

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT
RELATIONS BOARD

KEN MORROW,)	
Public Employee/Appellant,)	
and)	CASE NO. 13-MA-02
STATE OF IOWA (DEPARTMENT OF)	
TRANSPORTATION),)	
Public Employer/Appellee.)	

ORDER

On April 14, 2014, Administrative Law Judge Robert Wilson issued a Proposed Decision and Order in the above-captioned matter, concluding that the Appellee State of Iowa (Department of Transportation) failed to establish just cause within the meaning of Iowa Code section 8A.415(2)(b) for Appellant Ken Morrow's discharge. The proposed order provided generally that the State reinstate Morrow to the position he occupied prior to his discharge. The ALJ further ordered that the parties meet for the purpose of formulating the precise remedial terms and retained jurisdiction in the event the meeting of the parties proved unfruitful.

Both parties sought review of the Proposed Decision and Order from the Public Employment Relations Board (PERB or Board) on differing grounds, but both subsequently withdrew their requests. The Board did however retain the case for the purpose of overseeing the remedial proceedings, and only Morrow's remedy is at issue here.

While the parties agree on certain components of the remedy, others are still in dispute. Still at issue are (1) the deduction of unemployment compensation from back wages; (2) health and dental insurance payments; (3) future Part B Medicare insurance payments for Mr. Morrow's spouse; (4) repayment of monies Morrow withdrew from his IPERS account; (5) moving expenses incurred; and (6) the contents of Morrow's personnel file.

Pursuant to Iowa Code sections 20.1(2)(d) and 20.6(4), the Board conducted an evidentiary hearing on July 24, 2014, to receive evidence and arguments concerning the disputed aspects of the remedy. Mark D. Sherinian appeared on behalf of Morrow, and Jasmina Sarajlija appeared for the State. Both parties filed post-hearing briefs on remedy-related issues on July 31, 2014.

Based upon a review of the record, and having considered the parties' briefs and arguments, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On August 31, 2012, Morrow was discharged from his employment as a Highway Maintenance Manager (HMM) for the Department of Transportation (DOT) in District 5. Following the ALJ's proposed order, in discussing an appropriate remedy, Morrow and the State agreed that the DOT would reinstate him to a position located in Ames on July 28, 2014, which fell within the pay period beginning July 18, 2014.

Up until his reinstatement date, Morrow was unemployed and received disbursements from the Iowa Public Employee Retirement System (IPERS) to offset his lost salary. He would not have received the IPERS disbursements had he not been wrongfully terminated. IPERS representative, Sam Hoerr, testified that all disbursements made to Morrow must be replenished because Morrow's reinstatement effectively undoes his retirement. According to Hoerr, the reimbursement to IPERS must be made post-tax in an amount calculated by IPERS. At the time of hearing, this amount was \$56,464.00.¹

During his period of unemployment, Morrow received unemployment compensation benefits in the amount of \$10,296.00.

While unemployed, Morrow acquired health and dental insurance for both him and his spouse. The premiums for this coverage totaled \$28,622.01.² Additionally, Morrow's spouse, Cheri, incurred increased expenses associated with her Medicare Part B plan (*i.e.* supplemental Medicare insurance) in the amount of \$2,292.80.³ But for his wrongful termination, Morrow and his wife would not have acquired the insurance policies and incurred increased expenses for the supplemental Medicare insurance.⁴

¹ See Morrow Ex. L.

² See Morrow Exs. A through C. As the State noted in its post-hearing brief, Morrow mistakenly showed an incorrect amount on Ex. A as his insurance premium costs for March 2014 through July 2014. The \$28,622.01 reflects the correct amount paid by Morrow.

³ See Morrow Exs. A and D.

⁴ Morrow included \$1,353.36 of "out-of-pocket expenses" in his figure of reimbursable health care costs, but did not include any receipts or documentation confirming these expenses. And no evidence was presented establishing that Morrow would not have incurred the out-of-pocket expenses had he not been discharged without cause. As such, the out-of-pocket expenses will not be included in the make-whole remedy.

As a direct result of Morrow's discharge without just cause, he was no longer able to afford his mortgage and sold his home at a loss of \$8,000.00 in June 2014. At the time of hearing, Morrow and his spouse were temporarily living with family. Total "moving expenses"⁵ (including the loss on the home) were \$16,872.30⁶ at the time of the hearing.⁷ Morrow will incur additional moving expenses due to his relocation upon reinstatement to the position in Ames. He would not have incurred these moving expenses or sold his home for a loss had he not been discharged without just cause.

CONCLUSIONS OF LAW

This case is a disciplinary action appeal under Iowa Code section 8A.415(2)(b), which provides in relevant part:

. . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. . . .

The guiding principle when addressing the specifics of an appropriate remedial order is to fashion a "make-whole" remedy. The Board therefore "attempt[s] to place the grievant in the position he would have been in had no rule violations occurred, and to make the grievant whole for damages incurred." *Harrison & State of Iowa (Dept. of Human Servs.)*, 05-MA-04 at 5

⁵ At hearing, the parties used the term "moving expenses" to describe both the expenses Morrow incurred while moving and the costs associated with the sale of his home (*i.e.* inspection fees, realtor commission, etc.). We will likewise use this term to describe both.

⁶ The State does not dispute the calculation of this figure; it only disputes whether it is required to reimburse Morrow for these expenses under its policies.

⁷ See Morrow's Exs. A and F.

(Jan. 7, 2008) (citing *Israni & State of Iowa*, 92-MA-23 at 17). “Where an employee’s discharge is found to have been without just cause, reinstatement of employment with back pay and benefits is typically ordered, as specifically authorized by section 8A.415(2).” *Id.* at 5-6.

“A properly structured remedy in a discharge case makes the employee whole but avoids an undue financial burden or penalty, or an economic windfall, for either party.” *Id.* For this reason, the remedy in each particular case is tailored to its factual circumstances. *Id.*

In a back pay award, it is the employee’s burden to show the gross amount of back pay due. *See Harrison*, 05-MA-04 at 8. The burden then shifts to the employer to prove necessary facts that negate or mitigate its back pay liability. *Id.* The employee also bears the burden to prove that he incurred additional expenses during the period of unemployment (*e.g.* moving expenses and insurance premiums), that he would not have incurred them but for his wrongful termination, and the amount of any such expenses. *See, e.g., Harrison*, 05-MA-04 at 9-10.

The parties have reached agreement on a number of aspects of the remedy. The parties agree upon Morrow’s gross back pay (\$194,980.80) and additional non-base pay (\$1,640.00) and upon the number of hours of vacation and sick leave with which he should be credited (407.0724 and 1589.668 hours,⁸ respectively). The parties also agree on the amounts of employee and employer contributions to both IPERS (\$11,557.18 and \$17,341.44,

⁸ The latter figure includes the restoration of 1497.37 hours which were forfeited at the time of Morrow’s discharge.

respectively) and deferred compensation accounts (\$3,375.00 and \$1,650.00, respectively) which would have been made.⁹ All of these figures represent amounts earned or accrued through July 17, 2014. The State has agreed to adjust these figures to reflect Morrow's reinstatement date of July 28, 2014.

As previously noted, however, the parties disagree upon (1) the deduction of unemployment compensation from gross back pay; (2) the cost of health and dental insurance premiums; (3) future Part B Medicare plan payments for Mr. Morrow's spouse; (4) repayment of monies Morrow withdrew from his IPERS account; (5) repayment of moving expenses; and (6) the contents of Morrow's personnel file. Accordingly, the Board examines these disputed components of the make-whole remedy.

1. Deduction of Unemployment Compensation

Morrow seemingly argues that his unemployment compensation should be treated as a collateral benefit and therefore not deducted from his gross back pay award. Arbitrators typically deduct unemployment compensation benefits received by an employee from the gross back pay award to avoid unjust enrichment. *See Harrison*, 05-MA-04 at 6-7. As stated in *Harrison*, PERB has followed arbitral authority in section 8A.415 cases rather than the NLRB's approach in unfair labor practice cases where unemployment compensation is treated as a collateral source. *Id.* at 9, n.3. The Board is not persuaded to depart from this practice in this case and thus the unemployment

⁹ See State's Ex. 1.

compensation benefits Morrow received (\$10,296.00) should be deducted from his gross back pay.

Testimony from the Iowa Workforce Development (IWD) representative establishes that the unemployment compensation benefits Morrow received must be repaid to IWD, but that the required reimbursement may not equal the amount actually received. IWD will calculate and notify Morrow of the required repayment amount, and he shall promptly provide the DOT with that information. The DOT shall then remit the repayment to IWD on his behalf.

The question therefore becomes whether the State should deduct the \$10,296.00 from Morrow's gross back pay before taxes are withdrawn. The representative of IWD testified that it has no preference whether repayment to it is made pre- or post-tax. The deduction from Morrow's gross back pay award should be made on a pre-tax basis to avoid any possible double taxation.

2. Health and Dental Insurance Premiums

The State acknowledges that it should reimburse Morrow for the health and dental insurance premiums he paid during his period of unemployment, but disputed the amount shown in his Exhibit A. Having found that Morrow mistakenly calculated the total amount of premiums paid, the State should reimburse Morrow for \$28,622.01, the amount of health and dental premiums he actually paid, as part of the make-whole remedy.

3. Future Medicare Part B Payments

At hearing, but not in his brief, Morrow argued that the State should pay the expense of the increased cost of his wife's Medicare Part B payments until

he reaches the age of 65. Morrow contended that once an individual begins a Medicare Part B plan, the individual cannot withdraw from coverage. Morrow cited no authority for this position and the Board was unable to locate any support for it. Thus, Morrow has failed to establish that the State should be required to reimburse him for future expenses of his spouse's Medicare Part B plan. The State, however, should reimburse Morrow for increased expenses for his wife's Medicare Part B plan (\$2,292.80) incurred from his discharge date to his reinstatement date because these expenses would not have increased had Morrow not been wrongfully terminated.

4. Replenishing IPERS

Morrow requests the Board to order "the DOT to compensate him for the lost IPERS benefits, in an amount determined by IPERS which will fully compensate him for the losses and in a manner which will not cause him to incur double taxation for this reimbursement." See Morrow Brief, pp. 5-6. When fashioning a properly structured remedy, the Board attempts to place the grievant in the position he would have been had he not been terminated without just cause and make him whole for the damages incurred. *Harrison*, 05-MA-04 at 5. Such remedy avoids an undue financial burden or penalty, or an economic windfall, for either party. *Id.*

Had Morrow not been discharged, he would not have withdrawn IPERS benefits and would have received his earned salary. Morrow's reinstatement effectively undoes his discharge so there is no bona fide IPERS retirement. While Morrow is entitled to back pay to make him whole, to award

replenishment of the IPERS benefits in addition would be unjust enrichment. Repayment of the disbursed IPERS benefits he received is thus necessary to restore Morrow to the position he would have been in had he not been wrongfully terminated. In short, Morrow must replenish the IPERS benefits he withdrew to avoid an economic windfall.

Replenishment may be accomplished in one of two ways: (1) the DOT deducts the disbursement amount post-tax from Morrow's back pay award and remits this amount to IPERS on his behalf; or (2) Morrow receives his back pay award and remits the disbursement amount to IPERS on his own behalf. Consistent with the decision on unemployment compensation benefits, the Board will order the former. However, as IPERS representative Hoerr testified, the replenishment must be done post-tax.¹⁰

5. Moving Expenses

Morrow seeks moving expenses, including the amount he lost on the sale of his home, that were incurred after his discharge but before reinstatement as well as moving expenses he will incur after reinstatement. DOT policy provides that "[e]mployees who are reassigned at the direction of the Department of Transportation shall be reimbursed for moving expenses in accordance with this policy." State Ex. 5, p. 3.

The State takes no issue with paying Morrow's moving expenses post-reinstatement. See State Brief, p. 10. However, it argues Morrow should be

¹⁰ In contrast, contributions to IPERS that would have been made by Morrow and the DOT (\$11,557.18 and \$17,341.44, respectively) are made pre-tax. See Iowa Admin. Code § 495—4.6(7).

denied the pre-reinstatement amounts, including the loss on the sale of his home. The Board has found that the sale of Morrow's home and resulting loss and moving expenses to his temporary residence were directly related to and would not have been incurred but for his improper discharge. That Morrow was not on the payroll at the time he incurred the expenses does not alter the fact that he is entitled to a make-whole remedy. Nor does the fact that he incurred them before being reinstated to a position in Ames which requires his relocation prevent their inclusion in the make-whole remedy. Morrow's initial moving expenses and loss on the sale of his home were the result of his discharge without cause, and these amounts should consequently be included in the make-whole remedy.

6. Personnel File

The State made no argument countering Morrow's argument that it should be directed to make appropriate adjustments to his personnel file and remove his name from any "Do-Not-Hire" list. Such adjustments are appropriate and necessary here in order to make Morrow whole for his improper discharge. See Iowa Code § 8A.415(2).

The issues discussed above are the only ones raised or implicated by the parties. Accordingly, we enter the following final order.

ORDER

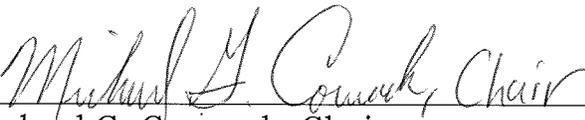
The State shall promptly pay Ken Morrow back pay reduced (a) on a pre-tax basis by the amount of unemployment compensation he received and (b) on a post-tax basis by the amount of IPERS disbursements he received. The State

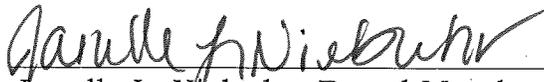
shall also promptly reimburse Morrow for: (a) the health and dental insurance premiums he paid following his discharge; (b) the increased expenses of his spouse's Medicare Part B plan through the date of his reinstatement; and (c) his pre- and post- reinstatement moving expenses and for the loss on the sale of his home. The State shall also (a) adjust and restore his benefit accruals as specified in this Decision; (b) remit to Iowa Workforce Development, on Morrow's behalf, the unemployment compensation reimbursement amount IWD calculates as due; and (c) remit to the Iowa Public Employees Retirement System, on Morrow's behalf, the reimbursement amount IPERS calculates as due for the disbursements he withdrew from IPERS.

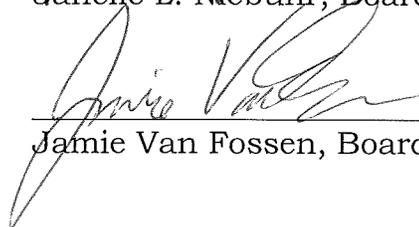
The State shall promptly remove any record of Morrow's discharge from his personnel file, remove his name from any so-called "Do-Not-Hire" list, and take any other actions necessary to restore his employment status to what it would have been had he not been discharged.

DATED at Des Moines, Iowa, this 6th of October, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Michael G. Cormack, Chair


Janelle L. Niebuhr, Board Member


Jamie Van Fossen, Board Member

Original filed.

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