

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES')	DOCKET NO. 90-74
ASSOCIATION (RE: REFUSAL)	
TO PAY STANDBY PAY))	

MEMORANDUM AND ORDER

Statement of Case

At issue is whether the Labor Relations Board should grant the Request For A Stay Pending Appeal filed in this matter by the State Department of Social and Rehabilitation Services, Division of Social Services ("Employer"), on January 12, 1993. By such request, the Employer is seeking to stay, pending appeal by the Employer, the Board Order of March 18, 1992, 15 VLRB 71; as amended by Order of November 5, 1992. 15 VLRB 443; and as made final by order of December 10, 1992. Therein, the Board concluded that the Employer violated the Contract between the State and the Vermont State Employees' Association ("VSEA"), and the Division's own policy, by requiring employees, while they were on a purported "available" status, to be reachable and to be able to respond as if they were on "standby" status. As a remedy, the Board ordered that the employees be awarded back pay, plus interest, for all hours such employees were assigned to be on "available" status, by compensating them as if they were on "standby" status for such hours.

The Employer filed a memorandum in support of its request for a stay at the time such request was filed. The Vermont State Employees' Association ("VSEA") filed a memorandum in opposition to such a request on February 11, 1993. The Board considers the Employer's request for a stay pursuant to 3 VSA §1003, which

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.

MAJORITY OPINION

In determining whether to grant a stay, we apply the following three-part test: 1) whether the party seeking the stay will suffer irreparable harm if the stay is not granted, 2) whether 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 VSEA (Re: Post Assignments), 12 VLRB 30 (1989). VSCFF, AFT Local 3180, AFL-CIO and Vermont State Colleges, 11 VLRB 1 (1988). Aff'd, Unpublished Decision, Supreme Court Docket No. 87-224 (April 5, 1988).

In applying the three-part test, we first review the respective contentions of the parties. The Employer contends that, if a stay is not granted, the Employer will suffer irreparable harm in the event the Employer prevails on appeal. The Employer reasons that, since the Board has ordered the Employer to pay sixteen separate employees approximately fifty thousand dollars in back pay and interest, the recoupment of such sums from so many employees would entail difficulty given the necessity of sixteen separate collection actions against such employees. Moreover, the Employer contends that there is no guarantee that the Employer would be able to successfully retrieve all the money paid out and, even if the Employer was so successful, the Employer will not be made whole since it will not receive the benefit of accrued interest on the money.

The Employer further contends that, on the other hand, no harm will come to employees if a stay is not granted since they

are assured of receiving their standby pay, plus interest, if the Board is affirmed on appeal. Finally, the Employer contends that there is a public interest in preserving public resources against unnecessary expenditures. The Employer indicates that it is agreeable to placing standby pay in escrow until a decision is rendered by the Supreme Court.

VSEA contends that the fact that the Employer may experience some difficulty in recouping the payments to employees is not sufficient to show irreparable harm. Moreover, VSEA contends that the potential collection problems are overstated. VSEA contends that the Employer could withhold sums from employees' paychecks. Alternatively, VSEA reasons, the Employer could eliminate the need for a collection action against any employee by reaching an agreement with employees to either make immediate repayment or consent to withholding from their paychecks.

VSEA further contends that issuance of a stay will substantially harm the involved employees. VSEA cites the lengthy period employees have been waiting for compensation to which the Board has determined they are entitled. Finally, VSEA contends that the public interest is best served by denial of a stay. VSEA contends that granting a stay will waste public resources since the interest due employees will continue to accrue until the conclusion of litigation. Also, VSEA contends that a stay denial will further the public policy requiring timely and appropriate compensation to employees for work performed.

In applying the applicable test for determining whether a stay will be granted, we first discuss whether the Employer will suffer irreparable harm if the stay is not granted. We conclude

that, in the event the Board is reversed on appeal, irreparable harm will occur to the Employer if a stay is not granted. We so conclude due to the difficulties which the Employer will experience in timely recouping payments made to employees. It is not unreasonable to assume that many employees will expend payments which they receive prior to the conclusion of this appeal. Under such circumstances, the Employer would face practical problems in quickly recovering payments made.

The suggestions offered by VSEA do not provide much assistance in this regard. The suggested management action of withholding monies from employee paychecks would not allow timely recoupment of the monies given an average award of approximately \$3000. This would require withdrawals over many pay periods to ensure employees remained able to meet their financial obligations. Also, some employees may no longer be employed by the Employer at the conclusion of the appeal, eliminating paycheck withdrawals as a viable option for such individuals. The VSEA suggestion that the Employer reach agreement with the employees concerning repayment is to unreasonably contemplate the certain occurrences of what are problematic events. We cannot assume that the Employer and sixteen individuals will be able to reach voluntary agreements on repayment provisions.

We recognize, as VSEA points out, that recently the Board concluded that the issue of whether the State could recoup payments was insufficient to demonstrate irreparable harm, and suggested that the parties explore ways to resolve the recoupment problem should it arise. Grievance of Lowell, 15 VLRB 436, 440 (1992). However, in Lowell, the recoupment problem was limited to


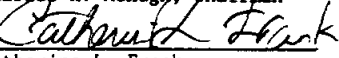
recouping payments which might be made to one employee as a result of a classification review of her position. The Board reasoned that the chance that an employee ultimately might receive a wage increase stemming from a Board order was insufficient to demonstrate irreparable harm. Id. at 441. Here, the recoupment problems involves an amount certain to be paid to sixteen separate individuals. The situation here constitutes much more serious recoupment problems than existed in Lowell.

In sum, the recoupment problems present in recovering payments made to sixteen employees rises to the level of irreparable harm to the Employer.

We further conclude that the irreparable harm to the Employer outweighs the harm to the involved employees. We recognize that there is some harm to the employees. We believe that they are being denied timely compensation to which they are entitled under the Contract. Nonetheless, we do not believe the harm is substantial enough under the circumstances to outweigh the irreparable harm to the Employer if a stay is denied. It is pertinent in this regard that the compensation employees are being denied is not their regular compensation, but is compensation in addition to their regular wages. Also, should the Board decision be upheld, the employees are entitled to interest on the payments they are now being denied.

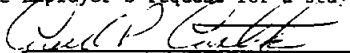
Moreover, the public interest is best served by granting the Employer's request for a stay. The Employer has agreed to place the disputed payments in escrow pending the outcome of the appeal. This will ensure that serious recoupment problems will be

avoided while protecting employees' right to compensation to which they are entitled.


Charles H. McHugh, Chairman

Catherine L. Frank

DISSENTING OPINION

I concur with VSEA that any difficulty which the Employer may ultimately experience in recouping payments to employees is outweighed by the substantial harm to employees in being deprived of an honest day's wages for an honest day's work. It is in the public interest that the State not be able to deny employees timely and appropriate compensation, and such interest would be served in this case by denying the Employer's request for a stay.


Carroll P. Comstock

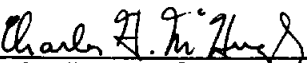

ORDER

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED:

1. The Employer's request for a stay, pending appeal, of the part of the orders of the Labor Relations Board that employees be awarded back pay, plus interest, in this matter is GRANTED; and
2. The Employer forthwith shall place into escrow the amount of back pay, plus interest, in dispute as a result of the orders of the Labor Relations Board in this matter.

Dated this 30th day of April, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman

Catherine L. Frank