

VERMONT LABOR RELATIONS BOARD

CHITTENDEN SOUTH EDUCATION ASSOC- )  
IATION, HINESBURG UNIT )

v. )

HINESBURG SCHOOL DISTRICT AND )  
HINESBURG SCHOOL BOARD )

DOCKET NO. 85-15

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue are disputes over entitlement to back pay, reinstatement to position held prior to the strike and reimbursement for expenses for various Hinesburg Elementary School teachers, who were on strike and have been reinstated.

On August 30, 1985, the Vermont Labor Relations Board ("Board") issued its Findings of Fact, Opinion and Order in this case, finding that the Hinesburg School District and Hinesburg School Board ("School Board") had committed unfair labor practices in violation of 21 VSA §1726(a)(1) and (a)(5). 8 VLRB 219 (1985). To remedy these unfair labor practices, the Board ordered the School Board to reinstate striking teachers "to their former jobs or, if those jobs no longer exist, to substantially equivalent positions", and to "(m)ake whole all said strikers for any loss of earnings they may have suffered". 8 VLRB at 252. This make-whole relief was to be accomplished "by payment to each (teacher) a sum of money equal to that which normally would have been earned as wages from five days after the strikers' unconditional request for reinstatement, to the date of their reinstatement, for all hours of their regularly-assigned shift, minus any income (including unemployment compensation received and not paid

back) received by employees in the interim". Id. On July 25, 1986, the Vermont Supreme Court affirmed in all respects the decision of the Board. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District, 147 Vt. 286. By decision of December 18, 1986, the Board decided whether various teachers should be denied back pay and other damages either because of strike misconduct, acceptance of teaching positions at other schools or because of having a special non-renewable contract. 9 VLRB 252.

At this point in the proceedings, there remain disputes as to whether five teachers have been made whole for losses that they suffered as a result of the School Board's unfair labor practices. Specifically, the following issues remain to be addressed by the Board:

- 1) Whether Sally Robertson is entitled to recover \$1,110, plus interest, for additional housekeeping costs that she incurred during the 1985-86 school year;
- 2) Whether Timothy Bourne is entitled to recover \$2,877, plus interest, for additional travel expenses that he incurred during the 1985-86 school year;
- 3) Whether Jean Paul Farineau is entitled to recover \$9,334 in back pay and other expenses, plus interest, for the 1985-86 school year or whether he failed to make a good-faith effort to find substantially equivalent employment.
- 4) Whether Katherine Kjelleren is entitled to recover \$12,554 in back pay and other expenses, plus interest, for the 1985-86 school year or whether she failed to make a good-faith effort to find substantially equivalent employment; and
- 5) Whether Nancy Bell is entitled to be reinstated, with full back pay and other damages of \$21,857, plus interest, to the full-time position as school nurse and health educator.

An evidentiary hearing on these issues was held before Board members Charles H. McHugh, Chairman, and Catherine Frank on February 5, 1987. The School Board was represented by Attorney Mary Ann

Rousseau. The Chittenden South Education Association, Hinesburg Unit ("Association"), the teachers' representative, was represented by Attorney Bruce Lerner and James Suskin, General Counsel, Vermont-NEA. The parties filed briefs on February 27, 1987, and reply briefs on March 12, 1987.

#### FINDINGS OF FACT

1. During the 1984-85 school year, Sally Robertson was a full-time sixth grade teacher at the Hinesburg School. During the 1985-86 school year, Robertson obtained an interim position as a full-time seventh and eighth grade English teacher at the St. Albans City School in St. Albans, Vermont.

2. Robertson resides in Shelburne, Vermont. Her interim employment in St. Albans added almost two hours to the time spent working and commuting while she worked in St. Albans compared to the hours she spent working and commuting in Hinesburg.

3. When compared to her position at the Hinesburg School, Robertson's interim position at the St. Albans City School also required that she spend additional time outside of school preparing for class and reviewing papers.

4. To ease some of the burden that would result from the extra time commitments of the job in St. Albans, Robertson and her husband decided, prior to her accepting the job, that it was necessary to hire a housekeeper who could work three hours per week in the Robertson household.

5. The housekeeper hired by the Robertsons worked for 37 weeks during the 1985-86 school year. She was paid \$30 per week, for a total of \$1,110.00 (Association Exhibits, Robertson 3 through 10).

6. During the 1984-85 school year, Timothy Bourne was a full-time fourth grade teacher at the Hinesburg School. Bourne owns a house and resides in Hinesburg. His commute to the Hinesburg School is less than two miles. During the 1985-86 school year, Bourne was unable to obtain an interim teaching position.

7. In September 1985, Bourne was told by friends in New York that a job was available with Andar Electronics, a company with which he had worked several years earlier. Bourne decided to take the job in New York while commuting back and forth between New York and Vermont approximately once per week, depending on his exact work schedule. Bourne shared an apartment in New York with a friend at a low cost to Bourne. Bourne and his friend had an arrangement whereby Bourne would obtain low cost accommodations by spending weeknights only at the apartment and returning to Vermont on weekends. In addition, by spending most weekends and certain weekdays in Vermont, Bourne was able to continue his search for employment in Vermont.

8. Bourne was employed by Andar Electronics from September 1985 until May 1986, during which time he earned a total salary of \$12,625.

9. When commuting between Vermont and New York, Bourne first drove from his home in Hinesburg to the airport in Burlington. He generally left his car in Burlington in a garage that was part of a private home near the airport, rather than in the more expensive parking lots at the airport. He then flew via People Express Airlines, the carrier with the lowest fares to the New York metropolitan area, to the airport in Newark, New Jersey. From that airport, Bourne would take a commuter bus into New York, and then take a subway to the office at Andar Electronics.

10. These additional travel expenses for Bourne, above and beyond his usual commuting expenses to and from Hinesburg, totaled at least \$2,877 for the period he was employed at Andar Electronics (Association Exhibits, Bourne 1 through 16).

11. During the 1984-85 school year, Jean Paul Farineau was a half-time French teacher at the Hinesburg School. His schedule required that he teach at the Hinesburg School five mornings per week. In addition to teaching at Hinesburg, Farineau coached volleyball at St. Michael's College and the University of Vermont. Farineau did not coach volleyball at either institution during the 1985-86 school year.

12. Farineau went on strike with other Hinesburg teachers on April 3, 1985. Farineau began looking for other teaching employment in May, 1985 and continued an active search in Vermont until September, 1985. Farineau sent resumes and cover letters to various school districts, school superintendents and school principals in Vermont. Farineau sent an application for employment to a minimum of three school districts per week. In addition, Farineau kept in contact with French teachers in the neighboring school districts and inquired of them as to any openings to teach French. Farineau did not refuse any interviews or job offers that he received during this time. Farineau was unsuccessful in securing alternative teaching employment. It is difficult to obtain regular teaching employment in Vermont after the school year begins in late August or early September.

13. In September, 1985, Farineau did obtain a part-time job as interim Recreation Director for the Town of Colchester. This position involved approximately 20 hours per week, and Farineau was allowed to

schedule his hours to best fit his other commitments. Farineau could have performed this job while teaching on a half-time basis at the Hinesburg School.

14. Farineau's interim position with the Town of Colchester ended on December 10, 1985, when a full-time, permanent Recreation Director was hired by the Town.

15. After losing his part-time position in Colchester, Farineau decided that he had exhausted virtually any possibility of obtaining a teaching position in Vermont. He and his wife decided, at the urging of several friends, to move to Birmingham, Alabama. Farineau remained in Birmingham from January 1986 through April 1986. Throughout this period, Farineau searched for teaching positions in school districts in that area. Farineau succeeded in obtaining several assignments as a substitute teacher in two schools in Birmingham. Specifically, Farineau substituted 15 days.

16. In late April or early May of 1986, Farineau and his wife returned to Vermont. At this time, Farineau was offered, and accepted, a permanent, part-time position with the Town of Colchester.

17. Since being offered reinstatement and returning to the Hinesburg School as a half-time French teacher in August, 1986, Farineau has continued to serve as a permanent, part-time employee for the Town of Colchester. Farineau is able to fulfill his duties at both jobs without any scheduling conflicts.

18. The difference between the salary Farineau would have earned if he taught at Hinesburg during the 1985-86 school year and his earnings during that year (less job search expenses) is \$9,334 (not including interest)(Association Exhibits, Farineau Exhibit 1).

19. During the 1984-85 school year, Katherine Kjelleren was a full-time junior high school science teacher at the Hinesburg School.

20. Kjelleren went on strike with other Hinesburg teachers on April 3, 1985. Kjelleren began looking for other teaching employment in May, 1985, and continued an active search through December, 1985. She sent cover letters and resumes to various school districts, school superintendents and school principals in Vermont. She sent an application for employment to a minimum of three school districts per week. Throughout this period, striking teachers kept each other informed of teacher job openings. Kjelleren was involved in this information network. Kjelleren also reviewed the help-wanted ads in the local newspaper and reviewed job listings from the University of Vermont Job Service.

21. During August, 1985, Kjelleren had interviews for teaching positions in Essex Junction, Colchester, Milton and St. Albans Town. Toward the beginning of August, 1985, Kjelleren received a job offer from the St. Albans Town School. However, the principal demanded a response from Kjelleren within two days. Kjelleren decided not to accept that position for the following reasons: 1) she was optimistic that one of her other interviews would result in her being offered a teaching job elsewhere; 2) she would have been required to teach under a new and complicated Mastery Learning Program which would have resulted in additional working hours; 3) and the school was more than 35 miles from Kjelleren's home in Burlington, which she thought was too far to drive in her unreliable car.

22. Kjelleren did not receive any full-time teaching offers as a result of her other interviews.

23. By late December, 1985, Kjelleren decided she had virtually exhausted any possibility of obtaining a full-time teaching position in another school district in Vermont. This was a reasonable conclusion on her part. Although she continued to be willing to accept a teaching position if it became available and continued to search for such positions, Kjelleren decided to enroll full-time in a Master's Degree program at the University of Vermont. She enrolled in four courses, all of which were scheduled during evening hours. Kjelleren was willing and able to drop a few of her classes if it became necessary to do so in order to obtain or keep a teaching position. From January, 1986, to September, 1986, Kjelleren took 24 credit hours of graduate courses.

24. During 1986, Kjelleren worked seven days as a substitute teacher at Champlain Valley Union High School and in the Colchester School District (Association Exhibits, Kjelleren 2 and 3).

25. The difference between the salary Kjelleren would have earned if she taught at Hinesburg during the 1985-86 school year less her earnings during that year (less job search expenses) and the unemployment compensation she received was \$12,554 (not including interest)(Association Exhibits, Kjelleren 1).

26. During the 1984-85 school year, Nancy Bell was a full-time school nurse and health educator at the Hinesburg School with 15 years seniority. Bell is certified pursuant to State regulations in both school nursing and health education.

27. Although Bell was originally hired by the Hinesburg School in 1970 as the school nurse, beginning in 1973, Bell took on responsibilities in health education. This included providing classroom instruction in general hygiene, drug abuse and other areas



that are traditionally included in a health education curriculum, as well as teaching health education to seventh and eighth grade students.

28. During the 1984-85 school year, Bell's responsibilities in health education occupied approximately 10 hours per week for three-quarters of the school year.

29. The School Board considered the job performance of Bell to be excellent.

30. In March, 1984, James Rice, Director of Personnel for the School Board, informed Bell that the "school nurse program" would be reduced if the school budget proposed by the School Board was decreased by Hinesburg voters. Rice informed Bell: "If the school budget passes,... the Board will attempt to renew the staffing as closely as it has in the past" (Association Exhibits, Bell 2). Bell's position of school nurse and health educator was continued after completion of the budget process.

31. On March 20, 1985, Bell received a letter from Rice, which provided in pertinent part as follows:

The Hinesburg Board of School Directors has decided to reduce the nursing position beginning in the 1985-86 school year. This decision was made following the Board's deliberations and preparation of the budget for next year.

Because you only have your single endorsement which is for the position being reduced, the Board will not have a position for you next year, if the budget concerns materialize.

(School Board Exhibit A)

32. Subsequently, Bell told Rice that the letter incorrectly indicated that Bell had "only (a) single endorsement" in school nursing. After being informed of this error, Rice sent another letter

to Bell indicating that Bell "indeed (has) two endorsements, school nurse and health educator". Rice informed Bell that this did not affect the reduction in force (Association Exhibits, Bell 13 and 14).

33. The School Board discussed the elimination of the school nurse and health educator position held by Bell and made the decision to do so by March 20, prior to the commencement of the strike by teachers on April 3. The School Board decided that they could not justify paying a substantially higher salary to Bell because of her health education duties than they would pay her if she performed only nursing duties.

34. On May 13, 1985, the School Board voted to change the school nurse and health educator position to a nurse resource person position which would not include health education duties. Bell's replacement as school nurse, Ann Petrie, was notified of the change on May 15, 1985, and she formally accepted the nurse resource person position for the 1985-86 school year. Petrie was paid an hourly rate of pay of \$12 per hour.

35. The duties of the nurse resource person are different from those of the school nurse and health educator. Although the nurse resource person does give medical attention to the students, the position has no official health education teaching duties.

36. The nurse resource person position was the position in existence when Bell made her unconditional offer of reinstatement in September, 1985. The school nurse and health educator position which she had previously held had been eliminated.

37. In August, 1986, the School Board offered Bell reinstatement, not to her former position, but to a position as nurse resource

person. The letter also indicated that the nurse resource position was a "position compensated on an hourly basis of \$12.96 per hour, seven hours a day for 182 days". According to this description, Bell would be working the same number of hours and days as she had since 1972-73, but would be paid a total of \$16,511, rather than the \$25,710 she would have been entitled to under the salary schedule governing compensation of teachers at Hinesburg (Association Exhibits, Bell 1, 15 and 16).

38. Bell does not teach or engage in health education as part of the responsibilities of the position. Two of the replacement teachers are teaching health education to students in addition to their regular teaching duties.

#### OPINION

At issue is the appropriate final remedy to grant five Hinesburg Elementary School teachers, who have been reinstated subsequent to an unfair labor practice strike, as a result of School Board unfair labor practices.

In its decision finding School Board unfair labor practices, the Board ordered as a remedy that the School Board reinstate striking teachers "to their former jobs or, if those jobs no longer exist, to substantially equivalent positions", and to "(m)ake whole all said strikers for any loss of earnings they may have suffered". 8 VLRB at 252. This make-whole relief was to be accomplished "by payment to each (teacher) a sum of money equal to that which normally would have been earned as wages from five days after the strikers' unconditional request for reinstatement, to the date of their reinstatement, for all hours of their regularly-assigned shift, minus any income (including

unemployment compensation received and not paid back) received by employees in the interim." Id.

The teachers involved herein were improperly denied reinstatement by the School Board for the 1985-86 school year and, thus, are entitled to a back pay award. In calculating such award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole". Grievance of Goddard, 4 VLRB 189 at 190-191 (1981). cf. Kelly v. Day Care Center, Inc., 141 Vt. 608 at 615-616 (1982). To make employees "whole" in this case is to place them in the position they would have been in had they not been improperly denied reinstatement. Grievance of Benoir, 8 VLRB 165, 168.

In making employees whole, interim sums of money earned or that without excuse should have been earned are generally deducted from the gross amount of back pay to which the employee is entitled. Grievance of Brooks, 135 Vt. 563, 570 (1977). Grievance of Hurlburt, 9 VLRB 229 (1986). It is further appropriate that, when calculating an employee's interim earnings, any additional necessary expenses that were incurred by an unfair labor practice striker while seeking or holding interim employment should be offset against the amount of wages earned during the relevant period. Phelps Dodge Corp. v NLRB, 313 US 177, 198 n. 7 (1941). Charles T. Reynolds Box Co., 155 NLRB 384, 387 (1965), enforced, 399 F2d 668 (6th Cir., 1968). Herman Brothers Pet Supply, Inc., 150 NLRB 1419, 1422-24 (1965), enforced, 360 F2d 176 (6th Cir., 1966).

We address the particular circumstances involved herein with these principles in mind. We first discuss the claims of two of the

teachers, Sally Robertson and Timothy Bourne, which involved additional expenses incurred while holding interim employment.

We conclude in both instances that the expenses claimed should be deducted from interim earnings. The cost of the housekeeper employed by Robertson was an additional necessary expense incurred to compensate for a small portion of the additional time required by her interim job. The position she accepted at the St. Albans City School required 10 hours per week additional commuting time and also required additional preparation time. It requires time to maintain a reasonably clean house. Therefore, we conclude employment of a housekeeper for three hours a week was a necessary expense to compensate for at least some of the additional time required by her interim employment.

The additional transportation costs incurred by Bourne likewise constituted an additional necessary expense. The additional costs were incurred by Bourne for commuting expenses between his home in Hinesburg and his interim job in New York. In accepting the position, Bourne was properly mitigating his damages after being unable to find teaching employment in Vermont. Reimbursement to him for these commuting costs is justified; particularly where Bourne owned a home in Vermont, secured low-cost accommodations in New York which generally were unavailable on weekends and, because of commuting, was able to continue searching for employment in Vermont. In sum, the travel costs incurred by Bourne were a necessary component of the interim employment in New York.

The central issue involved in the claim of two of the other teachers, Katherine Kjelleren and Jean Paul Farineau, is whether they fulfilled their obligation to seek interim employment. They had a

general duty to mitigate damages by making reasonable efforts to find interim work. Grievance of Hurlburt, *supra*. The School Board is claiming that Farineau and Kjelleren did not fulfill this duty. Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. Liability for back pay arises out of the employer's improper action and, accordingly, an employer must establish any claim of lack of mitigation. NLRB v. Westin Hotel, 758 F2d 1126, 1130 (6th Cir., 1985); Oil, Chemical and Atomic Workers v. NLRB, 547 F2d 598, 603 (D.C. Cir, 1977); NLRB v. Reynolds, 399 F2d 668, 669-70 (6th Cir. 1968); Grievance of Sullivan, 10 VLRB 71, 74 (1987).

In both instances involved herein, we conclude the School Board has failed to meet its burden of proof. We are unable to conclude from the evidence before us that Kjelleren did not make a reasonable effort to find alternative teaching employment. She followed the usual and customary means of seeking a teaching position. Her decision not to accept the only teaching position offered her was reasonable; particularly where she had only two days to decide whether to accept the position and she was waiting to find out whether interviews she had recently would result in more favorable teaching employment closer to her home. Also, the fact Kjelleren enrolled full-time in a Master's Degree program at the University of Vermont does not result in the School Board's back pay liability ending at that point. By this point, Kjelleren had reasonably concluded that she had virtually exhausted any possibility of obtaining a full-time teaching position in another school district in Vermont. The evidence further indicates she was willing and able to drop a few of her

classes, all of which were scheduled during the evening, if it became necessary to do so to obtain or keep a teaching position. Given the futility of her job search and her continued willingness and ability to accept teaching employment, it is appropriate to conclude the Employer's back pay liability continued to accrue while she was attending school. American Compress Warehouse, 156 NLRB 267, 268, 275 (1965); enforced 374 F2d 573 (5th Cir., 1967). NLRB v. Lozano Enterprises, 152 NLRB 258, 259, 264-265 (1965) enforced 356 F2d 483 (9th cir., 1966).

We also are unable to conclude from the evidence before us that Farineau did not make a reasonable effort to find alternative teaching employment. Farineau sent his resume to many neighboring school districts seeking teaching employment and, in addition, inquired of other French teachers as to any openings to teach French. He refused no interviews or job offers. Moreover, his reasonable efforts to seek interim employment are indicated by his relocation to Alabama to seek teaching employment once it became unlikely he would secure a position in Vermont.

An additional issue with respect to Farineau raised by the School Board is whether the back pay liability of the School Board should be reduced by Farineau's earnings from his interim employment with the Colchester Recreation Department. The Association contends such earnings should not reduce the Employer's back pay liability. Where an employee is claiming an exception to the general rule that post-dismissal earnings are deducted from an employer's back pay liability, it is appropriate to place the burden on the employee to justify such exception. Grievance of Sullivan, 10 VLRB 71, 75.

The Association has met such burden. Farineau's teaching position at Hinesburg was half-time and the Recreation position was half-time with flexible work hours. Farineau could have performed both jobs. We conclude that earnings for work which could be performed outside the hours that Farineau would have worked for the School Board are not properly deductible from a back pay award. Phelps Dodge, supra, 313 US at 198, n.7. NLRB v. S.E. Nichols of Ohio, 704 F2d 921, 924 (6th Cir.), Cert. denied, 464 US 914 (1983). cf. Grievance of Sullivan, 10 VLRB 71 (1987). Our conclusion that the Colchester job was not a substitute job for the Hinesburg position is bolstered by the fact that Farineau now holds a part-time position with the Town of Colchester even though he has been reinstated to his Hinesburg position.

The final issue before us is whether Nancy Bell is entitled to be reinstated with full back pay and other damages, to the position of school nurse and health educator which she held at the commencement of the strike. The School Board has reinstated Bell, but to a different position, nurse resource person, with lower pay and absent health education responsibilities.

The US Supreme Court has recognized that a refusal to reinstate striking employees is clearly destructive of important employee rights and holds that an employer must show "legitimate and substantial business justification" for refusing to reinstate striking employees upon their unconditional application to return to work. NLRB v. Fleetwood Trailer Co., 389 US 375, 378-380 (1967). Proof of anti-union motivation is unnecessary when the employer's conduct could have adversely affected employee rights to some extent and when the



employer does not meet the burden of establishing that he or she was motivated by legitimate objectives. Id. at 380.

We conclude the School Board had legitimate and substantial business justification for reinstating Bell to the nurse resource person position. The evidence indicates the School Board decided to eliminate the school nurse and health educator position held by Bell prior to the commencement of the strike for economic reasons; namely that substantial salary savings could be made by removing health education duties from the position held by Bell. Such economic savings constitute legitimate and substantial business justification for the School Board action.

We recognize the Board Order finding School Board unfair labor practices required the School Board to reinstate striking teachers "to their former jobs or, if those jobs no longer exist, to substantially equivalent positions". However, such an order presupposes the identical or substantially equivalent position is still in existence and does not prevent the legitimate elimination of a position. The School Board complied with the Board Order in this respect by reinstating Bell to the position closest in nature to the one she left.

#### ORDER

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

1. The School Board shall reimburse Sally Robertson \$1,110, plus interest (calculated in accordance with Paragraph D of the Board's August 30, 1985, Order, 8 VLRB 252) for additional housekeeping costs that she incurred during the 1985-86 school year;

2. The School Board shall reimburse Timothy Bourne \$2,877, plus interest (calculated in accordance with

Paragraph D of the Board's August 30, 1985, Order, 8 VLRB 252) for additional travel expenses that he incurred during the 1985-86 school year;

3. The School Board shall pay Jean Paul Farineau \$9,334 in back pay and other expenses, plus interest (calculated in accordance with Paragraph D of the Board's August 30, 1985, Order, 8 VLRB 252) for the 1985-86 school year;

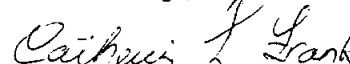
4. The School Board shall pay Katherine Kjelleren \$12,554 in back pay and other expenses, plus interest (calculated in accordance with Paragraph D of the Board's August 30, 1985, Order, 8 VLRB 252) for the 1985-86 school year; and

5. Nancy Bell is not entitled to be reinstated, with full back pay and other damages, to the full-time position of school nurse and health educator.

Dated this 30th day of April, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank