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State of Wisconsin
Wisconsin Employment Relations Commission

June 19, 2006

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Re: Milwaukee County
Case 547 No. 63542 MA-12621
(Seniority Rights and Recall
Grievance, #40465)

Gentlemen:

The following is my Supplemental Award in this matter.

SUPPLEMENTAL AWARD

The parties have stipulated to the following:

Stipulated Issue:

Can the calculation of lost wages be offset by amounts of wages the employee could have earned had he not voluntarily quit temporary employment?

Stipulated Facts:

1. On May 19, 2005 the arbitrator sustained a grievance filed by the union concerning the failure of the County to recall Daniel Gregory to a position at the County's House of Corrections. In the award the arbitrator stated that "the County is ordered to immediately recall the Grievant and to make him whole as to lost wages and benefits resulting from the County's violation."

2. The County's period of liability was from January 12, 2004, when it failed to recall Mr. Gregory, until the grievant began employment with another employer on June 7, 2004.

3. During the period of liability, the grievant received earnings from Techresources, a temporary labor service, for a total amount of $2,168.

4. On April 29, 2004, Mr. Gregory voluntarily ceased working for Techresources, Inc. Work was available for him until June 7, but such employment did not provide a potential for permanent employment or benefits.

5. In calculating back pay during the period of liability, the County has subtracted/offset potential earnings from Techresources, Inc. in the amount of $3,200. The amount is based on a total of 200 hours at a rate of $16.00.

6. Mr. Gregory did not, in fact, earn $3,200 from Techresources because he voluntarily ceased working for the company on April 29, 2004.

County

The County asserts that the award of back pay to the Grievant should be offset not only by his actual earnings, but also by what he would have earned had he remained employed by Techresources.

The duty to mitigate damages is well established. The County cites numerous authorities for the principle that a laid off or discharged employee is obligated to make a reasonable effort to obtain and keep suitable or similar alternate employment during the period between the termination of employment and reinstatement and that a failure to do so will result in reduction of the back pay award.

Union

The Union asserts that the traditional make whole remedy is to award monetary damages to make the employee whole for his losses – what the employee would have received but for the violation, less what he was to earn from outside sources during the period in question. Where the employer asserts, as the County does here, that the employee willfully incurred additional damages, the employer has the burden of proving its assertion. The County is not able to meet its burden in this case.

The Union asserts that the County cannot withhold money Gregory did not earn where the amount is based on conjecture. The work at Teleresources was temporary. Jobs are assigned when they are available and they are not always available. While some work was available for Gregory, there was no guarantee that 40 hours a week was, or would remain, available for the five weeks after he quit. Thus, the County cannot calculate with any certainty what Gregory would have earned. As Gregory did not earn the $3200, reducing his backpay by that amount would contravene the purpose of the award.

The Union cites numerous awards for the principle that a grievant is not required to take unsuitable or lower-rated work with inferior wages and benefits while his grievance is pending in order to mitigate damages. Techresources is a temp agency offering temporary employment at lower wages than Gregory had been receiving, no benefits or opportunity for advancement and no permanent employment opportunity. As employees are not obligated to accept inferior or unsuitable employment, Gregory was not obligated to accept the temporary assignments from Techresources when it was obviously inferior work. Gregory gave Techresources due consideration, intending to take advantage of the work opportunity, if it proved to be a reasonable opportunity. As it was not, he quickly sought alternative employment elsewhere. Thus, the County cannot meet its burden of proving that Gregory willfully incurred these damages without good reason and should be ordered to pay Gregory the $3200 plus interest.

DISCUSSION

The undersigned takes no issue with the principles or precedent cited by the parties. The question in this case is whether the Techresources employment was suitable alternative employment, i.e., "substantially similar" to his job with the County, such that his voluntarily quitting that employment should result in an offset of the wages he gave up against his backpay award.

The difficulty in answering this question is discussed at some length in *Remedies in Arbitration*, Hill & Sinicropi (BNA, 1981):

. *Willful loss of employment*. A difficult issue within the employment context is determining what constitutes a "willful loss of employment." Court decisions, Board rulings, and arbitration awards reveal that an employee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept "substantially equivalent" employment, fails to search for alternative work, or voluntarily quits alternative employment without good reason. Particularly troublesome is determining what constitutes similar employment which, if not accepted, will constitute failure to avoid loss and, thus, a reduction in back pay. The Court of Appeals for the District of Columbia has declared:

> A discriminatee need not seek or accept employment which is "dangerous, distasteful or essentially different" from his regular job. . .Similarly, he is not necessarily obligated to accept employment which is located an unreasonable distance from his home.
>
> . . . [T]here is no requirement that such a person seek employment which is not consonant with his particular skills, background, and experience.

The Fifth Circuit has likewise stated:

> In order to be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience."
>
> . . .
>
> At some point in the mitigation process an employee may be reasonably required to lower his/her expectations concerning alternative employment. As the Sixth Circuit noted in NLRB V. SOUTHERN SILK MILLS,
>
> > We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and family by

> suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay "desirable new employment." The fact that a married woman employee is being supported by her husband during the discharge period should not relieve her of the obligation to accept suitable employment. The failure. . .under the conditions existing in the present case, to seek or take other suitable employment, although at a lower rate of pay, over a period of approximately three years, constitutes to some extent at least loss of earnings "willfully incurred."
>
> One caveat, however, has been noted by the D.C. Circuit:
>
> If the discriminatee accepts significantly lower-paying work too soon after the discrimination in question, he may be subject to a reduction in back pay on the ground that he willfully incurred a loss by accepting an "unsuitably" low-paying position. On the other hand. . .if he fails to "lower his sights" after the passage of a "reasonable period" of unsuccessful employment searching, he may be held to have forfeited his right to reimbursement on the ground that he failed to make the requisite effort to mitigate his losses.

(At pages 76-78; citations omitted).

In this case, the Techresources work paid $16/hour, or approximately two-thirds of Gregory's rate of pay with the County, no benefits, and did not guarantee 40 hours of work a week. That is not "substantially equivalent" work. He was without work for five weeks after he quit Techresources before he found full employment. It does not appear to be a case of Mr. Gregory being content to just sit around. While at some point in time Gregory would have been obligated to accept such work as the Techresources work, if it were available, five weeks is not an unreasonable amount of time for him to seek work that was more similar to the work he had with the County.

Based upon the foregoing, it is concluded that the County may not offset Gregory's

back pay by the amount he might have earned at Techresources, and is therefore ordered to pay Mr. Gregory the $3200 in dispute. There is no provision for interest on a back pay award in the parties' Agreement and, as this was a good faith dispute regarding Gregory's obligation to mitigate his damages, interest would not be appropriate as a remedy.

AWARD

Milwaukee County is to immediately pay Mr. Gregory the sum of $3200.

Dated at Madison, Wisconsin, this 19th day of June, 2006.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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