

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 94-002

In the Matter of

State Employment Relations Board,

Complainant,

v.

Warren County Sheriff,

Respondent.

CASE NUMBER: 84-UR-08-1774

Opinion

POTTENGER, Vice Chairman:

I.

On remand, the hearing officer considered three issues regarding the computation of backpay liability under Board orders: the proper method of offsetting a discriminatee's interim earnings; the standard to be applied in compensating a discriminatee for projected overtime earnings; and the appropriate award of interest on backpay awards. For the reasons set forth below, we agree with the hearing officer's recommendations to apply a lump sum offset for interim earnings in this case but to utilize an annual offset method prospectively, and to award overtime claims only when they have been established with requisite certainty. Finally, we agree with the hearing officer that it is appropriate to grant interest on the backpay award given the circumstances of this case.

II.

*Proper Method of Offsetting Interim Earnings*

There are basically three methods to set off wages earned in mitigation: lump sum,

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yearly and quarterly. Under the lump sum method, the entire amount that would have been earned but for the illegal discharge is reduced by all money earned during this time period. This method is the most favorable of the three methods for the employer. Under the yearly method, money earned is only set off for the year in which it was earned. Therefore, as in this case, if an employee earns more at another job for one year than he would have earned working for the employer who illegally fired him, then the employer would owe him nothing for that year. Any surplus amount of interim earnings could not be used to reduce earnings of future years. The Ohio Civil Rights Commission utilizes this yearly approach. See *Ohio Civil Rights Commission v. David Richard Ingram*, Case No. 91-CI-064, unreported case, Wayne County Common Pleas Court (1-10-92). The quarterly approach is exactly the same as the yearly method, except the relevant set off period is reduced to a quarter. This method is utilized by the National Labor Relations Board and is the most favorable to the employee.

In the instant controversy the Board is compelled to use the lump sum method. In rendering its decision, the Ohio Supreme Court stated:

While we conclude that the tolling of the backpay award for the period that the unfair labor practice charge was pending was error, we are cognizant of the fact that during the period encompassed by the award, Sulfsted was employed for approximately one year by the Ohio Conference of Teamsters. Accordingly, the judgment of the Court of appeals is reversed and the cause is remanded to SERB with instructions to reduce the award by an amount equal to the compensation realized by Sulfsted during the period of his employment with the Teamsters. *SERB v. Warren County Sheriff*, 63 Ohio St. 3d 69, 76. (1992).

The only way to reduce the award by an amount equal to compensation realized by Sulfsted is to utilize the lump sum method. Therefore, the clear mandate from the Supreme Court precludes SERB in this case from adopting any other method except the lump sum method of setting off the earnings of Sulfsted.

However, in reviewing the various methods of calculations for future application, we have decided to implement the year-to-year approach for setting off wages earned in mitigation. A danger of utilizing the lump sum method, as noted in the above-cited *Ingram*

case, is that an employer could completely mitigate his losses by holding out on his offer of re-employment during the period (the discriminatee) held a higher paying job. Second, in a situation such as here, where the discriminatee only held interim employment for one year, an annual set-off is more realistic. The employee only truly realized the benefits of his earnings for the year in which he earned them. To set off excess earnings in more than one year may exert a hardship on the affected employee. It may also create a disincentive for the employee to accept lucrative work that would mitigate damages, especially if he knows the employment will be short-term.

Just as the lump sum method may work a hardship on the employee, the quarterly method can be unfair to the employer. This is especially true if the employee is able to manipulate the timing of his interim earnings, so as to reduce their negative impact on his backpay award. The quarterly method can also disadvantage an employee, who must reproduce a quarterly breakdown of past years' earnings when annual records, already reflected in the employee's tax returns, are easily available. Therefore, we conclude that the yearly method is a reasonable compromise, which we intend to apply in future backpay calculations.

#### *The Proper Award of Overtime Earnings As A Component of Backpay*

As the Complainant properly noted in its exceptions, the National Labor Relations Board has a long history of liberally including overtime in its backpay awards. See *International Trailer Company, Inc.*, 150 NLRB 1205 (1965). However, Ohio courts have declined to be so liberal in awarding backpay which is by its nature subject to some speculation. Before awarding backpay, Ohio courts have required that the award be based on 'certainty.' *State, ex rel. Hamlin, v. Collins*, 9 Ohio St. 3d 117 (1984). Here, Sulfsted simply cannot meet that stringent standard. The record lacks probative evidence from which we can project with certainty whether Sulfsted would have actually worked overtime during the period in question. The overtime records stipulated in the record show wild fluctuations in the amount of overtime each deputy of similar seniority worked.

There is no record evidence as to how overtime was assigned during this period, nor any showing that the work actually assigned would have been offered to the discriminatee and accepted by him if he had continued working for the Respondent Employer. Trying to determine how much overtime Sulfsted would have worked but for his unlawful discharge, based on this record, could be no more than guess work, which falls short of the certainty required by the courts of Ohio. We do not go so far as to say that overtime can never be established with enough certainty to warrant inclusion, but simply that more would be required than was shown here. Where the acceptance of overtime is mandatory and assigned according to a prescribed rotation, stipulated records of overtime hours worked by similarly situated employees may be sufficient to establish overtime as a component of backpay. Where assignment is voluntary and apparently random, such records are insufficient.

*The Granting of Interest on the Backpay Award*

When SERB issued its initial order in this case, it ordered the Respondent to award backpay, " ..together with interest at the rate payable on such awards in the courts of Ohio." *In re Warren County Sheriff*, SERB 88-014 (9-28-88). As the hearing officer noted, although the Board's original order was appealed all the way to the Ohio Supreme Court, the Respondent never, until the remand hearing, challenged the order of interest. We find it appropriate to uphold the award on that basis alone and decline in this case to extend our consideration of the issues beyond the court's remand, which was to reduce the Board's existing award by an amount equal to the compensation realized by Sulfsted during the period of his employment with the Teamsters.<sup>1</sup> Therefore, we find that it is appropriate to allow the award of interest on William Sulfsted's backpay award to stand.

III.

In deciding the instant case, it is sufficient to note that we hold the total backpay

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<sup>1</sup>This is consistent with the "law of the case" policy recognized by both Ohio and federal courts, which seeks to avoid endless relitigation of issues by limiting consideration on remand to those specific issues remanded. *Hawley v. Ritley*, 35 Ohio St. 3d 157 (1988), citing, inter alia, *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948).

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award must be reduced by an amount equal to his earnings from the Ohio Conference of Teamsters, being the sum of \$24,940.71. This figure is arrived at by using the lump sum method of setting off earnings earned in mitigation. The backpay award cannot include any sums for overtime because the amount of overtime Sulfsted would have earned cannot be determined with certainty, which is the standard mandated by Ohio Courts. Finally, inasmuch as we have determined that the award of interest is appropriate in this case, the total amount of interest to be paid is \$17,574.40.

Owens, Chairman and Mason, Board Member, concur.