

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-26
JACOB CARNELLI	)	

MEMORANDUM AND ORDER

The State of Vermont filed a motion on February 8, 2019, to amend, modify, and/or set aside the judgment issued by the Labor Relations Board in this matter on January 23, 2019. 35 VLRB 1. Grievant filed a response to the motion on February 15, 2019. The State filed a reply to Grievant's response on February 26, 2019.

The State motion is based on Grievant declining a job offer made by the State pursuant to the Board January 23, 2019, order. In the January 23 ruling, the Board ordered the State to place Grievant in a vacant Department of Motor Vehicles ("DMV") Customer Service Specialist position that fit within Grievant's reemployment parameters, or alternatively to offer him the next available vacancy in such a position. 23 VLRB at 17. This was part of a make-whole remedy for the State's violation of Grievant's reemployment rights by not offering him such a position in January of 2018. 23 VLRB at 16. To make Grievant whole was to place him in the position he would have been in had the contractual violation not occurred. Id. If the contract violation had not occurred, Grievant would have been offered the Motor Vehicle Customer Service Specialist position in early 2018 pursuant to the reemployment rights article of the Contract. Id. Grievant's acceptance of the position would have resulted in Grievant being placed in a working test period in this position since that is required by the reemployment rights article.

On January 30, 2019, the State offered Grievant a vacant DMV Motor Vehicle Customer Service Specialist position that fit within Grievant's reemployment parameters in accordance

with the reemployment rights article of the Contract. On February 7, 2019, Grievant declined the State's offer of the DMV Motor Vehicle Customer Service Specialist position.

Grievant's declining of the position was contrary to the remedy he requested in the grievance filed with the Board, at the hearing, and in his post-hearing brief. Grievant specifically sought as a remedy throughout the grievance proceeding leading to the Board decision that he be placed in the DMV Customer Services Specialist position. The Board granted this remedy in the January 23, 2019, decision. The State complied with the Board remedial order by offering Grievant a vacant Customer Service Specialist position in accordance with the RIF reemployment provisions of the Contract. Once the State made this offer, it fully complied with any remedial action required by the Board order with respect to placement of Grievant in a position. In declining this offer, Grievant acted contrary to his own requested remedy and forfeited any further remedy in this grievance with respect to placement in a position pursuant to RIF reemployment rights under the Contract.

Grievant points to the provision in paragraph 3 of the Board order stating that "Grievant shall continue to have RIF reemployment rights as long as he is in his current position at Vermont Psychiatric Hospital" to support his position that he is entitled to further RIF reemployment rights pursuant to the Board decision. This argument runs counter to the clear statement in the Board Opinion as to the purpose of this provision. The Board stated: "The possibility that there may not be a vacancy in the Motor Vehicle Customer Service Specialist position for a significant period of time results in the need for an additional alternative remedy to make Grievant whole. Grievant should continue to have RIF reemployment rights as long as he is in his current position at Vermont Psychiatric Hospital". 35 VLRB at 17. Thus, the intent of the cited provision in paragraph 3 of the Board order is that it is contingent on there not being a

vacancy in the Motor Vehicle Customer Service Specialist position for a significant period of time. That has not happened in this case as the State offered Grievant such a vacant position seven days after the Board decision in this matter. Thus, the contingent provisions of paragraph 3 of the Order do not come into play. Accordingly, Grievant is not entitled to any further remedy with respect to placement in a position pursuant to RIF reemployment rights under the Contract.

Finally, we can now provide specificity on the back pay due Grievant. Paragraph 4 of the Board January 23 Order states: “The State shall provide Grievant with any back pay and benefits he has lost, or will lose, as a result of not being selected to fill the Motor Vehicle Customer Service Specialist position in early 2018.” It is undisputed that Grievant was not working at the time the State declined to offer him a Motor Vehicle Customer Service Specialist position in January 2018, and that after he was rehired at the Vermont Psychiatric Hospital position, he was paid the same rate as he would have received had the State rehired him in the Customer Service Specialist position.

Accordingly, the State’s back pay liability is limited to the period from the date he would have started working in the Motor Vehicle Customer Service Specialist position had it been offered to him in January 2018 to the date he began working at the Vermont Psychiatric Hospital. The State seeks to absolve itself of back pay liability on the grounds that Grievant may not have accepted the position in January of 2018 and because he ultimately did not accept the position when it was offered to him in late January 2019. There is no evidence that Grievant would not have accepted this position at a time when he was unemployed in January 2018, and the State needs to be held accountable for its contractual violation. Grievant is entitled to back pay, plus interest at the legal rate of 12 percent, and benefits during this period for all hours of

his regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim.

In sum, we decline to grant the State's motion to amend, modify, and/or set aside the January 23, 2019, decision of the Board. The State has fully complied with any remedial action required by the Board order with respect to placement of Grievant in a position in accordance with his RIF reemployment rights. Also, we have clarified and specified as necessary any further provisions of the Board decision. There is no further action required.

Based on the foregoing reasons, it is ordered that the State of Vermont's motion to amend, modify and/or set aside the January 23, 2019, decision is denied and this matter is closed.

Dated this 8<sup>th</sup> day of March 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Alan Willard

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Alan Willard

/s/ David R. Boulanger

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David R. Boulanger