

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: )  
 )  
VERMONT STATE EMPLOYEES' ) DOCKET NO. 90-74  
ASSOCIATION (RE: REFUSAL )  
TO PAY STANDBY PAY) )

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 18, 1992, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order in this matter. 15 VLRB 71. Therein, the Board concluded that the management of the St. Johnsbury and Bennington District Offices of the State Department of Social and Rehabilitation Services, Division of Social Services ("Employer"), violated the State-VSEA Contract and the Division's own policy by requiring employees, while they were on a purported "available" status, to be reachable and to be able to respond as if they were on "standby" status. As a remedy, the Board ordered that the employees be "awarded back pay, plus interest, from July 22, 1990, until the date subsequent to this decision that the decision is fully complied with, for all hours such employees have been assigned to be on 'available' status, by compensating them as if they were on 'standby' status for such hours".

On March 31, 1992, the Employer filed a Motion for Reconsideration, which motion was limited to requesting that the Board reconsider the amount of back pay ordered in light of an October 25, 1991, memorandum from Social Services Division

Director Steven Dale to Division staff. On April 3, 1992, VSEA filed a memorandum in opposition to the Employer's motion.

On May 18, 1992, the Board ordered that an evidentiary hearing and argument be held with respect to the State's Motion for Reconsideration, compliance with the Findings of Fact, Opinion and Order of the Board issued on March 18; and any back pay issues in dispute. A hearing was conducted by Board members Charles H. McHugh, Chairman; Catherine L. Frank and Carroll P. Comstock on July 30, 1992. Assistant Attorney General Michael Seibert represented the Employer. VSEA Staff Attorney Jonathan Sokolow represented VSEA. The parties filed Memoranda of Law on August 13, 1992. The Employer, in its Memorandum, went beyond issues raised in its Motion for Reconsideration and requested that "the Board set aside in whole its Opinion and Order dated March 18, 1992". The Board concludes that consideration of any issues beyond those which were the subject of the July 30 hearing is unwarranted. As the Board made clear at that hearing, the Board was not reconsidering any part of its March 18, 1992, decision except the amount of back pay due employees.

#### FINDINGS OF FACT

1. On October 25, 1991, the day following the last Board hearing on the merits in this grievance, Division Director Steven Dale sent a memorandum to district offices, including the St. Johnsbury and Bennington District Offices. Therein, Dale stated in part:

At the Labor Board hearing regarding standby, held on October 10, 1991, several questions were raised around the definition of available status. The Board's process is continuing. However, I want to make sure that any misconceptions are cleared up immediately.

Following this introductory statement in the memorandum, Dale reiterated the after hours emergency services policy of the Division which, as the Board subsequently concluded in its March 18, 1992, decision, did not violate the Contract (Employer's Exhibit A).

2. Dale sent the October 25, 1991, memorandum to the District Directors in the district offices.

3. Bennington District Director Charles Gingo received a copy of Dale's memorandum a few days after October 25, 1991. He read the memorandum to employees at a November 5, 1991, staff meeting. At the meeting, no employee asked Gingo if he was rescinding his previous statement that he would consider disciplining an employee on "available" status if the employee went too far from the Bennington area to be able to respond to an emergency. Gingo made no retractions of these statements at the meeting. Following the meeting, Gingo routed the October 25, 1991, memorandum throughout the office to all staff.

4. St. Johnsbury District Director Harry Adamek received a copy of Dale's memorandum a few days after October 25, 1991. Adamek did not discuss the memorandum with staff or distribute a copy to them until an April 22, 1992, staff meeting (See Finding #8 below.)

5. The staff of the St. Johnsbury and Bennington district offices became aware of the March 18, 1992, decision of the Board in this matter soon after the issuance of the decision.

6. Following the March 18, 1992, decision by the Board in this matter, Dale, on April 13, 1992, recirculated a copy of his October 25, 1991, memorandum to all district directors, and asked

them "to share this with all of your staff, to ensure everyone has the correct information" (State's Exhibit D).

7. Gingo then brought Dale's October 25, 1991, memorandum to the attention of the Bennington staff for the second time.

8. Adamek distributed copies of Dale's October 25, 1991, memorandum at an April 22, 1992, meeting to all staff who were placed on "availability" and "standby" status. At the meeting, Adamek "walked through" the memorandum with staff to highlight its provisions. Employees of the St. Johnsbury office had not seen Dale's October 25, 1991, memorandum until the April 22, 1992, meeting.

9. At all times relevant since the implementation of the after-hours emergency services policy on July 22, 1990, there have been two workers on available status in the St. Johnsbury office at all applicable times. The management of the St. Johnsbury district office never distinguished between the two "available" workers in communicating expectations to the employees, except to indicate that the Emergency Services Program would attempt to reach the designated primary "available" worker before calling the designated backup "available" worker. Primary and backup "available" workers operated under the understanding that discipline would be a possibility if they could not be reached and/or were unable to respond to a call-out when on "available" status.

### OPINION

There are two issues before the Board: 1) whether the Board should grant the Employer's Motion for Reconsideration of the March 18, 1992, decision of the Board in this matter, and reduce the amount of back pay ordered to be paid St. Johnsbury and Bennington District Office employees in light of an October 25, 1991, memorandum from Division Director Steven Dale; and 2) whether the back pay in the St. Johnsbury district office should be limited to primary "available" workers, or should also be awarded to the backup "available" workers. We will discuss each of these issues in turn.

#### Motion for Reconsideration

In the March 18, 1992, decision, the Board ordered that the St. Johnsbury and Bennington District Office employees be "awarded back pay, plus interest, from July 22, 1990, until the date subsequent to this decision that the decision is fully complied with, for all hours such employees have been assigned to be on 'available' status, by compensating them if they were on 'standby' status for such hours". The Employer, in its Motion for Reconsideration, contends that the October 25, 1991, memorandum of Dale should serve to cut off the back pay granted to employees in St. Johnsbury and Bennington. The Employer contends that the memorandum should have taken care of any confusion which employees may have had over whether they were expected to respond while on "available" status in the same manner as would apply while they were on "standby" status.

In deciding whether to grant the Employer's Motion for Reconsideration, we adhere to the standards expressed in the

March 18, 1992, decision that employees are entitled to back pay for all hours they essentially were required, while on a purported "available" status, to be reachable and to be able to respond as if they were on "standby" status. 15 VLRB 89-91. Such a requirement exists when management leads employees to reasonably believe that they are not free to travel where they cannot be reached and would be unable to respond to an emergency. Id. Such a requirement does not exist where employees, while on "available" status, act as if they are on "standby" status as a result of a self-imposed professional responsibility, rather than a requirement imposed on them by management. Id., at 90-91.

In applying these standards to the situation in the Bennington District Office, we conclude that employees, while on purported "available" status, were required to act as if they were on "standby" status up until the November 5, 1991, staff meeting. The requirement ended then when Charles Gingo, Bennington District Director, read Dale's October 25, 1991, memorandum to the staff. This served to dispel the employees' reasonable belief up until that time that management was requiring them to act as if they were on "standby" status while they were on "available" status.

The Dale memorandum referenced the questions that had been raised concerning the definition of "available" status at the Board hearing on the merits of this matter, and Dale expressed the intent "to make sure that any misconceptions are cleared up immediately". Dale then reiterated in the memorandum the after hours emergency services policy of the Division which was consistent with the Contract. Upon Gingo reading this memorandum

to them, employees should have reasonably concluded that the past requirements imposed by Gingo in contravention of Division policy and the Contract now were superseded by Dale's memorandum.

We recognize that Gingo, at the November 5, 1991, meeting, did not explicitly rescind his previous statements that he would consider disciplining an employee on "available" status if the employee went too far from the Bennington area to be able to respond to an emergency. We also recognize that less than a month prior to this November 5 meeting, on the first day of hearing on the merits in this matter, October 10, 1991, Gingo indicated through his testimony that the possibility of discipline in such circumstances still existed. However, the expressed intent of the October 25, 1991, Dale memorandum was to clear up any misconceptions concerning "available" status which had arisen during the Board hearings on the merits. In light of this expressed intent, if employees had any doubts that Gingo still would contemplate discipline in contravention of the Division policy expressed in the October 25, 1991, memorandum by Dale, Gingo's supervisor, then employees should have asked Gingo if he adhered to his previous statements. This would have been the reasonable thing to do. Their failure to do so defeats their claim of reasonable belief that Gingo still would contemplate discipline. If employees subsequently acted, while on "available" status, as if they were on "standby" status, this was due to a self-imposed requirement, rather than a requirement imposed by management.

In addressing the situation in the St. Johnsbury District Office, we conclude that different factual circumstances warrant

a different result. Although St. Johnsbury District Director Harry Adamek received a copy of Dale's memorandum a few days after October 25, 1991, he did not discuss the memorandum with staff or distribute a copy to them until an April 22, 1992, staff meeting. By this time, the staff of the St. Johnsbury office had become aware of the March 18, 1992, decision of the Board.

Under these circumstances, we conclude that the reasonable belief of employees that they were required, while on "available"s status, to act as if they were on "standby" status ended upon issuance of the March 18, 1992, decision of the Board. Up until that time, employees had no basis to conclude that anything had changed with respect to St. Johnsbury District Office lack of adherence to Division policy since they had not been made aware of Dale's October 25, 1991, memorandum.

In the March 18, 1992, decision, the Board concluded that Division policy with respect to "available" status was consistent with the Contract, but that the requirement placed upon employees by St. Johnsbury District Office management violated the Contract and the Division's own policy. 15 VLRB 89-91. Upon issuance of this decision, St. Johnsbury District Office employees reasonably should have concluded that their district office management no longer could effectively require them to act contrary to Division policy. Prior to this decision, workers operated under the understanding, gained from discussions with their district office management, that discipline would be a possibility if they could not be reached and/or unable to respond to a callout when on "available" status. 15 VLRB at 82, Finding #22. Given the Board decision that the expectations placed on employees in St.



Johnsbury violated not only the Contract but the Division's own policy, the employees reasonably should have concluded that St. Johnsbury management could not effectively discipline employees for failing to meet such invalid expectations. Thus, the Board's decision should have led employees to reasonably conclude that they were no longer required, while on "available" status, to be reachable and able to respond as if they were on "standby" status.

In sum, we grant the Employer's Motion to reconsider the back pay award ordered in our March 18, 1992, decision to the extent that: 1) the Employer's back pay liability for Bennington District Office employees terminated as of the November 5, 1991, staff meeting; and 2) the back pay liability for St. Johnsbury District Office employees terminated as of the March 18, 1992, decision of the Board.

Back Pay for Backup "Available" Workers in St. Johnsbury

The State contends that the backup "available" workers in St. Johnsbury are entitled to no backpay in this matter, while VSEA contends that they are entitled to back pay to the same extent as primary "available" workers. The Employer reasons that, since the Board has accepted that all of the workers in St. Johnsbury held themselves to "standby" restrictions while they were the primary "available" person, then all such workers knew there was virtually no chance they would ever get a call while they served as the backup "available" person and should receive no backpay for such status. VSEA contends that management had never distinguished between the primary and backup person, and thus the primary and backup person were subject to the same

travel restrictions and time restrictions as rejected by the Board in its March 18, 1992, decision.

We conclude that backup "available" workers should be compensated to the same extent as primary "available" persons in St. Johnsbury. The management of the St. Johnsbury district office never distinguished between the primary and backup "available" workers in communicating expectations to the employees, except to indicate that the Emergency Services Program would attempt to reach the primary "available" worker before calling the backup "available" worker. This led backup workers reasonably to conclude that they had to be able to be reached and able to respond to an emergency while on purported "available" status to the same extent as if they were on "standby" status.

Thus, their situation was identical to that of primary "available" workers except that the likelihood that they would be called out was less. However, the likelihood of being called out is not the determinative factor in determining whether an employee on purported "available" status is actually on "standby" status. The status turns on the level of management expectation concerning ability to be able to reach employees and reporting for duty, 15 VLRB at 84, not on likelihood of being called out. Since expectations for primary and backup "available" persons was the same in St. Johnsbury (i.e., that they be reachable and able to respond as if they were on "standby" status), then both workers were entitled to be paid as if they were on "standby" status.

#### ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Employer's Motion for Reconsideration of the March 18, 1992, decision of the Board in this grievance is GRANTED to the extent indicated in the Opinion herein, and is DENIED in all other respects;

2. Employees in the Bennington District Office of the State of Vermont, Department of Social and Rehabilitation Services, Division of Social Services, shall be awarded back pay, plus interest, from July 22, 1990, through November 4, 1991, for all hours such employees were assigned to be on "available" status, by compensating them as if they were on "standby" status for such hours;

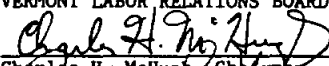
3. Employees in the St. Johnsbury District Office of the State of Vermont, Department of Social and Rehabilitation Services, Division of Social Services, shall be awarded back pay, plus interest, from July 22, 1990, through March 17, 1992, for all hours such employees were assigned to be on "available" status, whether they were the primary or backup "available" worker, by compensating them as if they were on "standby" status for such hours.

4. The interest due employees on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due that would have included the applicable payment for "standby" status, and ending on the date the employees actually receive such back pay; and

5. The parties shall submit to the Board by November 19, 1992, a proposed order indicating the specific amount of back pay due each of the employees. If they are unable to come to an agreement on such proposed order, they shall notify the Board in writing on that date of the specific facts agreed to by the parties, specific areas of factual disagreement, and a statement of issues which need to be decided by the Board.

Dated this 5th day of November, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Carroll P. Comstock