service. While these efforts did not prove fruitful, it does not appear it was due to lack of willingness to work since he refused no job offers during this time. Under these circumstances, it is apparent Grievant did not forego income "that without excuse should have been earned".

The second issue is whether the earnings from Grievant's National Guard weekend duty of 13 days during the period February 8 to June 6, 1986, should be deducted from the backpay award. Grievant contends such pay should not be deducted since, if he had not been dismissed, his pay for weekend National Guard duty would not have been deducted

from his pay earned as a State employee. The monetary compensation ordered in a backpay award shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole". Grievance of Merrill, 8 VLRB 383, 385 (1985). To make Grievant whole is to place him in the position he would have been in had he not been dismissed. Id., at 386.

If Grievant had not been dismissed, he would not have been employed on the National Guard training project, since that was a full-time commitment for a number of months. Instead, he presumably would have continued his practice while employed by the State of working one weekend per month, presumably two days, in the National Guard. This would mean that for the four months he was employed in the National Guard training project, he would have had Guard duty on four weekends, or eight days. Thus, his income for eight of the 13 weekend days he was on Guard duty should not be deducted from his backpay award. The remaining five days should be deducted because Grievant presumably would not have earned such income had he not been dismissed.

The third issue is whether Grievant's earnings from employment with Pizzagalli Construction Company - \$438 - should be deducted from the backpay award. Grievant contends such earnings should not be deducted since the Board found a 13-day suspension appropriate and Grievant could have worked at Pizzagalli during the suspension. By our calculations, a suspension of Grievant for 13 workdays meant he would have been on suspension from October 3, 1985, through October 21, 1985. The evidence indicates he worked at Pizzagalli during the period October 3 to October 30, 1985, a period of 20 "normal" workdays (i.e., Monday through Friday). To make Grievant "whole" under such

circumstances would be to deduct from his backpay only that income earned after expiration of the period he should have been suspended. However, the evidence does not indicate specifically which days he worked at Pizzagalli. Under the circumstances, the most appropriate alternative solution is to deduct 35 percent of his Pizzagalli earnings - \$153.30, which represents the percentage of normal workdays during the period Grievant worked at Pizzagalli which occurred after Grievant's suspension would have ended.

The final issue is whether Grievant should be reimbursed for mileage expenses for attendance at the hearings in this matter. Such reimbursement is sought by Grievant on the grounds it would further the intent of the law to make Grievant whole for losses caused by his improper dismissal. Grievant is requesting that we go beyond a backpay order and reimburse him for expenses incurred in appealing his dismissal. As discussed above, the Supreme Court has determined that, generally, the proper remedy for improper dismissal is reinstatement with backpay and other emoluments less money earned or without excuse should have been earned. Brooks, supra. We find no basis in law or the collective bargaining contract by which we may order such expenses reimbursement as requested by Grievant in addition to granting reinstatement with backpay and other emoluments.

#### ORDER

Now therefore, based on the foregoing findings of fact and the foregoing reasons, and consistent with the Board's Order of October 9, 1986, it is hereby ORDERED:

1. The terms and conditions of paragraphs 1-5 of the Board's Order of October 9, 1986, and the terms and conditions of the parties' stipulation of October 28, 1986, are incorporated herein; and

2. The State shall, forthwith, pay Grievant a backpay award covering the period commencing 13 working days from the effective date of his discharge until his reinstatement, which award, as of December 18, 1986, equals \$3,639.92, plus interest calculated in accordance with Paragraph 4 of the Board's October 19, 1986, Order; which award represents the net pay Grievant would have earned during the period (\$8,808.20), plus payment of \$20.43 as a result of the Board-ordered rescission of Grievant's half-day suspension imposed by letter dated May 14, 1985, minus properly-deducted income earned by Grievant during this period (\$2,353.71), and minus unemployment compensation payments received and not paid back by Grievant during this period (\$2,835), plus interest.

Dated this 18th day of December, 1986, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Acting Chairman

William G. Kemsley, Sr.

Catherine L. Frank