

## **APPEAL OF OUDENS**

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New Hampshire Case Law

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APPEAL OF OUDENS, 125 N.H. 410 (1984)

480 A.2d 188

APPEAL OF WILLIAM H. OUDENS (New Hampshire Personnel Commission)

No. 83-422

Supreme Court of New Hampshire

Personnel Commission

Decided August 10, 1984

1. Public Employees – Suspension and Dismissal – Compensation and Benefits  
Unemployment compensation law provision enacted in 1979 requiring employing unit to reimburse unemployment compensation fund for unemployment benefits paid an employee for a period covered by a back pay award did not repeal the rule of Foote v. State Personnel Commission, 118 N.H. 640 (1978), that whenever a wrongfully discharged State employee is reinstated and awarded back pay, his award is to be reduced by the amount of unemployment compensation, if any, he received while wrongfully not employed by the State. RSA 282-A:14.
2. Unemployment Compensation – Taxation of Benefits – Generally  
While unemployment benefits are taxable under the Internal Revenue Code, amount deducted from a back pay award corresponding to unemployment compensation benefits received by a wrongfully discharged employee are not, absent an express statutory provision to the contrary, also subject to income tax. 26 U.S.C.A. 85.
3. Public Employees – Suspension and Dismissal – Compensation and Benefits  
Where State employee was determined to have been wrongfully discharged and was awarded full back pay and benefits from which there was first deducted federal income tax and F.I.C.A. contributions and then deducted an additional amount equal to the amount of unemployment compensation received by the employee during the period following his wrongful discharge, reduction of the award for unemployment benefits received should have preceded any calculation of taxes to be withheld, since the unemployment benefits deducted from the award were not subject to income tax under the Internal Revenue Code, and the case was remanded for exclusion of the federal tax deduction. 26 U.S.C.A. 85.

Stanton E. Tefft, of Bedford, by brief and orally, for William H. Oudens.

Gregory H. Smith, attorney general (Eve H. Oyer, assistant attorney general, on the brief and orally), for the State.

BROCK, J.

This case originated when William H. Oudens was discharged from his employment with the New Hampshire Water Supply and Pollution Control Commission (WSPCC) on August 12, 1981. After extensive litigation, including a previous appeal to this court (Appeal of Oudens, 122 N.H. 642, 448 A.2d 1374 (1982)), the New Hampshire Personnel Commission ordered the WSPCC to reinstate Mr. Oudens with full back pay and benefits. This appeal Page 411 concerns the method by which the WSPCC computed the amount of a check made payable to Mr. Oudens and dated July 28, 1983.

The check purported to represent the pay Mr. Oudens would have earned between August 12, 1981 and June 30, 1983. The check stub indicated correctly that the gross amount of such pay was \$23,460.30. From this amount, the WSPCC deducted \$4,638.40 for federal income tax, and \$1,571.84 for FICA contributions. It then deducted an additional \$6,054. This was the amount of unemployment compensation received by Mr. Oudens following his discharge.

The WSPCC was obligated by law to pay this last amount to the unemployment compensation fund, in conjunction with the award of back pay to Mr. Oudens. RSA 282-A:14, III(b) (Supp. 1983). Mr. Oudens argues that the statute should not be read to permit the WSPCC to recover this money from him, since there is no express reference to that possibility in the statute itself.

Mr. Oudens concedes that in Foote v. State Personnel Commission, 118 N.H. 640, 392 A.2d 156 (1978), we held that "whenever a wrongfully discharged State employee is reinstated and is awarded back pay, [his] award is to be reduced by the amount of unemployment compensation, if any, [he] received while wrongfully not employed by the State." Id. at 645, 392 A.2d at 160. He argues, however, that the Foote rule was repealed by the passage of RSA 282-A:14, III(b) (Supp. 1983).

This argument is not supported by the legislative history. The provision in question was first enacted by Laws 1979, 348:3, as an amendment to the former RSA chapter 282. The Senate Insurance Committee recommended passage of the bill (HB 757), evidently on the basis of an analysis by the New Hampshire Department of Employment Security, which reads in pertinent part:

"Section 3 will require an Employer to make restitution to the unemployment compensation fund of benefits received by a former employee who is awarded back pay either through arbitration or a court award. Under the present statute, employers have in many cases been allowed to deduct from the back pay award the amount of unemployment benefits received by the aggrieved employees, thus giving the employer a windfall."

Department of Employment Security, Analysis of H.B. 757, as amended, submitted to House Appropriations Committee (May 4, 1979)

[1] The statute, applied in conjunction with the Foote rule, eliminates the employer's windfall. On the other hand, if the statute is construed as repealing the Foote rule, it penalizes the employer  
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and gives the employee a windfall, by permitting him to collect both unemployment benefits and full back pay for the same period of time. We will not presume that the legislature intended such an illogical result, or one so opposed to the evident purpose of the statute. *State v. Kay*, 115 N.H. 696, 698-99, 350 A.2d 336, 338 (1975). Accordingly, we hold that the rule announced in *Foote* retained its efficacy after passage of the statute, and that the deduction of \$6,054 from Mr. Oudens' award was proper.

Mr. Oudens argues that, in the practical circumstances of this case, he would receive no windfall because his attorney's fees, plus his increased taxes on the back pay award, exceed \$6,054. The first part of this argument is without merit. The personnel commission denied Mr. Oudens' request for an award of attorney's fees, and he failed either to seek rehearing or to appeal that portion of the decision. He may not, therefore, raise the issue directly or indirectly before this court. RSA 541:4.

[2] On the question of taxes, Mr. Oudens' argument has merit only to the extent that he may have been subjected to double taxation. Unemployment benefits have been taxable under the Internal Revenue Code since 1978. 26 U.S.C.A. 85. We conclude that, absent an express statutory provision to the contrary, a corresponding amount deducted from a back pay award is not also subject to income tax. See *United States v. Supplee-Biddle Co.*, 265 U.S. 189, 195-96 (1924); cf. Rev. Rul. 56-631, 1956-2 C.B. 25 (where unemployment benefits were not taxable, equal amount deducted from back pay award was subject to tax).

[3] It was accordingly improper for the WSPCC to deduct federal taxes from Mr. Oudens' award before deducting the \$6,054. Since only the reduced award was taxable as income, the reduction for unemployment benefits should have preceded any calculation of taxes to be withheld. The WSPCC's records, including any reports submitted to the Internal Revenue Service regarding Mr. Oudens' award, should be amended to reflect the correct procedure. We remand this case to the personnel commission for the sole purpose of its taking the corrective actions required hereby.

Any overpayment of taxes by Mr. Oudens may be recouped through the filing of an amended return. Because the WSPCC's error produced no other injury to Mr. Oudens, and no benefit to itself, no further modification of the commission's order is necessary.

Affirmed as modified; remanded.

All concurred.  
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