

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

STEVEN SCOTT, Public Employee/Appellant,)	
)	
and)	CASE NO. 13-MA-03
)	
STATE OF IOWA (DEPARTMENT OF TRANSPORTATION),)	
Public Employer/Appellee.)	

ORDER

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PUBLIC EMPLOYMENT
RELATIONS BOARD

On April 1, 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) for Appellant Steven Scott's discharge. The proposed order provided generally that the State reinstate Scott 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 parties' meeting 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 Scott'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 position to which Scott should be reinstated; (2) the deduction of other income from the back wages to which he is entitled; and (3) the contents of Scott's personnel file.

Pursuant to Iowa Code sections 20.1(4) and 20.6(4), the Board conducted an evidentiary hearing on July 24, 2014, to receive evidence and arguments concerning all aspects of the remedy. Mark D. Sherinian appeared on behalf of Scott, and Jasmina Sarajlija appeared for the State. Both parties filed post-hearing briefs 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, Scott was discharged from his employment as a highway maintenance supervisor (HMS) for the Department of Transportation (DOT) in District 5. In this role, Scott oversaw and supervised the operations and personnel of three garages located in District 5: Osceola, Chariton, and Albia. Following his discharge, the DOT eliminated Scott's position and divided his duties amongst the other District 5 HMS positions.

The DOT currently has a HMS vacancy in Cedar Rapids which is substantially equivalent to Scott's former position. Alternatively, the DOT proposes that it reclassify a current vacancy as a HMS position in District 5. In doing so, the DOT would be required to redraw its "circles" within District 5,

resulting in the proposed HMS position supervising three garages: Knoxville, Chariton, and Albia. The proposed HMS position would have the same classification, pay grade, and type and level of responsibilities as Scott's former position. Just as in the eliminated position, the proposed position would fall within the same chain of command, reporting to a Highway Maintenance Manager who in turn reports to the District Engineer, a position currently occupied by Jim Armstrong. The only difference between Scott's former position and the proposed position is that the Knoxville garage, rather than the Osceola garage, is within its supervision circle. At all relevant times, Scott has resided in Osceola.

It is uncontroverted that most if not all of the DOT employees the ALJ found were involved in the actions and false accusations which ultimately led to Scott's discharge are still employed in the same or similar capacities as they had been on the date of his discharge. This includes District Engineer Jim Armstrong, who has purportedly stated since the issuance of the ALJ's proposed decision and order that Scott will not ever work in District 5 again.

During the period of his unemployment, Scott received unemployment compensation in the amount of \$15,331.54. Scott also performed some welding work for a friend and received approximately \$2,100.00 for his services. Scott admits he performed the welding during DOT working hours, but would have welded for his friend even if he had been working for the DOT at the time. Scott had previously done similar construction and welding jobs while employed by the DOT during off-duty hours.

CONCLUSIONS OF LAW

This case is a disciplinary action appeal under Iowa Code section 8A.415(2), 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 (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.*

The parties have reached agreement on a number of the aspects of the remedy. The parties agree upon Scott’s gross back pay (\$126,425.60) and additional non-base pay (\$1,355.80) and upon the number of hours of vacation

and sick leave with which Scott should be credited (361.8454 and 1490.5111 hours, respectively). The parties also agree on the amounts of employee and employer contributions to both IPERS (\$7,513.48 and \$11,273.97, respectively) and deferred compensation accounts (\$3,375.00 and \$1,650.00, respectively) which would have been made.¹ The State acknowledges that it should reimburse Scott for the health and dental insurance premiums he paid during his period of unemployment in the amount of \$19,787.89.² Because all of these figures represent amounts earned or accrued through July 17, 2014, the State has agreed that these figures will be adjusted accordingly to reflect Scott's actual reinstatement date. The State also indicated that it would provide a DOT vehicle for Scott drive to and from work if reinstated to the proposed HMS position in District 5.

As previously noted, however, the parties disagree upon (1) the position to which Scott should be reinstated; (2) the deduction of other income from Scott's back wage entitlement; and (3) the contents of Scott's personnel file. Accordingly, the Board examines these disputed components of the make-whole remedy.

1. Reinstatement Position

In his proposed decision and order, the ALJ directed that the State reinstate Scott to "the position he occupied immediately preceding his termination in August 2012." However, the evidence presented at the July 27 hearing establishes that Scott's former position no longer exists.

¹ See State's Ex. 1.

² See Scott's Exs. E through I.

In *Harrison*, the Board adopted the NLRB's long-held principle that where the former position is well defined and still exists, the employee should be reinstated to that position. 05-MA-04 at 16 (citing *Chase Nat'l Bank*, 65 NLRB 827, 829 (1946); *Panoramic Indus.*, 267 NLRB 32, 38-39 (1983)). Only where the former position is no longer in existence is reinstatement to a substantially equivalent position adequate. *Id.*

Given that Scott's former position no longer exists, reinstatement into a substantially equivalent position, such as the proposed District 5 HMS position supervising the Knoxville, Chariton, and Albia garages or the HMS vacancy in Cedar Rapids, is adequate. The arbitral cases cited in Scott's brief do not persuade the Board that it should direct the DOT to redesign its operations structure (*i.e.* circle of garages or district boundaries) or alter its chain of command when constructing a remedy. These tasks fall within the DOT's statutorily-defined authority and expertise and directly affect the day-to-day management and operations of the department. If Scott's former position still existed, then PERB would order the DOT to reinstate him to that specific position. But that is not the case here. The DOT has presented two substantially equivalent positions – the proposed District 5 HMS position supervising the Knoxville, Chariton, and Albia garages or the Cedar Rapids HMS vacancy – that are adequate alternatives.

While it is a legitimate concern that Armstrong would be a superior within Scott's chain of command were he reinstated to the proposed position in District 5, Scott would not report directly to Armstrong. And, we trust that the

DOT will address any lasting acrimony within District 5, lest they end up in a similar situation in the future. Scott may always institute section 8A.415 proceedings if he feels he has been treated in a manner which violates a DAS rule or constitutes discipline without just cause by Armstrong or any other agent of the DOT.

Scott also raised concerns about being required to live within the circle of garages to which he is assigned. Just as he did at the time of his discharge, Scott resides in Osceola. Thus, he lives within his former position's circle of garages, but not within the proposed position's circle. It remains unclear whether the DOT requires a HMS to live within his or her circle. Because the DOT discharged Scott without just cause from a position in which he did meet this potential requirement, Scott should not be forced to relocate and should be given reasonable accommodations, such as the DOT vehicle the State indicated it would provide to him, if he is reinstated to the proposed position in District 5 and such requirement exists. If he is reinstated to the Cedar Rapids vacancy, Scott should not have to pay for his moving expenses.

2. Deduction of Other Income from Wages

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.*

Because the parties have agreed on the gross amount of back pay due, Scott has met his burden. The State must therefore prove that the amounts

Scott received through unemployment compensation and by welding for a friend mitigate its back pay liability.

a. Unemployment Compensation

Scott 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 traditionally followed arbitral authority in section 8A.415 cases rather than NLRB's approach in unfair labor practice cases in which unemployment compensation is treated as a collateral source. *Id.* at 9, n.3. The Board adheres to that practice in this case and thus the amount of unemployment compensation benefits Scott received (\$15,331.54) should be deducted from his back pay award.

Testimony from the Iowa Workforce Development (IWD) representative establishes that unemployment compensation benefits are required to be repaid pursuant to its statutory authority, but that the required reimbursement may not equal the amount Scott actually received. IWD will calculate and notify Scott of the required repayment amount, and Scott 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 \$15,331.54 from Scott'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 Scott's gross back pay award should be made on a pre-tax basis to avoid any possible double taxation.

b. Welding Work

The State has not met its burden to prove that the monies Scott earned from doing welding work for a friend (approximately \$2,100.00) should reduce his back pay award. Generally, the employee's gross amount of back pay is reduced by other compensation received by the employee. *Harrison*, 05-MA-04 at 6. But if the compensation was a normal part of the employee's income prior to discharge, the back pay award should not be reduced by it. *Id.*

Scott has done similar welding projects outside of his normal DOT work hours in the past and would have done this particular work for his friend even if he had been actively employed by the DOT at the time. The State has not proved otherwise. On the facts of this case, the amounts Scott earned by welding for his friend should not be deducted from his back pay award.

3. Personnel File

The State made no argument countering Scott'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. PERB has previously given such directives as "other appropriate remedies," and it is appropriate and necessary here in order to make Scott 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

Absent the parties' agreement on upon reinstatement to a different position, Steven Scott shall be promptly reinstated to his choice of two positions: (1) the proposed District 5 Highway Maintenance Supervisor position supervising the Knoxville, Chariton, and Albia garages; or (2) the Highway Maintenance Supervisor vacancy in Cedar Rapids. Scott shall make and notify the DOT of his decision within 15 business days of the date of this Order. If Scott chooses the proposed District 5 position, the DOT shall not require him to live within the circle throughout the duration of his employment in that position and the State shall provide him with a DOT vehicle to drive to and from work and other appropriate reasonable accommodations. If he chooses the Cedar Rapids vacancy, the DOT shall reimburse him for all reasonable moving and related expenses.

The State shall promptly pay Scott back pay reduced on a pre-tax basis by the amount of unemployment compensation he received; reimburse him for health and dental insurance; have his benefit accruals adjusted and restored as specified in this Decision; and remit to IWD, on Scott's behalf, the unemployment compensation reimbursement amount IWD calculates as due.

The State shall promptly remove any record of Scott'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 2nd of September, 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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