

## Vermont Labor Relations Board

GRIEVANCE OF:

ALBERT BROOKS

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DOCKET # 77-6S

### FINDINGS OF FACT, OPINION AND ORDER

#### Statement of Case.

This matter came on before the Board on the Petition for Enforcement dated 11 April 1977 and filed the same day. The petition requested enforcement of the Order of this Board dated 4 March 1977, and sought the immediate reinstatement of Albert Brooks to his former position or another position. The State of Vermont had filed a Notice of Appeal to the Supreme Court dated 29 March 1977. The grievant seeks to enforce his motion pursuant to 3 V.S.A., § 1002. The State filed a Motion to Dismiss on 9 March 1977. The matter was heard 20 March 1977 and an Agreed Statement of Facts filed. The grievant was represented by Alan S. Rome, Esquire, counsel for Vermont State Employees' Association, Inc., and the State by the Honorable Louis Peck, Chief Assistant Attorney General.

#### Discussion of Evidence and Credibility of Witnesses.

No testimony was taken at the hearing, the case having been submitted to the Board on an Agreed Statement of Facts filed 31 May 1977.

Findings of Fact.

1. The question of retroactive pay (back to October 22, 1976) will be held in abeyance pending the Supreme Court decision.

2. The following are wages which Mr. Brooks will receive, should ~~he~~ be reinstated:

a. Until July 2, 1977 - \$143.50/week

b. Commencing July 3, 1977 - \$167.50/week

3. There is, at present, no vacancy in the Military Department for which Grievant is qualified.

4. At the hearing on the merits before the Vermont Labor Relations Board, in the aforementioned matter, certain employees of the Military Department expressed concern with Mr. Brook's supposedly unpredictable behavior.

Conclusions of Law and Opinion.

The State of Vermont and the Vermont State Employees' Association have agreed that Albert Brooks, the grievant, has not been employed by the State of Vermont since October 22, 1976; that his salary until July 2, 1977, would be \$143.50 per week and after that date would be \$167.50 per week; that no vacancy exists in the Military Department for which the grievant is qualified, although it is noted here that the Department has created the existing situation by filling the vacancy. At the hearing on the merits in this matter, it is also noted that certain employees in the

Military Department expressed concern with Mr. Brooks' supposedly unpredictable behavior.

The Board has authority to enforce its decision pursuant to 3 V.S.A., § 1102. It should be noted in passing that there now appear to be two sections numbered 1002. This opinion would apply to either section, however. The Board has issued an order, which is not yet final pending appeal to the Vermont Supreme Court by the State. The Board is expressly exempt from the Administrative Procedures Act. 3 V.S.A., § 1005. The remedy granted the grievant in this case was in the nature of an injunction ordering the State to continue him in its employment. Vermont Rules of Civil Procedure provide that:

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the Court in its discretion may suspend, modify, restore or grant an injunction during the pendency of an appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."  
(V.R.C.P. 62 (d) )

The issue as to whether this Board should (or can) petition the Washington Superior Court for enforcement of its order is not clearly answered by statute and appears to be up to the discretion of the Board. The State has elected to appeal the Board's order and to terminate the grievant's employment pending final determination of its appeal. The grievant has been willing and able to work for the State. Clearly, if the grievant should prevail on appeal, he will be entitled to back wages. The State will not have received

the benefits of any work from him though it will be obligated to pay him that sum of money which he lost. On the other hand, if the Board orders that the grievant be reinstated in State employment pending the final appeal and the grievant should lose on the appeal, he would have been kept on the State work force beyond that date to which he was legally entitled. Further, he is a "lame duck" employee for whom no position is available and the usefulness of his work is questionable. If he does not work for the State but is paid, it would not be fair to the State. The Vermont State Employees' Association, or the grievant, has not offered to post a bond in the event the order reinstating the grievant is reversed by the Vermont Supreme Court. After weighing the interests of the State and employee, we believe that the employee is adequately protected if he prevails on appeal because the State will have to reimburse him. Whereas, if the State is forced as a result of these proceedings to employ him during the appeal period, the interest of the State may not be protected, or, in the alternative, grievant may be required to pay back a large sum of money to the State. Therefore, the petition to enforce the Board's order should be denied. The grievant has his own additional remedy and may avail himself of the Vermont Rules of Appellate Procedure to request a stay of execution or injunction.

Order.

NOW, THEREFORE, it is hereby ordered that the petition to enforce is DENIED.

Dated at Brattleboro, Vermont this 17th day of June, 1977.

VERMONT LABOR RELATIONS BOARD

By

John S. Burgess  
JOHN S. BURGESS, CHAIRMAN

William G. Kemsley, Sr.  
WILLIAM G. KEMSLEY, SR.

H. James Wallace  
H. JAMES WALLACE