

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 20-32
PATRICK RYAN)	

MEMORANDUM AND ORDER

The State of Vermont (“Employer”) has filed a Motion to Stay the April 14, 2021, Order of the Board reinstating Patrick Ryan (“Grievant”), to his position as District Director of the Newport office of the Family Services Division, Department for Children and Families, and its May 21, 2021, Back Pay Order, during the pendency of the Employer’s appeal of the Final Order of the Board to the Vermont Supreme Court.

On April 14, 2021, the Vermont Labor Relations Board sustained in part the Grievance of Patrick Ryan (“Grievant”) and ordered that his dismissal be reduced to a fifteen-day suspension. On May 20, 2021, the Board adopted the stipulation of the parties and issued a Back Pay Order. Employer appealed the Final Board Order to the Vermont Supreme Court. Employer requests the Board stay both Orders until the disposition of the Employer’s appeal to the Vermont Supreme court. The Grievant has filed an Opposition to the Employer’s Motion to Stay.

The applicable statute, 3 V.S.A. § 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.” When evaluating a stay request, the Board and the Vermont Supreme Court apply a 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, 249-51 (1993).

When applying this test to requests for stay of reinstatement orders pending appeal, the Board has consistently denied such requests. See Grievance of John Lepore, 33 VLRB 422, (2016) (listing five previous cases where Board had denied Employer motions to stay reinstatement orders pending appeal). The Vermont Supreme Court has affirmed Board decisions denying motions for stay of reinstatement. See Id. (citing unpublished decisions of the Vermont Supreme Court affirming Board decisions). The Board has denied the stay requests because of the inability of employers to demonstrate irreparable harm. In contrast, The Board has found the harm to the Grievant of staying reinstatement substantial due to the additional time separated from their position during the appeal period.

Nevertheless, Employer argues that application of the three-part test demonstrates that a stay of the Board's reinstatement order is warranted. Employer maintains that reinstatement will result in irreparable harm to the State due in large part to its fear that Grievant's return will cause a disruption to the workplace. Employer claims that those employees that testified against Grievant will be negatively impacted by his return resulting in a disruption and loss of productivity in the workplace. Employer also contends that due to the seriousness of Grievant's misconduct, its wide publicity, and the public nature of his duties, reinstatement of Grievant during the pendency of the appeal will cause irreparable harm to the integrity of the State's workforce and the Department's reputation for integrity.

Employer gives short shrift to the second prong's focus on the impact of the stay on the Grievant. Employer claims that Grievant will not be substantially harmed because even if the Supreme Court affirms the Board decision, Grievant's backpay award will be increased to reflect the added period of separation during the appeal.

The Employer has failed to demonstrate that it will suffer irreparable harm if a stay is not imposed. Employer's fear that Grievant's return will lead to disruption of the workplace and negatively affect the productivity of the Newport District Office is not supported by the record and merely speculative. Speculation regarding future problems is insufficient to demonstrate irreparable harm. See Grievance of Greenia, 23 VLRB 12, 15 (2000). Grievant had received no previous discipline and his overall performance had been rated at least satisfactory in his performance evaluations. The Board considered the testimony of the employees and it contributed to the decision to find that Grievant's actions warranted a fifteen-day suspension. "This significant level of discipline should suffice to deter such conduct by Grievant in the future. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned." Grievance of Ryan, 36 VLRB 24, 60 (2021).

Employer's attempt to add the displacement of the replacement employee hired during the pendency of the grievance to bolster its irreparable harm claim is unavailing. The harm or impact to a third party, the replacement employee, is not a factor in the stay analysis. Moreover, Employer was on notice that Grievant was seeking reinstatement. Despite the foreseeable potential for reinstatement, Employer elected to hire a replacement for Grievant. Any disruption resulting from the replacement employee's removal was caused by Employer, not Grievant.

The harm to Grievant from a stay of his reinstatement, in contrast, is real and substantial. Grievant has been out of his position for over a year. Removal from his position deprives him of the opportunity to advance in his career and to pursue his profession. The appeal could last another year or longer. Grievant is not currently employed in a position that pays him the same as his work with Employer. The public interest is served by allowing Grievant to provide

productive service to Employer. Rather than extending the period of back pay to Grievant for work not performed, the Employer gets the benefit of Grievant's productive work. See Grievance of Camley, 25 VLRB 147, 151 (2002); Grievance of Gregoire, 18 VLRB 205, 221 (1995); McCort, 16 VLRB at 252. The public is served by the suspension of Grievant and his return after discipline to the worksite. Grievance of Revene, 28 VLRB, 71, 74 (2005). See also McCort, 16 VLRB at 252; Gregoire, 18 VLRB at 221. A stay of Grievant's reinstatement will result in unnecessarily increasing potential costs to the public. Accordingly, the Board denies Employer's request to stay Grievant's reinstatement.

We turn next to Employer's request to stay the back pay award. When applying the three-part test to back pay orders, the Board has consistently ruled in favor of a stay. See Revene, 28 VLRB at 80; McCort, 16 VLRB at 252. The Board has found compelling that delaying payment of back pay will not result in substantial harm to the Grievant because the Grievant will continue to earn interest on the award during the stay. In past decisions, the Board has also been swayed by the employer's commitment to place the funds in escrow. See Gregoire, 18 VLRB, 205, 222; McCort, 16 VLRB at 253. Employer here has not indicated it will keep the funds in escrow.

The Grievant maintains that employer has not demonstrated irreparable harm if the back pay award is not stayed. He also claims that he will be harmed because he will be forced to live another year without the funds awarded to him by the Board. This delay will cause substantial harm to him both financially and emotionally.

The Board is not inclined to stray from its established precedent of staying back pay orders. If the stay is not granted, Employer will be required to pay Grievant over \$50,000 with no guarantee that it will be able to recover those sums if the Employer prevails on appeal.

Employer would be in the position of pursuing Grievant to recover these funds which Grievant may have spent and may not be in a position to reimburse Employer. See Revene, 28 VLRB 78, 80; McCort, 16 VLRB at 252. Although we recognize that Grievant will suffer economic harm by staying the back pay order, he will recover the back pay, with interest, if the Board decision is upheld.

The public interest is served by staying the back pay order provided the Employer place the backpay funds in escrow. See McCort, 16 VLRB at 253. Requiring reinstatement and staying the back pay order during the pendency of the appeal balances the respective interests in this matter. See Gregoire, 18 VLRB at 22.

For the reasons stated above, it is ordered:

1. The Employer's request for a stay pending appeal of the April 14, 2021, Order of the Board reinstating Grievant, is denied.
2. The Employer's request for a stay pending appeal of the May 21, 2021, Back Pay Order, is granted.
3. The Employer shall immediately place into escrow the amount of back pay and benefits that the Board awarded to Grievant. The Employer shall notify the Board in writing when the amount of back pay and benefits is placed in escrow.

Dated this 6th day of August, 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s Robert Greemore

Robert Greemore, Acting Chairperson

/s/ Karen Saudek

Karen Saudek

/s/ Roger Donegan

Roger Donegan