VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 94-17
CYNTHIA GREGOIRE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over back pay due Cynthia Gregoire ("Grievant") as a result of her improper dismissal. On January 27, 1995, the Labor Relations Board issued Findings of Fact, Opinion and Order sustaining the above-entitled grievance. 18 VLRB 78. The Board ordered that the dismissal of Grievant be rescinded and replaced with a 30 day suspension without pay; and that Grievant be reinstated with back pay and benefits from the date commencing 30 working days from the date of her discharge until her reinstatement. 18 VLRB at 108. The Board left the case open for the purpose of determining the specific back pay and other benefits due Grievant from the date of her improper dismissal. Id.

The parties have filed a partial stipulation as to back pay and other benefits due Grievant. The parties were unable to agree, however, on whether Grievant mitigated her damages to the extent required by law by making reasonable attempts to earn wages during the period her grievance was pending, and on when Grievant is entitled to reinstatement.

A hearing on those issues was held before Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on February 16, 1995. David Herlihy, Assistant Attorney General, represented the Employer. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. The parties filed post-hearing briefs on

February 21, 1995. On February 21, the Employer also filed a Motion to Admit Documents or Reopen Hearing. Grievant filed a response in opposition to such motion on February 22, 1995.

FINDINGS OF FACT

1. Prior to her dismissal as a Delinquent Tax Compliance Officer with the State Department of Employment and Training on March 14, 1994, Grievant had minimal involvement with Downtown Auto, a business in Barre primarily operated by her husband and primarily engaged in auto body repair work. Grievant's work for Downtown Auto was limited to bookkeeping, and she was paid approximately $500 in total for such work from the time the business opened by June, 1993, until her dismissal.

2. At the time Grievant was dismissed, her hourly rate of pay was $12.05 (Grievant's Exhibit 13, page 1).

3. Subsequent to her dismissal, Grievant and her husband decided that they would work together at Downtown Auto to seek to develop the business. Grievant did not apply for work outside of Downtown Auto, and did not receive any job offers.

4. In the ten months following her dismissal, Grievant worked on a full-time basis at Downtown Auto, and earned a total of $2941.75 during that period. Grievant received $326.00 in wages during the second quarter of calendar year 1994, $765.75 during the third quarter of the year, $1675.00 during the fourth quarter of the year, and $175.00 during January of 1995 (Grievant's Exhibit 1A).

5. Following her dismissal from State employment, the bulk of the work performed by Grievant at Downtown Auto was auto body repair work. For a period of months, Grievant was in a training

period with respect to learning auto body repair work, and her productive work was limited. Her skills and contributions to the business increased over time.

6. By the fourth quarter of 1994, Grievant's skill levels had increased to the point where she could do more productive auto body repair work such as sanding, surface preparation, and finish work after painting. Brooks Duquette also was employed as an auto body person during this period. Downtown Auto has grown in size and success during the period in which Grievant has worked as an auto body repair person. The income of Grievant's husband from the business has more than doubled in the past year.

7. The Employer would be obligated to pay Grievant the sum of $17,729.06 in gross pay, less the amount of all appropriate payroll deductions, if Grievant fully mitigated her damages.

OPINION

We first address the Employer's motion to admit documents or, in the alternative, to reopen the hearing for the same purpose. The proposed exhibits are documents prepared by Grievant and her husband setting forth their wages, which documents were presented to the Employer. Grievant objects to the admission of these exhibits, and the reopening of the hearing, on the grounds that the Employer had a full and fair opportunity to submit the documents at the hearing on February 16, 1995, and chose not to do so.

Section 12.17 of Board Rules of Practice provides that "(m)otions for leave to reopen a hearing because of newly-discovered evidence shall be timely made" and that the "Board may, in its discretion . . . reopen a hearing and take further testimony at any

time". There is no claim by The Employer that the exhibits were newly discovered evidence, so we are left to decide whether to otherwise exercise our discretion to reopen the hearing and allow the admission of exhibits.

We deny the Employer's motion. The Employer had the opportunity to offer any relevant evidence at the February 16 hearing, and the Employer's motion does not allege that any new information, including the exhibits, has come to light since the hearing which was not known at the time of the hearing. Hartford Career Fire Fighters Association and City of South Burlington, 6 VLRB 337, 338 (1983).

We turn to the issue of the back pay due Grievant. The Employer contends that Grievant is not entitled to any back pay award because she made no effort to find interim employment, and instead worked for her husband's business at a job paying little for which she had no skills. If Grievant is entitled to back pay, the Employer contends that the award should be adjusted for the actual value Grievant gained by working at the business, not her own valuation. Grievant contends that her full-time employment at her husband's business since her dismissal satisfied her obligation to mitigate her damages.

The proper remedy for an improper dismissal generally 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 since that date. In re Brooks, 135 Vt. 563, 570 (1977). An employee has a general duty to mitigate damages by making reasonable efforts to find interim work. Grievance

of Hurlburt, 9 VLRB 229, 232 (1986). Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. Id. at 226. Liability for back pay arises out of the employer's improper action and, accordingly, the employer must establish any claim of lack of mitigation. Id.

The Employer makes the contention that Grievant should not receive any back pay award due to a complete failure to mitigate damages, by working for her husband's business at a job paying little and for which she had no skills. This contention is based on 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. NLRB v. Westin Hotel, 758 F.2d 1126, 1130 (6th Cir. 1985). NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972).

We recognize that this is the general rule in back pay cases but, like many general rules, there are recognized exceptions to it. One such exception arises from the situation where a discharged employee becomes self-employed or engaged in new businesses. In Grievance of Merrill, 12 VLRB 222 (1989), the Board concluded that the employer had not met the burden of proving that a discharged employee had not properly mitigated his damages when he left an income-producing truck driver position to work full-time on his new business even though he had no expectation of immediate earnings. 12 VLRB at 227. At the time, Grievant's case was on appeal to the Supreme Court, his dismissal had occurred three and one-half years earlier, and Grievant had no expectation as to when the Supreme

Court would decide his case or, further, what the outcome might be. Id. The Board concluded that the employer had not shown that this was a reckless business venture or an unreasonable financial move. Id. at 227.

In addition to our own precedent, we note that the Second Circuit Court of Appeals has recognized that 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. Hazard v. NLRB, 917 F.2d 736, 738 (2d Cir. 1990). NLRB v. Hazard, 959 F.2d 407, 408 (2d Cir. 1992). This decision was in line with another general rule accepted by courts that a discharged employee is not entitled to back pay to the extent he or she fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason. Madison Courier, 472 F.2d at 1317. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965).

In applying these precedents and the realities of Grievant's situation upon her dismissal, we conclude that the Employer has not met the burden of proving that Grievant failed completely in her obligation to mitigate her damages. The fact that Grievant had been dismissed from her job with the State due to a breach of the trust given her by the Employer, 18 VLRB at 102, practically limited her ability to secure comparable positions with other employers. An

employee should not be faulted for reasonably lowering expectations concerning alternative employment. Merrill, 12 VLRB at 226-27.

Further, the opportunity for Grievant to work full-time in her husband's business presented itself upon her dismissal. This excused her obligation to first seek alternative employment if working in the business was otherwise reasonable. In this regard, it should be noted that the mitigation doctrine as applied in labor law furthers "the healthy policy of promoting production and employment". Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941). The fact that Grievant took advantage of the opportunity to become gainfully employed, and become a productive member of the work force, furthered the policy behind the mitigation doctrine.

Also, the Employer has not shown that Grievant was committing herself to a reckless business venture or making an unreasonable financial move. Although the evidence indicates that she had to undergo a substantial period of training before her productivity as an auto body repair person substantially increased, the business grew in size and success during the period she was employed. Her earnings increased substantially over time, although after ten months in the business her earnings were still well below her wages as a state employee. Lower earnings are to be expected during the period a new business is getting established, and it is not unreasonable for an employee to accept lesser wages in the short-term if there is a reasonable expectation that earnings eventually will at least approximate earnings in the state job. The Employer has not presented evidence indicating that Grievant acted unreasonably by accepting this employment. As discussed later, this

does not mean that the actual wages reported by Grievant in the new business were sufficient to completely fulfill her obligation to mitigate damages.

It should also be noted that in this case, unlike cases concluding that employees engaged in new businesses did not properly mitigate their damages when they declined offers of substantially equivalent employment to the position from which they were discharged, e.g., Hazard, 959 F.2d at 407-09, the Grievant declined no such job offers.

In sum, we conclude that the Employer has not met the burden of proving that the acceptance by Grievant of work with her husband's business means that Grievant completely failed in her obligation to mitigate her damages. Nonetheless, the Employer contends that, even if Grievant is entitled to some back pay, the award should be substantially reduced. This is because, the Employer claims, Grievant's actual wages undervalued her contributions to the business. The Employer requests that the Board deduct from any back pay obligation one-half the earnings increase which the business achieved during the time Grievant has been employed there. The Employer contends that one-half the earnings increase is $7,898. In addition, the Employer contends that any backpay award would have to be adjusted further for the value of Grievant's apprenticeship, which the Employer contends should be valued at the difference between Grievant's pay and what she would have earned working full-time at minimum wage during the period.

An employer may meet the burden of mitigating its liability by establishing that the employee has willfully incurred losses with

respect to interim employment, and thus did not earn wages that without excuse should have been earned. Phelps Dodge, 313 U.S. at 198-200; Brooks, 135 Vt. at 570. Given the state of the evidence presented to us by the Employer, we can make no conclusion that Grievant's wages undervalued her contributions to the business to the extent requested by the Employer. The evidence provides no valid basis by which to conclude that the backpay obligation should be reduced, in the first instance, by one-half the earnings increase which the business achieved during the time Grievant has been employed there. If the Employer wants us to make such a determination, it should have presented much more evidence than set forth in the sparse record before us. The Employer could have met its burden in this regard by presenting such evidence as the gain in the fair market value of the business during the time Grievant was employed, Grievance of Merrill, 15 VLRB 24, 28-29 (1992), and the hourly amounts Grievant's work was being billed to customers of the business. The failure of the Employer to present such evidence defeats its claim in this regard.

This does not mean, however, that we conclude that Grievant has fully mitigated her damages. We agree with the Employer that Grievant's backpay award should be adjusted by the difference between Grievant's wages from the business and what she would have earned working full-time at minimum wage during the period. This is because, if Grievant's husband had hired another individual to do the work performed by Grievant, that individual would have to have been paid at least minimum wage. As indicated above, we cannot assign a precise value to Grievant's contributions to the business,

but believe it would be inappropriate to assign a value less than the statutory minimum wage to her efforts under circumstances where the business grew in size and success during the period in which Grievant worked as an auto body repair person and Grievant and her husband were drawing from a common pot of earnings. This is an appropriate constructive mitigation result given the state of the evidence.

The result is that the backpay obligation of the Employer is reduced by $3,736.25. This is calculated by taking the sum of what Grievant would have earned from April 25, 1994, to the end of 1994, if she had earned minimum wage working full-time (assuming that she would not have worked on the nine state holidays during this period) (i.e., 171 days X 8 hours a day X 4.25 an hour = $5814.00), plus what Grievant would have earned if she had earned minimum wage working full-time from January 2, 1995 - February 5, 1995 (assuming that she would not have worked on Martin Luther King Day) (i.e., 24 days X 8 hours a day X $4.50 an hour = $864.00), and subtracting from that sum the amount Grievant actually was paid in the business during that period (i.e., $2941.75). 29 U.S.C. §206. 21 VSA §384.

The final issue presented to us by the parties is when Grievant is entitled to reinstatement to her position pursuant to the January 27 Board Order directing the Employer to reinstate her. The Employer contends that there is no requirement to return Grievant to her position until 30 days from the issuance of the Board's final order on back pay and benefits. Grievant contends that the Employer has been obligated to reinstate Grievant since the January 17 Board Order.

In deciding this issue, we are guided by the Vermont Supreme Court decision, Grievance of McCort (Supreme Court Docket No. 93-370, April 5, 1994). Therein, the employer had appealed from a Board decision declining to stay the part of the Board order reinstating Grievant to his prior position. In its decision, the Court stated: "we note that because the State never obtained from the Board or this Court a stay of the part of the Board's order reinstating Grievant, that provision has been in full force and effect since it was issued". It follows from this statement of the Court that a Board order directing the reinstatement of an employee is in full force and effect upon its issuance unless that order is stayed by the Board or the Court. Since our order directing the reinstatement of Grievant has not been stayed at this point, it is in full force and effect.

ORDER

NOW THEREFORE, based on the foregoing findings of fact, and consistent with the January 27, 1995, Board Order in this matter and the Stipulation and Agreement of the parties dated February 8, 1995, it is hereby ORDERED:

1. The Employer shall pay to Grievant the sum of $13,992.81 in gross backpay covering the period commencing 30 working days from her dismissal through February 5, 1995, less the amount of all appropriate payroll deductions, including but not limited to retroactive payment of any and all benefit premiums for which Grievant would have been responsible had she not been dismissed, and a retroactive adjustment regarding retirement contributions in accord with paragraph numbered eight of the parties' Stipulation and Agreement dated February 8, 1995. In addition, Grievant shall receive backpay; minus wages earned or wages for work performed which she would have earned if she was receiving minimum wage, whichever is greater; for the period between February 6, 1995, and her reinstatement;

2. Grievant shall be treated as though she had been a member of the State medical plan, in which she was enrolled at the time of her dismissal, since her dismissal. Grievant shall be reinstated to all medical and dental benefits plans in which she was enrolled at the time of her dismissal. The Community Health Plan shall reimburse providers or Grievant for medical and dental expenses incurred by Grievant and her dependents since her dismissal in accordance with paragraph numbered five of the parties' Stipulation and Agreement dated February 8, 1995;

3. Grievant's leave banks shall be credited to the following extent: a) 15 days of annual leave, b) 15 days of sick leave. In addition, Grievant's records shall be adjusted to the additional extent necessary to cover the period between February 6, 1995, and her reinstatement, and to ensure she is treated for all leave purposes as if she had never been dismissed on March 14, 1994, nor had any break in State service;

4. Paragraph numbered 8 of the parties' Stipulation and Agreement dated February 8, 1995, relating to Grievant's reinstatement into the Vermont State Employee Retirement Plan, is incorporated herein by reference; and

5. The Employer shall rescind the March 14, 1994, letter of dismissal, and substitute in its place a letter suspending Grievant without pay for the 30 work day period between March 14, 1994 and April 24, 1994.

Dated this 27th day of April, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Carroll P. Comstock

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 94-17
CYNTHIA GREGOIRE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

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, Department of Employment and Training. By such request, the Employer is seeking to stay, pending appeal by the Employer, the Board Orders of January 27 and April 27, 1995. Therein, the Board sustained the grievance of Cynthia Gregoire ("Grievant"). The Board ordered that the dismissal of Grievant be rescinded and replaced with a 30 day suspension without pay; and that Grievant be reinstated with back pay plus interest, reduced by wages earned by Grievant and wages which should have been earned in the interim, and benefits from the date commencing 30 working days from the date of her discharge until her reinstatement. 18 VLRB 78, 108; 18 VLRB 205.

The Employer filed a memorandum in support of its request for a stay. Grievant filed a memorandum in opposition to such request. A hearing on the stay request was held before Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on May 4, 1995. David Herlihy, Assistant Attorney General, represented the Employer. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. The Findings of Fact, Opinions and Orders issued by the Board in these matters on January 27, 1995, and April 27, 1995, are incorporated herein by reference.

FINDINGS OF FACT

1. The Employer's Contribution Section, in which Grievant worked, collects approximately $50 million from employers annually in unemployment insurance contributions. There is presently $1.5 million in delinquent contributions by employers. The three delinquent tax compliance officers in the section, which was the position occupied by Grievant, are involved in the collections process.

2. A monthly report on the status of employer unemployment insurance contribution accounts is provided to the three delinquent tax compliance officers and their supervisor.

3. An individual has been hired as a delinquent tax compliance officer as a replacement for Grievant.

4. Neither Grievant nor her husband presently have health insurance coverage. It would cost Grievant approximately $300 per month in health insurance premiums to obtain coverage for herself and her husband if she is not reinstated by the Employer.

MAJORITY OPINION

We consider the Employer's request for a stay pursuant to 3 V.S.A. §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, 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 McCort, 16 VLRB 248, 249-51 (1993).

In applying this test, we discuss separately Grievant's reinstatement and the payment to her of back pay. The Employer contends that returning Grievant to duties in which she must be trusted with collection of public funds, despite the conclusion of the Board that Grievant committed an act of dishonesty in the course of performing those duties, poses potential for irreparable harm both within the Department of Employment and Training and to the public at large. The Employer contends that actions would have to be taken to oversee closely the accounts assigned to Grievant and protect the security of all other accounts, and that a larger harm looms of injury to public confidence that taxes are collected fairly and honestly. The Employer also claims harm because Grievant has been replaced, and there is no work for her. The Employer contends that these considerations outweigh any harm to Grievant.

We disagree, and conclude that the Employer will not suffer irreparable harm by Grievant being reinstated pending appeal. In our decision on the merits reducing Grievant's dismissal to a 30 day suspension, we concluded that Grievant committed a serious offense by shielding the delinquent account of Downtown Auto, a business primarily operated by her husband and in which she had some involvement, from the normal procedural collection process for employer unemployment insurance contributions. 18 VLRB at 101-102. The Board concluded that her act of handling the Downtown Auto account, in violation of conflict of interest policies which were known to her, compromised her integrity and the trust placed in her. 18 VLRB at 102.

This conclusion by us, however, does not result in the Employer suffering irreparable harm if Grievant is reinstated pending appeal. We also concluded in our decision on the merits that Grievant's strong prior work record of good performance over 13 years of employment, and no previous discipline, meant she is a good candidate for rehabilitation, once a strong message is sent to her that future misconduct similar to that engaged in here will not be tolerated. 18 VLRB at 103. We concluded that a 30 day suspension was an adequate and effective sanction to deter Grievant in the future from engaging in the misconduct demonstrated by her offense. 18 VLRB at 303. Under these circumstances, we conclude that the Employer will be able to obtain productive work from Grievant during the appeal period, and such productive work will outweigh any harm to the Employer caused by any additional security measures or diminishment of public confidence.

We are not persuaded by the Employer's claim that additional burdensome measures will have to be taken to accommodate Grievant's return to work. We also are not persuaded by the Employer's claim that there will be no work for Grievant if she is reinstated pending appeal because she has been replaced. Such an argument taken to its logical conclusion would result in an improperly discharged employee never being reinstated pending appeal since, presumably, the work previously performed by discharged employees has to be performed by other individuals in the discharged employee's absence. We are not inclined to promote such a result. In our decision on the merits, we ordered that Grievant "be reinstated to her position as a Delinquent Tax Compliance Officer with the Employer". 18 VLRB at 108. If we

were to accept the Employer's argument in this regard, we would contravene our previous order.

On the other hand, issuance of the stay with respect to Grievant's reinstatement will substantially harm Grievant. Her dismissal occurred more than a year ago, and the appeal may take more than a year to be completed. Although Grievant is presently employed, her interim wages are much less than what she earned in state employment; 18 VLRB at 206; and she is without health insurance. Obviously, an employee is substantially harmed economically and professionally by removal from a job for such an extended period without a comparable interim job. Grievance of McCort, 16 VLRB at 252.

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. McCort, 16 VLRB at 252. We are not persuaded by the Employer's claim that there will be a significant diminishment in public confidence in taxes being collected fairly and honestly if Grievant is reinstated pending appeal.

We reach a different conclusion with respect to staying our order granting Grievant back pay. In a previous case on a stay of a back pay order stemming from an improper dismissal, we concluded that an employer may suffer irreparable harm and the public interest would not be served if the employer prevailed on appeal, thus presenting a significant risk of the employer being unable to recoup the back pay award from the employee. McCort, 16 VLRB at 252-53.

In this case, the Employer has agreed to place the disputed amounts in escrow pending the outcome of the appeal. In light of the McCort decision and the Employer's agreement to hold the amount of back pay in escrow, Grievant has indicated that she does not oppose the Employer's request to stay the back pay award. This will ensure that public monies not be spent where serious recoupment problems potentially exist while protecting Grievant's right to compensation to which she is entitled. McCort, 16 VLRB at 253.

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

Charles H. McHugh, Chairman

Carroll P. Comstock

DISSENTING OPINION

I disagree with my colleagues' denial of the Employer's request to stay the Board order reinstating Grievant pending appeal. I concur with the Employer that the potential of irreparable harm to the Employer, and the best serving of the public interest, outweigh any harm to Grievant.

Grievant's act of handling the delinquent account compromised her integrity and the trust placed in her to an unsalvageable degree. 18 VLRB at 106. The offense understandably destroyed supervisors' confidence in Grievant responsibly performing her fiduciary duties as a Delinquent Tax Compliance Officer. Id. Under these circumstances, I conclude that supervisors' loss of trust in

Grievant is irreparable, and the workplace atmosphere would be adversely affected to a significant degree if she is reinstated pending appeal. This is detrimental to a well-functioning department of state government, and would cause irreparable harm to the Employer. This harm outweighs any harm to Grievant.

Leslie G. Seaver

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, and consistent with the January 27, 1995, and April 27, 1995, Board Orders in this matter, it is hereby ORDERED:

1. 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;

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 Board in this matter; and

3. 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 5th day of May, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Carroll P. Comstock