

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

DARWIN MERRILL

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DOCKET NO. 84-46

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue 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. On December 12, 1985, the Board issued a back pay order in this case. 8 VLRB 383. The State appealed the Board decision to the Vermont Supreme Court. The Court affirmed the Board decision on December 16, 1988, ___ Vt. ___, and on March 24, 1989, denied in relevant part the State's motion for reargument.

The parties were unable to stipulate to the specific amount of back pay and other benefits due Grievant for the period subsequent to the Board's December 5, 1985, back pay order. A hearing on that issue was held before Board Members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Louis A. Toepfer on July 20, 1989. Attorney Norman Blais represented Grievant. Michael Seibert, Assistant Attorney General, represented the State.

The parties filed Requested Findings of Fact and Memoranda of Law on August 3, 1989.

FINDINGS OF FACT

1. Subsequent to his dismissal on October 5, 1984, Grievant applied for numerous jobs in Vermont. He received no interviews for these jobs and refused no interviews. 8 VLRB 384-385. Grievant did not work between his dismissal and February, 1986.

2. In February, 1986, Grievant took a job driving a truck for Marlin Management, earning \$8.00 per hour. For two and one-half months, Grievant worked part-time. Thereafter, he worked full-time, plus overtime, until May, 1988. During this period, Grievant did not seek other alternative employment.

3. In 1987, Grievant and another person formed a partnership to engage in the sale of breathalizers, devices which approximate the content of alcohol in a person's system. The partnership was supplied items for sale by Intoximeter, Inc. In addition, Intoximeter made available to Grievant's partnership a loan of \$7,000. The partnership repaid the loan to Intoximeter out of commissions from sales. In addition to the loan from Intoximeter, Grievant loaned \$21,000 to the partnership.

4. The partnership agreement provided that Grievant's partner would receive a salary of \$12,000 per year, and that Grievant would receive no salary. The agreement provided that once the partner's salary had been paid, the partnership would use any additional available monies to repay Grievant his \$21,000 loan. The agreement provided that once the loan was paid to Grievant, any profits would be divided equally by the partners. During the life of the partnership, monies were not available to repay Grievant the loan or to pay him any salary.

5. Grievant's partnership did not show earnings for the 1987 calendar year because its sales were offset by expenses.

6. In May, 1988, Grievant resigned from his truck driving job for Marlin Management to devote full-time to the partnership to expand the business. At the time Grievant decided to resign from Marlin Management, his case concerning his dismissal had been on appeal to the Supreme Court for approximately two and one-half years and Grievant had no reasonable expectation as to when the Vermont Supreme Court would decide his case.

7. Grievant worked full-time for the partnership from June, 1988, to April, 1989. Grievant received no salary from the partnership during this time. Grievant used monies generated from the sale of his property to pay for living expenses during this period.

8. The partnership grossed \$75,000 in sales of breathalizers during 1988. After subtracting the cost of goods sold and total deductions claimed for tax purposes, the net income for the partnership was a \$3,820 loss. Among the expenses of the partnership was the \$12,000 salary of Grievant's partner (State's Exhibit 1).

9. In April, 1989, subsequent to the Supreme Court decision affirming the Board decision in this matter, Grievant was reinstated by the State. At that time, Grievant sold his interest in the partnership to his partner. The sale agreement provides that, over a five-year period, Grievant will recover his initial investment of \$21,000 and will also receive, in recognition of the value of the partnership, another \$14,000. A note, secured by a second mortgage on Grievant's former partner's house, calls for Grievant's partner to pay just interest on the note for the first 12 months, and to pay principal and interest thereafter. Beyond the mortgage and interest

payments, Grievant received no other value from the sale of the partnership.

10. Grievant and the State have agreed that, with respect to medical expenses incurred by Grievant since December 5, 1985 (the date of the original back pay order by the Board in this matter), Grievant will submit his medical and dental expenses to the State's insurance carrier for reimbursement. The State and Grievant agree to be bound by the determination of the carrier as to reimbursement or, in the event of an appeal, by the determination of the State's Department of Banking and Insurance. The State agrees to reimburse Grievant for those expenses already accepted by the State as reimbursable.

11. If Grievant had not been dismissed, he would have earned, from October 7, 1984, to the time of the hearing in this matter, 81 days of annual leave and 31 days of personal leave.

12. Grievant had accumulated 206 1/2 days of accrued sick leave at the time he was dismissed. If Grievant had not been dismissed, he would have earned an additional 78 days up to the day of the hearing in this matter, for a total of 284 1/4 days of sick leave.

OPINION

The State has raised various issues with respect to Grievant's back pay award. We will discuss each issue in turn. First, the State contends that Grievant did not discharge fully his obligation to mitigate his damages while this matter was pending before the Supreme Court. 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". Grievance of Goddard, 4 VLRB 189 at 190-191 (1981). To make Grievant "whole" in this case is to place him in the position he would have been in had he not been improperly denied reinstatement. Grievance of Benoir, 8 VLRB 165, 168.

In making an employee whole, interim sums of money earned or that without excuse should have been earned are generally deducted from the gross amount of back pay to which the employee is entitled. Grievance of Brooks, 135 Vt. 563, 570 (1977). Grievance of Hurlburt, 9 VLRB 229 (1986).

An employee has a general duty to mitigate damages by making reasonable efforts to find interim work. Grievance of Hurlburt, supra. 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, an employer must establish any claim of lack of mitigation. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 10 VLRB 106, 119 (1987).

The State faults Grievant first for not continuing to look for better employment after securing the truck driving job with Marlin Management, and then for ultimately resigning from his truck driving job to devote full time to his fledgling breathalyzer business. We conclude that in neither instance has the State met its burden of proving that Grievant did not properly mitigate damages.

After being dismissed in October, 1984, Grievant made numerous applications for available jobs and refused no interviews. When this job search proved fruitless, Grievant secured the truck driving job

more than one and one-half years after his dismissal. By doing so, Grievant reasonably lowered his expectations concerning alternative employment and cannot be faulted. NLRB v. Southern Silk Mills, 242 F2d 697 (6th Cir., 1957), Cert. denied, 355 US 821. NLRB v. Madison Courier, Inc., 472 F2d 1307 (DC Cir., 1972). Once Grievant obtained the truck driving job and thus acted to mitigate his damages, we do not believe he failed to further mitigate his damages by not actively seeking other better paying employment. This is particularly so given that Grievant had made numerous employment applications without success for a significant period of time after his dismissal.

Further, the State has not met its burden of proving that Grievant did not properly mitigate his damages when he resigned from the truck driving job to work full time on his breathalyzer business. The State simply has not demonstrated that this was a reckless business venture or an unreasonable financial move. This is true even though Grievant left an income-producing job to take one from which he had no expectation of immediate earnings. At that point, Grievant had been dismissed three and one-half years earlier with no expectation as to when the Supreme Court would decide his case. Under such circumstances, it was reasonable for Grievant to explore an alternative professional opportunity and seek to build up the fledgling breathalyzer business so that it ultimately would produce income for Grievant.

The second issue we need address is the State's contention that Grievant's \$14,000 gain from the sale of his interest in the partnership should be attributed as income for Grievant over the entire life of the partnership and that half, or \$6,000, of the salaries paid out by the partnership during 1988 also should be

considered as income for Grievant. The State requests that this total of \$20,000 be deducted from Grievant's back pay award. We conclude that the State has not met its burden of demonstrating that the \$14,000 was "money earned" during the life of the partnership or that the \$6,000 was "money... that without excuse should have been earned" during 1988. Brooks, supra, at 570. It is particularly compelling to us that Grievant has yet to receive any cash payment from the partnership and, based on the evidence before us, we cannot conclude with reasonable certainty that he will actually receive the \$14,000 from the sale of the partnership. Such a possibility is speculative.

The final issue before us is the State's contention that Grievant should not be paid monies reflecting the value of annual leave he would have accrued in excess of the maximum he could accumulate in his leave bank. This issue was addressed and decided by the Board in its December 5, 1985, decision, 8 VLBB 383, 386, and we reaffirm that decision here. Given the fact that Grievant's annual leave bank was not reduced through his fault, we believe it proper to award Grievant a payment representing the monetary value of the annual leave days that Grievant would have earned from his dismissal to the present. Id., at 386.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, and consistent with the Orders of the Labor Relations Board dated October 3, 1985, and December 5, 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 represents the amount Grievant would have earned during the period minus interim

income earned by Grievant from his employment with Marlin Management, plus interest earned on those earnings minus interest on the annual leave and compensatory time payment made to Grievant at the time of dismissal, plus the net medical and dental payments Grievant made which would have been covered under the State medical insurance plan if he had not been discharged, plus payment for 78 1/2 days of annual leave plus whatever annual leave days he earned from the date of the hearing in this matter to the time of this order, minus payment for accumulated annual leave and compensatory time made to Grievant at the time of his dismissal and minus unemployment compensation payments received and not paid back by Grievant;

2. Forty two and one-half days shall be restored to Grievant's annual leave bank;

3. Two hundred twenty hours of compensatory time shall be restored to Grievant's compensatory time bank;

4. Thirty-one days shall be restored to Grievant's personal leave bank;

5. Two hundred eighty-four and one-half days shall be restored to Grievant's sick leave bank, plus whatever sick leave days Grievant earned from the date of the hearing in this matter until the date of this order;

6. Grievant shall be restored to benefits under all group insurance plans to which he was entitled at the time of his dismissal; and

7. The State shall submit to the Board by October 16, 1989, a proposed order indicating the specific amount of back pay and other benefits due Grievant pursuant to this Order. Grievant shall inform the Board in writing by October 26, 1989, whether he agrees with the proposed order, and, if not, shall notify the Board of specific areas of disagreement. If necessary, a hearing on these issues will be held at 11:30 a.m. on November 2, 1989, in the Board hearing room.

Dated this 5th day of October, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh
Charles H. McHugh, Chairman

William G. Kamsler, Jr.
William G. Kamsler, Jr.

Louis A. Toepfer
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