

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

MARTHA SULLIVAN

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DOCKET NO. 85-53

FINDINGS OF FACT, OPINION AND ORDER

At issue here is a dispute over back pay due Martha Sullivan ("Grievant") as a result of her improper discharge. On December 18, 1986, the Labor Relations Board issued Findings of Fact, Opinion and Order sustaining the above-entitled grievance and ordering that Grievant be reinstated with back pay. 9 VLRB 277. The Board left the case open for the purpose of determining the back pay and other benefits due Grievant from the date of her improper discharge until her reinstatement.

The parties have filed a partial stipulation as to back pay and other benefits due Grievant. However, the parties were unable to agree on whether the Employer's back pay liability should be reduced by Grievant's earnings from her employment by H & R Block after she was dismissed and disagree as to which party has the burden of proof on that issue.

A hearing on those issues was held before Board Member Charles McHugh, Chairman; Catherine L. Frank and Louis Toepfer on February 20, 1987. Michael Zimmerman, Staff Attorney for the Vermont State Employees' Association, represented Grievant. James Crucitti, Legal Counsel for the Department of Public Safety, represented the Employer. Grievant filed Requested Findings of Fact and Memorandum, and the

Employer filed a Memorandum, on February 27, 1987. Portions of the following findings of fact are based on stipulation by the parties.

FINDINGS OF FACT

1. In mid-July of 1984, Grievant requested permission from the Commissioner of Public Safety to begin working on a permanent part-time basis, rather than a permanent full-time basis. Grievant made such request so that she would have more time to spend at home with the children for whom she cared. As a result of her request, Grievant was, effective July 29, 1984, transferred to permanent part-time (partial week, full year) status. She became one of four job-sharing Clerk Dispatchers at the Middlebury Police Barracks.

2. The characteristics of the schedules and shifts of the job-sharing Clerk Dispatchers are as follows:

A. For each two week pay period, each job-sharing Clerk Dispatcher works 40 hours in 5 shifts (8 hours each), 2 shifts in one week, and 3 shifts in the other week;

B. For each 4 week period, each job-sharing Clerk Dispatcher works 10 shifts, broken down into 2 third shifts (i.e., 12 a.m. to 8 a.m.), and 8 second shifts (i.e., 4 p.m. to midnight). At the end of the 4 week period, the cycle begins again;

C. Since there is a regular day shift Clerk Dispatcher at the barracks, the only time a job-sharing Clerk Dispatcher would work the day shift would be in the event the normal day shift Clerk Dispatcher was on a day off.

3. By mid-1985, it was apparent to Grievant that her change from full-time to part-time status, and the accompanying reduction in

income (from about \$20,000 to about \$12,000 per year), was having a greater than anticipated financial impact on her. As a result, Grievant wrote a memorandum to the Middlebury Station Commander in which she requested that she be allowed to work more hours. She did not specify how many additional hours she wished to work. Grievant realized no change in hours worked as a result of that request.

4. In August, 1985, Grievant saw a newspaper advertisement announcing a basic income tax class, with the possibility of post-graduation employment. Grievant enrolled in the class, which was sponsored by H & R Block, and she paid a \$200 tuition. Grievant's classes began two days after Labor Day in 1985 (while Grievant was still employed by the State), and continued until November of 1985. Grievant's final examination for the tax instruction class was given on November 26, 1985, the day after Grievant was dismissed from State service.

5. During the tax training classes, the class instructor spoke to Grievant a number of times about becoming a tax preparer for H & R Block.

6. In December, 1985, Grievant began working on a part-time basis for H & R Block. Her work schedule was flexible and the number of hours she worked per week varied. During the period December 1985 through April 1986, Grievant worked anywhere from 4 - 32½ hours per week. During that period, Grievant worked more than 20 hours in a week seven times; working 30½, 22, 22½, 22, 22, 28 and 25 hours for those weeks. She did not work for H & R Block from late April 1986 through mid-October 1986. During the period mid-October 1986 through February 1987, Grievant worked anywhere from 0 - 35 hours per week.

During that period Grievant worked more than 20 hours per week 2 weeks, working 35 hours each of those two weeks.

7. As of February 27, 1987, Grievant had earned \$2,796 from her employment with H & R Block.

8. During the income tax return season, the H & R Block office is open from 9 a.m. to 9 p.m.

OPINION

At issue is whether the back pay liability of the Employer should be reduced by Grievant's earnings from her employment by H & R Block after she was dismissed. Grievant contends such earnings should not reduce the Employer's back pay liability, while the Employer contends the earnings should reduce the liability.

We first need decide which party has the burden of proof on that issue. The proper remedy for improper dismissal is reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned since that date. Grievance of Brooks, 135 Vt. 563, 570 (1977). This places a general duty on discharged employees to mitigate damages by making reasonable efforts to find work. Grievance of Hurlburt, 9 VLRB 229, 232 (1986). Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. The employer is claiming lack of mitigation and must establish it.

However, that is not the issue involved in this matter. Here, the Employer is claiming Grievant did mitigate damages by her earnings at H & R Block and is contending that the general rule that post-dismissal earnings are deducted from an employer's back pay

liability should be followed in this case. Grievant is claiming an exception to the general rule by contending that her post-dismissal earnings should not be deducted from back pay liability. Where an employee is claiming an exception to the general rule of mitigation, we believe it is appropriate to place the burden of proof on the employee to justify such exception. Thus, the burden of proof is on Grievant.

Grievant contends that her earnings from H & R Block should not be offset against the Employer's back pay liability because such earnings were not really a substitute for the earnings lost by reason of her dismissal. Grievant submits that the evidence indicates the employment was 'moonlighting' and that she could have worked at that job even had she remained in the State's employ after November 25, 1985.

We conclude Grievant has not sufficiently established that she would have been employed by H & R Block had she remained employed by the State. It is noteworthy that Grievant did not work for H & R Block at all before being dismissed and, thus it is difficult for us to conclude the employment was "moonlighting." Also, the evidence indicates that during some weeks, Grievant worked over 20 hours a week at H & R Block. This would mean that, taken together with the 20 hours per week Grievant worked on average as a dispatcher, Grievant would have been working more than 40 hours per week during those weeks. Yet, she had requested to become a part-time dispatcher to spend more time with the children for whom she cared. Further, Grievant has not clearly established that her work schedule at H & R Block would not conflict with her schedule as a dispatcher. Given

such circumstances, we do not believe Grievant has sufficiently established that she would have held both positions.

Under the circumstances, we conclude it is more prudent to apply the general rule of mitigation here. Grievant has a duty to mitigate damages, she did mitigate damages by working at H & R Block, and the bulk of such earnings should be deducted from the Employer's back pay liability.

However, we place one qualification on use of such earnings to offset liability. As a dispatcher, Grievant worked an average of 40 hours for a two week period. She had a duty to mitigate damages by seeking to obtain employment up to, but not beyond 40 hours for a two week period. Thus, any hours she worked in excess of 40 in any two week period at H & R Block, which two week period coincides with the State's payroll period, should not be deducted from the Employer's liability.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, and consistent with the Board's Order of December 18, 1986, in this matter, it is hereby ORDERED:

1. The terms and conditions of paragraphs 1 - 3 of the Board's Order of December 18, 1986, and the terms and conditions of the parties' Stipulation of February 27, 1987, are incorporated herein by reference and the parties are ordered to comply therewith;

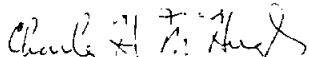
2. The Employer shall, forthwith, pay to Grievant an amount representing back pay, said sum being calculated in accordance with the terms of the stipulation of the parties and the provisions of this order;

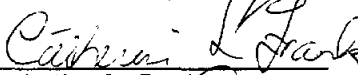
3. The back pay due Grievant shall be offset by the income earned by Grievant from her employment with H & R Block during the period between her November 25, 1985, dismissal and her reinstatement to State service; except that those earnings for hours worked in excess of 40 in any two week period, which two week period coincides with the State's payroll period, shall not be deducted from the back pay due Grievant; and

4. The State shall restore to Grievant all benefits (e.g., sick leave, annual leave, insurance) in accordance with the parties' stipulation, as though she had not been dismissed.

Dated the 26th day of March, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer