

VERMONT LABOR RELATIONS BOARD

MILTON EDUCATION AND)	
SUPPORT ASSOCIATION)	
)	
v.)	DOCKET NO. 96-63
)	
MILTON BOARD OF SCHOOL)	
TRUSTEES)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over the back pay due custodians who were laid off when the Milton Board of School Trustees ("Employer") contracted out its custodial services on July 1, 1996. On June 6, 1997, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order, and concluded that the Employer's actions were an unfair labor practice in violation of 21 V.S.A. Section 1726(a)(1) and (5), and that the custodians were entitled to reinstatement with back pay and other benefits. The Board left the case open for the purpose of determining the specific back pay and other benefits due the custodians from the date of their improper discharge to the date of their reinstatement. 20 VLRB 114, 131.

The Employer and the Association were unable to stipulate to a proposed order on the specific amount of back pay and other benefits due the laid off custodians. On September 8, 1997, the parties filed a stipulation with the Board which narrowed the issues in dispute to three contested issues. A hearing was held before Board Members Catherine Frank, Chairperson, and Carroll Comstock on September 11, 1997. Vermont-NEA General Counsel Joel Cook represented the Association. Attorney Dennis Wells represented the Employer.

At the September 11 hearing, the parties stipulated to facts and resolved one of the issues in dispute, leaving two remaining issues for the Board to decide: 1) "the extent, if any, beyond receipt of back pay," that vacation, personal leave and bereavement leave "categories should be accounted for in making the employees whole"; and 2) "the extent to which Eugene Ballard is owed back pay, given that subsequent to being laid off he applied for and has been receiving retirement benefits under the Vermont Municipal Employees Retirement System". The parties filed post hearing briefs on September 26, 1997.

FINDINGS OF FACT

1. Eugene Ballard was between 62 and 65 years of age when he was laid off from his custodial position with the Employer. Shortly after his layoff in June or July 1996, Ballard applied for and was granted retirement benefits from the Vermont Municipal Employees Retirement System ("VMERS"). He also applied for and received Social Security retirement benefits; such benefits were and remain at a reduced level because Ballard was under 65 at the time he started receiving such benefits. Ballard continues to receive VMER and Social Security retirement benefits.

2. Recipients of Social Security retirement benefits are penalized by a reduction in benefits if employment earnings exceed a certain amount. Ballard's earnings limit before there is a reduction in benefits is approximately \$8,100 per year.

3. In September 1996, Ballard applied for unemployment compensation benefits and received his full complement of benefits for 26 weeks. During this 26 week period, Ballard fulfilled his obligation to the Vermont Department of

Employment and Training by actively seeking full time employment and participating in a program with the Vermont Job Service.

4. Except for the 26 week period in which he received unemployment compensation benefits, Ballard applied for part time employment with various employers, including the contractor the Employer hired to perform its custodial services.

5. Ballard did not apply for full time employment because of the reduced benefit penalty associated with his receiving Social Security retirement benefits.

6. Prior to the Employer contracting out its custodial services, it did not employ part time custodians.

7. Under the terms of the collective bargaining agreement between the Association and the Employer, employees were entitled to earn three days of personal leave and 10 - 20 days of annual leave, depending upon years of experience with the Employer. Employees were not permitted to carry over such leave to the succeeding school year.

OPINION

The parties have presented two stipulated issues to be resolved by the Board. We limit our opinion to consideration of these stipulated issues. Each will be discussed in turn.

The first stipulated issue the Board must decide is the extent, if any, beyond receipt of back pay, that vacation and personal leave categories should be accounted for in making employees whole. The Association did not pursue the other disputed leave category, bereavement leave, at the hearing or in its post hearing brief, and we

deem that issue waived by the Association.

The Association contends that the custodians are entitled to receive the monetary value of the vacation and personal leave days they earned for the period of time that they were unlawfully laid off; that such monetary value represents the benefit they lost by being laid off because leave accruals cannot be carried forward into succeeding school years. The Employer contends that employees receive the same amount of pay whether or not they use their leave time, and that awarding employees monetary compensation for leave accruals would result in "double pay" for such days and make employees more than whole.

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). c.f., Kelley v. Day Care Center, Inc., 141 Vt. 608, at 615-616 (1982). To make employees whole is to place them in the position they would have been in had they not been improperly dismissed. Grievance of Benoit, 8 VLRB 165, 168 (1985).

We conclude under the circumstances of this case that the Employer should not be required to pay employees the monetary value of any leave accruals that cannot be carried over into the succeeding school year under the terms of the collective bargaining agreement. To do so would make the employees more than whole. To the extent that our conclusion differs from the views expressed by the Board in Grievance of Merrill, 8 VLRB 383, 386 (1985) (grievant awarded a payment representing the monetary value of annual leave days which exceeded those

permitted to be carried over and stored in a leave bank); we believe that our holding more closely adheres to the standard that employees be made whole.

The second stipulated issue presented to us is the extent to which Eugene Ballard is owed back pay, given that subsequent to being laid off he applied for and has been receiving retirement benefits under VMERS. The Association contends that Ballard's back pay award should not be reduced by any retirement benefits he received from VMERS. The Employer, in its post hearing brief, expands the issue stipulated to by the parties. The Employer asks us to deny Ballard not only back pay but reinstatement as well because Ballard did not actively seek alternative full time employment after he was laid off by the Employer. We decline to decide this expanded issue, and limit our opinion to the issue stipulated to by the parties as set forth above.

The Association acknowledges that interim earnings, such as unemployment compensation, should be deducted from a back pay award. It then differentiates between unemployment compensation and retirement benefits, asserting that retirement benefits are a collateral source of income and should not be considered in the mitigation of a back pay award. Given the state of the evidence before us and consistent with Board practice, we conclude it is appropriate to treat VMERS' benefits in the same way as unemployment compensation benefits. Such benefit should be deducted from Ballard's back pay award to the extent that he retains the benefit. Otherwise, Ballard would be made more than whole because he would receive monies deriving directly from his employment with the Employer in excess of what he would have earned had he not been laid off.

In the event that Vermont municipal employees are permitted to repay VMERS' benefits back into the retirement system, return to the municipal workforce and continue contributing into the retirement system, Ballard should be allowed to exercise this option. If Ballard exercises this option, none of his VMERS' benefits that he repays should be deducted from his back pay award. This would serve to make Ballard whole for the Employer's improper action.

ORDER

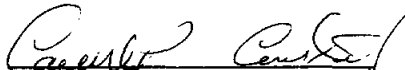
Now therefore, based on the foregoing findings of fact and the foregoing reasons, and consistent with the Board's Order of June 6, 1997, it is hereby ORDERED:

1. The Milton Board of School Trustees are not required to include the monetary value of any vacation and personal leave days, which could not be used and carried over from the 1996 - 1997 school year, in the back pay awards for the custodians who were laid off due to the contracting out of custodial services by the Milton Board of School Trustees on July 1, 1996; and
2. The Milton Board of School Trustees may deduct from Eugene Ballard's back pay award any monies he received as a retirement benefit from the Vermont Municipal Employees' Retirement System consistent with this opinion to the extent that Ballard does not repay VMERS' benefits back into the retirement system.

Dated this 19th day of November, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Carroll P. Comstock