

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 84-33
ALEXANDER BARON)

MEMORANDUM AND ORDER
ON STATE'S MOTION TO DISMISS

Statement of Case

Grievant was employed by the State of Vermont, Department of Employment and Training until June 1, 1984. On June 15, 1984, he filed this grievance with the Board seeking reinstatement to his position of employment, relief from his January 30, 1984, performance evaluation, and related relief. On October 11, 1984, Grievant amended his grievance to add a challenge to his performance evaluation of May 1, 1984. The State filed an answer to the grievance raising the issue of whether the grievance was timely. On October 25, 1984, the State filed a Motion to Dismiss the grievance on timeliness grounds (except as to the May 1, 1984, performance evaluation matters which the State concedes were timely filed).

On February 6, 1985, the full Board issued a Memorandum and Order which dismissed the grievance except for the grievance of the performance evaluation dated May 1, 1984. On February 15, 1985, Grievant filed a Motion for Reconsideration pursuant to Section 11.1 of the Board's Rules of Practice and V.R.C.P. 52. By issuance of this Memorandum and Order, we are recalling the February 6, 1985, Memorandum and Order and substituting this in its place. Board Member William G. Kemaley, Sr., has not participated in the decision upon reconsideration.

The facts necessary to resolve the issues raised by the State's Motion to Dismiss are not in dispute. Those facts may be summarized as follows:

1. Grievant was appointed to the position of Unemployment Compensation Tax Auditor A on October 21, 1983.
2. Grievant claims that between October 21, 1983, and January 13, 1984, he was subjected to harassment, intimidation and retaliation by his employer because of his age and prior grievance activity. Grievant further alleged that these actions caused him to send the notice of retirement described below. For purposes of this ruling, the Board accepts these allegations as true.
3. On January 13, 1984, Grievant advised his employer in writing that he had "set the wheels in motion" for his retirement on June 1, 1984. He stated that he provided this advance notice "to give you sufficient time to prepare".
4. On January 17, 1984, Grievant's employer acknowledged receipt of Grievant's January 13, 1984, memorandum and formally accepted Grievant's retirement as of June 1, 1984.
5. On January 30, 1984, Grievant received a performance evaluation on which his overall rating was "Unsatisfactory". Grievant subsequently grieved this evaluation through Step II. On April 2, 1984, the employer denied the grievance at Step II on timeliness grounds. Grievant took no formal action with regard to this denial until he filed the instant grievance with the Board.
6. On May 1, 1984, Grievant received another performance evaluation showing an overall rating of "Inconsistently meets job requirements/standards". Grievant subsequently grieved this evaluation through the contract procedures, including the final step before this Board.

7. On May 1, 1984, Grievant notified the State he was retracting his retirement notice.

8. On May 7, 1984, Sandra Dragon, Commissioner of the Department of Employment and Training, advised Grievant by letter the State would not consent to his withdrawal of the retirement notice and that June 1, 1984, would be his last day of employment in State service. Grievant received this letter on May 14, 1984.

9. On May 18, 1984, Grievant objected through his union representative to the State's refusal to permit him to work beyond June 1, 1984.

10. On May 28, 1984, Commissioner Dragon gave Grievant written notice confirming her earlier position that Grievant had resigned and that his resignation could not be withdrawn.

11. June 1, 1984, was Grievant's last day of work. Grievant alleged that he was ready, willing and able to continue work after that date but was prevented from doing so by the State. The Board accepts these allegations as true for purposes of this decision.

12. On June 15, 1984, Grievant filed his grievance with the Board.

OPINION

The parties' collective bargaining agreement requires that employee grievances, except for dismissal actions, must be filed with the employer within 15 days of the time when the employee could reasonably have been aware that the grievable event had occurred. Article 16, Section 3, A. Dismissal actions may be grieved directly to the Board within 30 days. Article 16, Section 4, C; VLRR Rule 23.1. Decisions on grievances filed with the employer must be appealed through Step III within 10 working days, Article 16, Section 3, B, a and 3, C, a, and appealed to the Board within 30 days of the decision at Step III, VLRR Rule 23.1.

As to the issues relating to reinstatement of Grievant's employment, the State contends the original grievance was not timely filed with the Board. It argues that even if this matter is viewed as a "constructive discharge" grievance to the Board, the filing occurred more than 30 days after Grievant's voluntary notice of resignation and, therefore, was untimely. Grievant contends the filing was timely since the operative date from which the filing time should be measured is Grievant's last day of work.

As to the grievance of the January 23, 1984, performance evaluation, the State contends Grievant's failure to appeal the Step II decision within 10 days precludes Board review at this time.

For reasons stated below, the Board holds the grievance was not timely filed.

Grievant maintains the key issue in this matter is whether resignation is the same as retirement. Grievant contends they are not since the Rules and Regulations for Personnel Administration define retirement and resignation separately. Grievant alleges the State, in essence, forced him to retire in violation of the Rules and Regulations for Personnel Administration by refusing to recognize Grievant's May 1 withdrawal of his retirement notice, since the Rules do not require an appointing authority's approval for withdrawal of a decision to retire.

The Rules and Regulations for Personnel Administration provide in pertinent part as follows:

2.018 Separation is the termination of an employee from employment by the State through resignation, removal, dismissal, retirement or layoff.

2.0384 Resignation is a separation of an employee from the State Service by his own voluntary act.

2.0385 Retirement is the separation of an employee from the State Service in accordance with the provisions of the Vermont Employees' Retirement System or other retirement systems under which an employee is eligible to receive retirement benefits.

12.02 Resignation: An employee who resigns shall give at least two weeks' notice and reasons for such action in writing to the appointing authority. A resignation once submitted shall not be withdrawn by the employee without the consent of the appointing authority.

Although the Rules do not contain identical definitions of "retirement" and "resignation", we believe retirement prior to the mandatory time for retirement is the functional equivalent of a resignation. In either case, an action is initiated by an employee to voluntarily terminate his or her employment. In either case, the employer must take action to either replace the departing employee or reorganize the work force to eliminate the position the employee held. Under these circumstances, we are not persuaded by Grievant's implicit arguments he could withdraw his retirement notice without the employer's approval because the Rules do not explicitly require the employer's approval for withdrawal of a decision to retire. Such a ruling on our part would be unfair to the employer who operated under the assumption Grievant was leaving and had to plan accordingly. A retirement, just like a resignation, may not be withdrawn by the employee without the consent of the appointing authority.

The Board finds Grievant's memorandum of January 13, 1985, announcing his retirement and the employer's reply of January 17, 1985, accepting it make it clear the parties viewed Grievant as having given notice in January of retirement in June. If, as Grievant alleges, his notice of retirement was a result of some improper discrimination or harassment by

the State, these acts happened before Grievant delivered the notice on January 13, 1984. Although such facts may make this a constructive discharge grievable directly to the Board, the grievance was not filed until five months after the acts amounting to a "discharge" occurred. This delay deprives the Board of jurisdiction to consider these actions in this grievance proceeding. Even if the State's conduct amounted to a constructive discharge, the grievance must be filed with this Board within 30 days. VI.RB Rule 23.1

Given the fact of Grievant's retirement in January, 1984, Grievant's efforts in May, 1984, to rescind the retirement were, in effect, an offer which the employer could accept or reject in its discretion. cf. Grievance of Willis Ross, VI.RB Docket No. 75-19 (1975). The State gave notice of its rejection of this offer on May 14, 1984. This action by the State occurred more than 30 days before Grievant filed his grievance with this Board. Therefore, the Board is without jurisdiction to consider a grievance testing whether or not the State's exercise of discretion was in any way improper. VI.RB Rule 23.1.

The next employer action from which a grievance might arguably be taken is the May 28, 1984, confirmation that the May 14, 1984, decision would stand. The Board does not view this confirmation as a separate, grievable event which would extend the time for filing a grievance. Under the Board's Rule 23.1, the grievance must be filed within 30 days after notice of the "final decision of the employer". The May 14, 1984, decision not to allow Grievant to retract his resignation was, in its own terms, final. A later refusal to reconsider that decision is not separately subject to grievance on the facts of this matter.

It is implicit in the above rulings the operative date from which the time for filing a grievance began to run here was not Grievant's

last day of work, which was June 1, 1984. The proper focus in this particular case is the time when an alleged wrongful conduct occurred, not the time when the consequences of the conduct became effective. c.f. United States Postal Service Marine Mail Processing Center, 271 NLRB 61 (1984).

The Board is unwilling to hold that the time for filing a grievance in these circumstances is measured from the last day of work because such a ruling would ignore the compelling realities of the workplace. These realities require an employer to take action once it accepts an employee's retirement or resignation. The employer must either replace the departing employee or reorganize the work force to eliminate the position the employee held. The employer may also postpone or discontinue actions detrimental to the employee if the employer judges them unnecessary given the employee's remaining tenure. The employer cannot realistically wait until the employee has left his job to begin these efforts. Rather, it must make decisions and begin to implement those decisions quickly.

These considerations, plus the fact only a single individual was involved and there was clear notice to Grievant on May 14 the employer had made a final decision not to allow him to retract his notice of retirement, differentiates this case from Mount Abraham Education Association v. Mount Abraham Union High School Board of School Directors, 4 VLRB 224 (1981), where we held implementation of a no-smoking policy by management, not its adoption, was the time the clock for filing an unfair labor practice charge began running. In Mount Abraham, a policy affecting the entire functioning of the workplace was involved which management could unilaterally change at the last minute prior to implementation, unlike here where the employer's decision not to

allow retraction of the retirement notice was a final decision affecting one individual. Also, H.L. Abraham was an unfair labor practice case which concerned an entire bargaining unit of employees and raised issues about collective bargaining, circumstances not present here.

The grievance procedure is designed to provide a fair and practical method of resolving disputes. Strict time limits are imposed in the grievance procedure in recognition that the work of State government must proceed while disputes are resolved. The required time limits permit the parties to plan with relative certainty on the assumption that actions which are not challenged within the specified times cannot be challenged thereafter.

In recognition of these realities, the Board is inclined to rule that the grievance time began to run upon employer's acceptance of Grievant's resignation. It is unnecessary to reach this issue in the instant case, however, since the employer's response to Grievant's attempt to rescind the resignation occurred more than 30 days before the grievance was filed. Accordingly, we hold that on the facts before us, the time for filing a grievance began to run not later than May 14, 1984. Therefore, Grievant's filing on June 15, 1984, was not timely to vest jurisdiction in the Board over the issue arising out of Grievant's separation from service on June 1, 1984.

The timeliness of the grievance concerning the January 23, 1984, performance evaluation is less complicated. The record shows that Grievant took no appeal from the denial of this grievance at Step II on April 2, 1984. The collective bargaining agreement precludes review by this Board. VIRB Rule 21.1; Agreement Article 16, Section 3, C, a.

We thus conclude this grievance should be dismissed except for the grievance of the performance evaluation dated May 1, 1984. Grievant maintains, by dismissing this matter insofar as it contested Grievant's termination from State service, the Board would essentially deprive itself of jurisdiction over the only remaining issue - the May 1, 1984, performance evaluation - under the rule announced in Grievance of Boocock, 7 VLRB 265, 269 (1984).

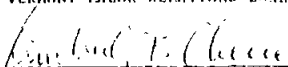
We disagree. In Boocock, the Board concluded an actual controversy did not exist, thus stripping the Board of jurisdiction, because the potential harm to the employee which may have been caused by an adverse performance evaluation had been eliminated because he obtained satisfactory employment in the Federal service, and there was no indication the evaluation at issue affected his procuring of employment. However, here the Board has no evidence what effect the performance evaluation Grievant received had on his procuring of other employment.

ORDER

For the reasons stated above, it is hereby ORDERED the Grievance of Alexander Baron is DISMISSED except for the grievance of his performance evaluation dated May 1, 1984, as set forth in the pleading to amend the grievance dated October 11, 1984.

Dated this 2nd day of March, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly D. Cheney, Chairman

James S. Gilson