

Back Pay Issues

As stated in the section above, the proper remedy generally for improper dismissal is reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned from that date. In many cases, the Board has resolved specific back pay issues in applying this general standard.

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".¹ To make employees whole is to place them in the position they would have been in had they not been improperly dismissed.²

The Board has addressed whether improperly dismissed employees are entitled to lost overtime wages as part of a back pay award. The Board has held that back pay awards generally do not include overtime pay because it is not predictable and not part of the regular workweek.³ If the specific amount of overtime is predictable and part of the employee's regular schedule, the Board has concluded overtime pay is an appropriate remedy.⁴

Also, in one case an improperly dismissed Agency of Transportation employee sought compensatory time off because he would have been entitled to it due to being in a status where he had to be reachable and available to report to work quickly during the winter months. The Board concluded that the presumption was

¹ 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).

² Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591, 593 (2002). Grievance of Benoir, 8 VLRB 165, 168 (1985).

³ Grievance of Brown, 25 VLRB 179 (2002). Grievance of Lilly, 23 VLRB 129, 130, 139 (2000). Grievance of Goddard, 4 VLRB 189, 190 (1981).

⁴ Lilly, 23 VLRB at 139-140.

that the employee would have received the compensatory time off absent his dismissal and was entitled to it as part of a back pay award.⁵

In a 2004 decision, the Vermont Supreme Court considered whether overtime hours that are not part of an employee's regular work schedule can be included in a back pay award if they are sufficiently predictable. The Court held that, where an employee proves that he or she would have earned overtime compensation but for an unjust dismissal, a back pay award must ordinarily include lost overtime compensation.⁶ The Court reversed the portion of a Board decision denying an unjustly dismissed state employee overtime compensation, and remanded to the Board to estimate the amount of overtime that the employee would have worked within reasonable limits to determine a fair amount.⁷ The Court left it to the Board's discretion to calculate overtime either based on the average of the employee's previously-worked overtime or on the overtime of a similarly-situated employee.⁸

In cases where state employees sought overtime pay for holidays that occurred between the time the employees were relieved from duty until their reinstatement, the Board has interpreted the applicable collective bargaining agreement to deny the additional compensation.⁹ The Board noted that the contract language was clear that only employees who actually worked the holiday were entitled to holiday pay.¹⁰ Although it was through no fault of their own, the dismissed employees did not work the holidays and therefore were not entitled to be paid for those holidays on which they did not work.¹¹ The Board similarly has reasoned that it would not be

⁵ Grievance of Brown, 25 VLRB 63, 69 (2002).

⁶ In re Grievance of Brown, 177 Vt. 365 (2004).

⁷ Id.

⁸ Id.

⁹ Grievance of Carosella, 8 VLRB 178, 180 (1985). Grievance of Lilly, 23 VLRB 129, 139 (2000).

¹⁰ Id.

¹¹ Id.

appropriate to provide stipend pay to an improperly discharged employee for training he did not receive although the employee's inability to participate in these training sessions occurred through no fault of his own.¹²

Where an employer made a monetary payment to a dismissed employee of all accrued annual leave earned by the employee, the Board has held that the employee's accrued annual leave balance should be restored and the payment made at the time of dismissal should be offset against the amount of back pay otherwise due.¹³ The Board also has decided that an improperly dismissed employee who was owed annual leave accruals upon reinstatement which would have put the employee over the contractual limit on annual leave accrual was entitled to a payment representing the monetary value of the annual leave exceeding the contractual limit.¹⁴ The Board has reasoned that such payment is proper since the employee was in the situation of not being able to use leave through no fault of the employee.¹⁵ The Board has determined that this payment should not be subject to interest.¹⁶

However, the Board has determined that personal leave accruals are sufficiently distinct from annual leave accruals so that they should be treated differently. The Board stated:

The amount of annual leave which an employee is entitled to depends only on an employee's active status and length of service. Personal leave accrual to the contrary is much more speculative, depending on the employee's usage of sick leave. The speculative nature of personal leave accrual versus annual leave accrual causes us to conclude that dismissed employees should not be

¹² Grievance of Lilly, 23 VLRB at 140.

¹³ Grievance of Benoir, 8 VLRB 165, 166-167 (1985). Grievance of Carosella, 8 VLRB 178, 181 (1985). Grievance of Rosenberger, 29 VLRB 194, 202-03 (2007). Appeal of Davidson, 29 VLRB 243, 256 (2007).

¹⁴ Grievance of Merrill, 8 VLRB 383, 386 (1985). Grievance of Greenia, 22 VLRB 85, 87 (1999).

¹⁵ Id.

¹⁶ Grievance of Rosenberger, 29 VLRB at 204-05. Appeal of Davidson, 29 VLRB at 256-57.

credited with personal leave accrual during the period between their dismissal and reinstatement.¹⁷

The Board also has determined that back pay awards for improperly dismissed employees should include the following: shift differential pay if an employee consistently worked a shift where shift differential pay was provided,¹⁸ and extra holiday pay provided in the contract if an employee does not work on a holiday¹⁹

An improperly dismissed employee is entitled to be paid at a rate giving the employee credit for the period which the employee was separated from employment.²⁰ Thus, the employee is entitled to any pay raises the employee would have received had employment not been improperly terminated.²¹

It is Board practice to add 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.²² 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.²³ Interest is calculated on gross pay, not net pay.²⁴ The Vermont Supreme Court has approved the Board's practice of awarding interest on back pay awards, and using the gross amount of back pay as a starting point for determining interest.²⁵

¹⁷ Appeal of Davidson, 29 VLRB at 258.

¹⁸ Grievance of Ouellet, 1 VLRB 230 (1978). Grievance of Goddard, 4 VLRB 189, 190 (1981).

¹⁹ Id.

²⁰ Grievance of Brown, 23 VLRB 63, 71 (2002).

²¹ Id.

²² Grievance of Warren, 10 VLRB 154, 155-56 (1987). Grievance of Rosenberger, 29 VLRB 194, 204 (2007).

²³ Id.

²⁴ Grievance of Merrill, 13 VLRB 119, 125 (1990); *Affirmed*, 157 Vt. 150 (1991).

²⁵ Grievance of Merrill, 157 Vt. at 154-155.

The interest computation is directly offset by unemployment compensation payments received by the employee.²⁶ Also, interest should be computed on any accrued annual leave payment made to the employee from the date the employee received the payment to the date of the backpay order of the Board because the employee had the use of the money during this period.²⁷

There are special considerations in back pay awards when the improperly dismissed employee participated in a deferred compensation plan prior to the dismissal. The employee is entitled to receive the amount of the deferred compensation payments that would have been made into the plan, plus interest payments on such amounts at the legal rate of interest.²⁸

When an employee sought compensation for losses on deferred compensation monies that he withdrew subsequent to his dismissal, the Board concluded that any such investment losses are beyond the reach of a back pay award. The Board stated: “(T)he awarding of interest compensates the employee for the loss of the use of the money represented by the wages not paid the employee due to the dismissal. Additional compensation to account for investment losses would further compensate the employee for the loss of the use of the money, and go beyond making employees whole for income losses suffered as a result of the dismissal.”²⁹ However, the employee may be entitled to reimbursement for a penalty incurred for early withdrawal of monies from a deferred compensation plan if the employer is unable to establish that the penalty would have been imposed absent the improper dismissal.³⁰

²⁶ Grievance of Benoir, 8 VLRB at 169.

²⁷ Id.

²⁸ Appeal of Davidson, 29 VLRB 243, 258-59 (2007).

²⁹ Id. at 259-60.

³⁰ Id. at 260-61.

In cases where an improperly dismissed employee sought reimbursement for mileage expenses for attendance at the Labor Relations Board hearings on his dismissal, the Board has denied such reimbursement. The Board stated: “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 back pay and other emoluments.”³¹

An employee has a general duty to mitigate damages by making reasonable efforts to find interim work.³² Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. Liability for back pay arises out of the employer's improper action and, accordingly, the employer must establish any claim of lack of mitigation.³³ The employer may meet the burden of proof by establishing that suitable work existed, and that the employee did not make reasonable efforts to obtain it.³⁴

It is the general rule in back pay cases that an employee must make at least reasonable efforts to find new employment which is substantially equivalent to the position lost and is suitable to a person of his or her background and experience.³⁵ A wrongfully discharged employee is not held to the highest standard of diligence.³⁶ The employee need only make a good faith effort to find suitable alternative employment.³⁷

Like many general rules, there are recognized exceptions to the duty to mitigate; one such exception arises from the situation where a discharged employee

³¹ Grievance of Hurlburt, 9 VLRB 229, 234 (1986). Appeal of Davidson, 29 VLRB at 261.

³² Lilly, 23 VLRB at 137. Grievance of Hurlburt, 9 VLRB 229, 232 (1986).

³³ Lilly, 23 VLRB at 137. Grievance of Merrill, 12 VLRB 222, 226 (1989).

³⁴ In re Lilly, 173 Vt. 591, 593 (2002).

³⁵ Lilly, 23 VLRB at 137; Affirmed, 173 Vt. 591, 593-94 (2002). Grievance of Gregoire, 18 VLRB 205, 209 (1995).

³⁶ Lilly, 173 Vt. at 593-94.

³⁷ Lilly, 173 Vt. at 594.

becomes self-employed or engaged in a new business.³⁸ A discharged employee is entitled to some leeway in getting started with self-employment following a wrongful discharge, with the proviso that at some point a refusal to accept substantially equivalent employment that is offered terminates the former employer's back pay obligation.³⁹

In one case where an employee properly mitigated damages by accepting interim employment in New York after being unable to find employment in Vermont, the Board determined that commuting expenses between Vermont and New York incurred by the employee were a necessary component of the interim employment and were appropriately deducted from the employee's interim earnings.⁴⁰ In another case where an employee properly mitigated damages by obtaining an interim job, the Board determined that reimbursing the employee for his commuting miles based on the mileage reimbursement rate set by the federal General Services Administration appropriately compensated him for his increased traveling expenses due to his interim employment. The Board denied the employee's request that he also recover as part of his back pay award a portion of the payments he made to purchase an automobile that the employee used to commute to his interim job.⁴¹

Where an employee does properly mitigate damages by finding interim employment, the Board has qualified the use of such earnings to offset liability. Any hours worked by the employee in their interim job which are in excess of what they

³⁸ Id.

³⁹ Id. at 210.

⁴⁰ Chittenden South Education Association, Hinesburg Unit v. Chittenden School District and Hinesburg School Board, 10 VLRB 106, 118 (1987).

⁴¹ Grievance of Rosenberger, 29 VLRB 194, 198-201 (2007).

would have worked in the job from which they were improperly dismissed are not deducted from the employer's liability.⁴²

Where an employee is claiming an exception to the general rule that post-dismissal earnings are deducted from an employer's back pay liability, it is then the employee's burden to justify such exception.⁴³ The employee must establish that the employment was truly "moonlighting" and that he or she would have been employed in the non-state employment if still employed by the State.⁴⁴ Earnings for work that could be performed outside the hours that the employee would have worked for the employer are not properly deductible from a back pay award.⁴⁵

⁴² Grievance of Sullivan, 10 VLRB 71, 76 (1987).

⁴³ Id. at 75.

⁴⁴ Id. Grievance of Taylor, 15 VLRB 275, 281-82 (1992).

⁴⁵ Taylor, 15 VLRB at 282. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 10 VLRB 106, 121 (1987).