

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-67
LESLIE BROWN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over back pay and other benefits due Leslie Brown (“Grievant”) as a result of his improper dismissal by the State of Vermont Agency of Transportation (“Employer”). On October 24, 2001, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order, concluding that Grievant was dismissed without just cause. 24 VLRB 159. The Board reduced the dismissal to a 30 day suspension, and determined that Grievant was entitled to reinstatement with back pay and other benefits. Id. The Board left the case open for the purpose of determining the specific back pay and other benefits due Grievant from the date commencing 30 working days from the date of his improper discharge to the date of his reinstatement. Id.

The parties entered into a partial stipulation concerning back pay and other benefits, but have not reached agreement on certain issues. Specifically, the parties disagree whether Grievant is entitled to four days of compensatory time due to the “Special Snow Season Status” article of the Contract for the 2000-2001 winter, and also disagree whether Grievant’s back pay should be reduced by wages he earned during his interim employment working holidays observed by the State.

An evidentiary hearing was not held on these issues in dispute because the parties stipulated to the facts on these issues. The Findings of Fact contained herein consist of the facts stipulated to by the parties on disputed issues as well as agreements reached by

the parties on other issues. Grievant and the Employer filed briefs on the disputed issues on February 15 and 19, 2002, respectively.

### FINDINGS OF FACT

1. By Order dated October 24, 2001, the Labor Relations Board ordered that Grievant be reinstated to his position as Transportation Area Maintenance Supervisor in the Irasburg Garage. Grievant returned to work at that position on or about December 16, 2001.

2. The parties agree that, absent a requirement that Grievant be awarded an overtime payment estimating the amount of time that Grievant would have expected to have worked had he not been dismissed, Grievant is not entitled to receive back pay (State's Back Pay Exhibit 1).

3. By stipulation signed by the parties on January 9, 2002, the parties agreed that as of December 16, 2001, in accordance with the Board's Order in this grievance, Grievant is to be credited the following leave accruals/restoration:

a) 161.10 hours of annual leave, representing Grievant's annual leave balance at the time of his dismissal, plus additional annual leave at the rate of 6.46 hours per pay period beginning 30 days after the effective date of his dismissal. As of December 15, 2001, this sum adds up to an additional 187.34 hours of accrued annual leave.

b) 64 hours of personal leave which Grievant accrued on July 1, 2001.

c) 1,970 hours of sick leave to Grievant, representing his sick leave balance at the time of his dismissal, plus additional sick leave at the rate of 6.46 hours per pay

period beginning 30 days after the effective date of his dismissal. As of December 15, 2001, this sum adds up to an additional 187.34 hours of accrued sick leave.

d) 8.5 hours of compensatory time to Grievant's compensatory time balance. The parties have not resolved the issue of whether Grievant is entitled to additional compensatory time which he has been awarded in the past as part of special snow season status.

4. At the time of his dismissal, Grievant paid \$9,448.56 to the Vermont State Retirement System to purchase 2.121953 years of "air time" in order to bring his total creditable service to a full 30 years, thereby qualifying him to become eligible to begin receiving retirement benefits upon his dismissal. The Retirement System will reimburse Grievant the money he paid to purchase the above "air time" and will reduce his creditable service accordingly.

5. Following his dismissal, Grievant received retirement benefits from the Vermont State Retirement System, which were used by the State to offset his back pay award. The Agency of Transportation will reimburse the Retirement System all sums necessary to restore Grievant to the position he would have been in had he received a thirty day suspension and continued in full-time employment, as opposed to being dismissed and entering retirement status.

6. The Employer and Grievant agree to pay to the Retirement System their respective contributions in order to restore Grievant's salary and service credit to the level it would be had he not been dismissed. The parties agree that they will each pay the Retirement System their respective shares of contributions to Grievant's retirement account as determined by the Retirement System, which contributions shall be calculated

as though Grievant had received his base salary during the period of his termination. Neither party is obligated to pay contributions for the 30 day period representing the suspension imposed on Grievant by the Labor Relations Board.

7. The parties agree that the State will reimburse Grievant for dental expenses incurred by him and his eligible covered dependents to the extent that would have been required by the terms of the Dental plan. In order to receive this reimbursement, Grievant will submit his and his eligible covered dependent's bills to the Department of Personnel's Employee Benefits and Wellness Division.

8. Credit for compensatory time earned as a result of being on "Special Snow Season Status" is generally given to the employee in May, following the completion of snow season. During the winter of 1999-2000, Grievant received 4 days (32 hours) of compensatory time as a result of being on "Special Snow Season Status". Grievant was dismissed effective September 21, 2000, and did not work the 2000-2001 snow season (Grievant's Back Pay Exhibit 6 at 16, Pay Period Ending April 22, 2000).

9. After his dismissal, Grievant obtained employment as a carpenter for Taylor Made Homes. While there, he received 4 paid holidays: New Years, Independence Day, Thanksgiving and Christmas. He worked on the following days, which are designated holidays under Article 32 of the Contract, and observed by the State as follows: Columbus Day, October 9, 2000 (floating holiday); Veteran's Day, November 10, 2000; the day after Thanksgiving, November 24, 2000 (compensatory time only holiday); Martin Luther King's Birthday, January 15, 2001 (compensatory time only holiday); Washington's Birthday, February 19, 2001; Town Meeting Day, March 6, 2001; Memorial Day, May 30, 2001; Bennington Battle Day, August 16, 2001; Labor

Day, September 3, 2001; Columbus Day, October 8, 2000; and Veterans Day, November 12, 2001. Grievant earned \$13.00 per hour (\$104.00 per day) when he worked for Taylor Made Homes on the first seven days listed above, and \$14.00 per hour (\$112.00 per day) when he worked on the other four days listed above.

### OPINION

The parties disagree whether Grievant is entitled to four days of compensatory time due to the “Special Snow Season Status” article of the Contract for the 2000-2001 winter, and also disagree whether Grievant’s back pay should be reduced by wages he earned during his interim employment working holidays observed by the State.

### General Standards in Back Pay Cases

The Vermont Supreme Court has held that if the Board finds lack of just cause for dismissal, its authority is limited to remedying the improper dismissal; with the proper remedy generally being 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 from that date. Brooks, 135 Vt. at 570. 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 Lilly, 23 VLRB 129, 137 (2000). Grievance of Benoir, 8 VLRB 165, 168 (1985).

### Special Snow Season Status Issue

Grievant seeks compensatory time for special snow season status during the 2000-2001 winter pursuant to Article 78 of the Contract covering the Supervisory Unit, which provides in pertinent part:

1. In recognition of outstanding dedication and service to the people of the State of Vermont during the winter storm season, Agency of Transportation personnel in the classes listed in subsection (3), below who are normally required to work overtime hours on special snow season shall be on "Special Snow Season Status" for the duration of the special snow season, and eligible for the benefits of this Article unless requested otherwise by the employee. "Special Snow Season Status" shall mean that an employee must be immediately reachable by telephone and must report to work within 30 minutes of their normal commute, whichever is greater, upon being reached.
2. Notwithstanding any contrary provision of the On Call, Standby Duty and Available Status Article Sections 1 or 2, employees shall be compensated by receiving up to four (4) days of compensatory time off, at the rate of one day of compensatory time per complete calendar month of Special Snow Season service, which shall be the only compensation for being on "Special Snow Season Status" for the entirety of the special snow season, which shall begin on December 1<sup>st</sup> and run until April 1<sup>st</sup>.
3. The classes of employees generally eligible for this option are:  
Area Foreman  
...

The Employer contends that Grievant is not entitled to the four days of snow season compensatory time. The Employer notes that the Board Order provided that Grievant would receive back pay "for all hours of his regularly assigned shift" and special snow season status was not part of Grievant's regularly assigned shift. The Employer further contends that any award of snow season compensatory time to Grievant is speculative because employees have the right under Article 78 to opt out of being required to work overtime hours on special snow season status, and Grievant could have selected the opt-out option.

Grievant contends that such an assertion places an impossible burden on him to establish attendance at a job that the State wrongly forbade him from attending. Grievant contends that to adopt the State's rationale is to reward it for taking improper disciplinary action, and asserts that to deny him the benefit is to place him in a worse position than he would have been in had he not been improperly dismissed.

In past cases, the Board has addressed whether improperly dismissed employees are entitled to overtime compensation. The Board has held that back pay awards generally do not include overtime pay because it is not predictable and not part of the regular workweek. Grievance of Lilly, 23 VLRB 129, 139 (2000). Grievance of Goddard, 4 VLRB 189, 190 (1981). However, in a case where an improperly dismissed employee sought overtime pay for roll call during the period of his dismissal, the Board concluded that was an appropriate remedy. Lilly, 23 VLRB at 139-140. The Board relied on roll call being predictable and part of the employee's regular schedule. Id.

We conclude that snow season compensatory time is more similar to the latter case. This is not a situation where the amount of compensation beyond regular pay is unpredictable. As long as employees do not request to be removed from special snow season status, they are in such status and receive a predetermined amount of compensatory time for it at the end of the snow season. Grievant previously received payment for being in such status prior to his dismissal, and this creates a presumption that he would have continued such status absent his dismissal. Thus, we conclude he is entitled to receive compensatory time for special snow season status during the 2000-2001 winter to make him whole and place him in the position he would have been in but for his improper dismissal.

### Holidays Worked by Grievant During Interim Employment

Grievant contends that his back pay should not be reduced by wages he earned working holidays during his interim employment. Grievant maintains that to do so would penalize him for hard work that he performed on holidays observed by the State that he ordinarily would not have worked had the Employer not dismissed him. Grievant requests that the Board apply a rule that any hours an employee works in an interim job over and above the normal state work week should not be deducted from the back pay award.

The Employer cites the statement in the Board Order that “Grievant shall be awarded back pay and benefits . . . for all hours of his regularly assigned shift, minus any income received by Grievant in the interim” in contending that Grievant’s back pay should be reduced by holidays worked by Grievant during interim employment. The Employer asserts that Grievant should not be granted a windfall due to his having voluntarily worked on State-observed holidays.

Where an employee is claiming an exception to the general rule that post-dismissal earnings are deducted from an employer's back pay liability, it is then the employee's burden to justify such exception. Grievance of Sullivan, 10 VLRB 71, 75 (1987). The only such exception recognized by the Board to date has to do with “moonlighting” cases. The employee must establish that the employment was truly "moonlighting", and that he or she would have been employed in the non-state employment even if still employed by the State, to have earnings from such employment not deducted from a back pay award. Grievance of Taylor, 15 VLRB 275, 281-82 (1992). Id.

We conclude it would be inappropriate to carve out another exception to the general rule for holidays worked during interim employment. Unlike “moonlighting” cases, this is not a situation where Grievant would have received the involved earnings for the non-state employment if he was still employed by the State. Instead, the fact Grievant worked holidays in his interim employment simply reflects that his working hours and conditions of employment differed in that job from his State employment.

If we accept Grievant’s position on this issue, a logical extension of the ruling would be to open the door to not deducting interim earnings in other situations where hours and conditions of employment in interim jobs differed from the State job. Potential examples are working shifts with different hours and a requirement to work on some days of the week different from the State job. We are not inclined to create such a result.

#### Grievant’s Rate of Pay

In his brief, Grievant indicates that since being reinstated he has not received pay raises he is entitled to under the Contract for the period he was improperly dismissed. Grievant requests that the Board order the Employer to pay him these wages, plus interest, from the date each underpayment should have been paid to him.

Grievant is entitled to be paid at a rate giving him credit for the period in which he was separated from state service. Grievance of Taylor, 15 VLRB 275, 282 (1992). This is necessary to make him “whole” since it places him in the position he would have been in had his employment not been improperly terminated. Id. The Employer does not dispute that Grievant is entitled to the pay raises, and upon issuance of this Order the Employer should adjust Grievant’s pay to reflect what he is entitled to under the Contract.

## ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The stipulations by the parties set forth in Findings of Fact Nos. 2 through 7 are incorporated into this Order;
2. The Employer shall credit Grievant with four days of compensatory time for the 2000-2001 winter pursuant to the "Special Snow Season Status" article of the Contract;
3. Grievant's back pay should be reduced by wages he earned during his interim employment working on holidays observed by the State;
4. The Employer shall adjust Grievant's pay rate pursuant to the Contract so that he is given credit for the period he was improperly dismissed, and shall pay Grievant back pay plus interest to ensure that he receives compensation for pay raises to which he is entitled pursuant to the Contract; and
5. The Labor Relations Board retains jurisdiction over the issue of whether overtime should be included as part of Grievant's back pay award, and if Grievant wishes to pursue this issue he shall so notify the Board in writing by April 19, 2002.

Dated this \_\_\_\_ day of March, 2002, at Montpelier, Vermont.

### VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Carroll P. Comstock

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John J. Zampieri