VERMONT LABOR RELATIONS BOARD

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| GRIEVANCES OF: | ) | |
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| GENE MCCORT | ) | DOCKET NO. 91-57 |
| | ) | DOCKET NO. 92- 9 |
| | ) | DOCKET NO. 92-26 |

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the Request For Stay Pending Appeal filed in this matter by the State of Vermont, Agency of Transportation ("Employer"). By such request, the Employer is seeking to stay, pending appeal by the Employer, the Board Orders of March 8 and April 8, 1993. Therein, the Board ordered the rescission of various actions taken against Gene McCort ("Grievant") culminating in his dismissal from employment, reduced the dismissal to a 30-day suspension, and directed that Grievant be reinstated with back pay to his position as Auditor C with the Employer. 16 VLRB 70.

The Employer filed a memorandum in support of its request for a stay. Grievant filed a memorandum in opposition to such request. The Vermont State Employees' Association ("VSEA") filed an Application to Intervene. VSEA contends that, even though it does not represent Grievant in this matter, it has an interest in the Board's interpretation of the right of the Employer to appeal a Board decision in a disciplinary matter under the State-VSEA collective bargaining agreement for the Non-Management Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract"). VSEA contends that the Contract explicitly prohibits an appeal in a case such as this one.

On June 10, 1993, the Labor Relations Board issued a Memorandum and Order on the Employer's stay request. The Board granted VSEA's Application to Intervene, and denied the Employer's stay request. The Board hereby withdraws the Memorandum and Order issued on June 10, and substitutes this decision in its place. We continue to hold that VSEA has an interest in this matter, and grant VSEA's Application to Intervene. However, we modify our conclusions with respect to the Employer's stay request.

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". In determining whether to grant a stay in the past, we have applied 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 Lowell, 15 VLRB 436, 437 (1992).

In our June 10 decision, we concluded that, under the unique circumstances of this case, it was appropriate to add a fourth prong to this three-part test: whether the party seeking to stay has made a showing of likelihood of prevailing on the merits of the appeal. This is traditionally considered by courts, along with the other three considerations, in deciding whether to issue stays. Virginia Petroleum Jobbers' Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1959). Although we have declined in the

past to add this fourth prong to our three-part test; Lowell, 15 VLRB at 437; the Board concluded in the June 10 decision that the circumstances here resulted in adding the fourth prong.

In reaching this conclusion, the Board relied on Appendix B of the Contract, which provides that the "State and VSEA mutually agree not to appeal any VLRB decision in a suspension or dismissal case in which the VLRB exercised its authority to impose a lesser form of discipline except where dismissal was for *a reason for which the Agreement allows the State to dismiss an* employee immediately". The Board concluded that, since Grievant was not dismissed for a reason for which the Contract allows the State to dismiss an employee immediately, the State has agreed pursuant to the Contract not to appeal the Board decision to reduce Grievant's dismissal to a 30-day suspension. The Board concluded that it was not probable the Employer would succeed on the merits of an appeal which the Contract prohibits. The Board further concluded that the Employer will not suffer irreparable harm by our decision not to stay a decision which the State has agreed not to appeal, and that Grievant would be substantially harmed by any further delay in being reinstated, and receiving back pay, under the circumstances. The Board determined further that it was in the public interest to deny the stay.

However, in reaching this conclusion, the Board believed that there was no doubt under the Contract that the Employer could not appeal the Board decision. The Board did not consider Article 14, Section 10, of the Contract which provides that "(t)he memorandum of agreement dated 4-26-89 shall remain in

effect until 6-30-91, unless extended by mutual agreement of the parties". The cited April 26, 1989, memorandum is the above discussed Appendix B.

Since the Contract remained in effect until June 30, 1992, there may have been a one-year period under the Contract where the Employer had not negotiated away its ability to appeal. The successor collective bargaining agreement, effective July 1, 1992 to June 30, 1994, again incorporates the provisions of Appendix B as part of the Contract. Since Grievant was dismissed on May 22, 1992, there is a question under the Contract whether the Employer had in fact waived its ability to appeal the Board's decision. Given the existence of this question, which we do not attempt to answer, we now conclude that it is not appropriate for us to consider the probability of the Employer succeeding on the merits in weighing whether to stay our decision.

Thus, in determining whether to grant a stay, we apply our usual 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.

In applying this test, we discuss separately Grievant's reinstatement and the payment to him of back pay. In deciding whether to stay our decision ordering Grievant's reinstatement, we conclude that the Employer will not suffer irreparable harm by ordering Grievant's reinstatement. As we indicated in our decision on the merits, Grievant was by all indications a capable

auditor during his tenure of employment. 16 VLRB at 127. This leads us to conclude that the Employer will be able to obtain productive work from Grievant during the appeal period.

On the other hand, issuance of the stay with respect to his reinstatement will substantially harm Grievant. His dismissal occurred more than a year ago, and the appeal may take another year to be completed. Obviously, an employee is substantially harmed economically and professionally by removal from a job for such an extended period.

Finally, the interests of the public will best be served by reinstating Grievant. The public will gain the benefit of productive work during this period, instead of potentially having to pay a large back pay sum at the conclusion of the appeal for which no work was performed.

We reach a different conclusion with respect to staying our order granting Grievant back pay. The Employer may suffer irreparable harm in this regard if the Employer prevails on appeal. The Employer would be in a position of seeking to recover substantial sums paid Grievant which Grievant may have spent. Grievant may be in no financial position to reimburse the Employer under such circumstances. The recoupment problem where such a significant amount certain is involved is more serious than a situation where an employee ultimately might receive a wage increase stemming from a Board order, which the Board has concluded does not rise to the level of irreparable harm. Lowell, 15 VLRB at 440-41. Grievance of VSEA (Re: Refusal to Pay Standby Pay), 16 VLRB 139 (1993).

We further conclude that the irreparable harm to the Employer outweighs the harm to Grievant. We recognize that Grievant will suffer significant economic harm by staying the back pay order since we believe he is being denied a large amount of back pay to which he is entitled under the Contract. However, he will be able to recover such back pay, with interest, in the event that the Board's decision is upheld.

Moreover, we conclude that the public interest is best served by staying the back pay order. The Employer has agreed to place the disputed amounts in escrow pending the outcome of the appeal. This will ensure that public monies not be spent where serious recoupment problems potentially exist while protecting Grievant's right to compensation to which he is entitled. Grievance of VSEA, 16 VLRB at 143-44.

In sum, requiring the Employer to reinstate Grievant, but not pay him back pay, during the pendency of the appeal best balances the respective interests in this matter.

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

1. The Memorandum and Order issued by the Labor Relations Board in this matter on June 10, 1993, is WITHDRAWN;

2. The Application for Intervention filed by the Vermont State Employees' Association is GRANTED;

3. The Employer's request for a stay pending appeal of the part of the Board's orders that Grievant be awarded back pay, plus interest, in this matter is GRANTED;

4. The Employer forthwith shall place into escrow the amount of back pay, plus interest, in dispute as a result of the orders of the Board in this matter; and

5. The Employer's request for a stay pending appeal of the part of the Board's order that Grievant be reinstated is DENIED.

Dated this 24th day of June, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver