

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

BARBARA MONTI

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DOCKET NO. 87-25

MEMORANDUM AND ORDER
ON STATE'S SUPPLEMENTAL MOTION
FOR SUMMARY JUDGMENT AND/OR DISMISSAL

At issue is whether the Labor Relations Board should grant the Supplemental Motion for Summary Judgment and/or Dismissal filed by the State of Vermont, Department of Agriculture ("State") in this matter.

On April 23, 1987, a grievance was filed on behalf of Barbara Monti ("Grievant"). The grievance in effect alleged that Grievant's resignation from her position as Director of Development, Department of Agriculture, effective August 8, 1986, was tantamount to a wrongful dismissal, because the resignation was based upon the State agreeing to enter into a contract or contracts with Grievant to perform professional services with a value of \$25,000 in the areas of agricultural marketing, promotion and/or development and the State failed to enter into a contract in a reasonable time and did not compensate Grievant. Grievant requested as a remedy that she be reinstated, together with all retroactive pay and benefits from August 8, 1986, and that the State reimburse her for costs and attorney's fees.

On May 20, 1987, the State filed a Motion for Summary Judgment, requesting that the Board grant judgment in favor of the State and dismiss the matter for want of jurisdiction because the grievance was

untimely filed and because the matter was not a grievance over which the Board had jurisdiction. Grievant filed a response to the motion on June 11, 1987. On June 18, 1987, upon review and consideration of the materials then on file, the Board denied the State's motion subject to the right of the State to renew the motion during the Board hearing on the merits.

On August 27, 1987, the State filed a Supplemental Motion for Summary Judgment and/or Dismissal, which motion brought additional facts and legal arguments before the Board for its consideration. In the supplemental motion, the State again requested that the Board grant summary judgment in favor of the State and dismiss the matter for want of jurisdiction because the grievance was untimely filed and because the matter was not a grievance over which the Board otherwise had jurisdiction. Included with the motion were affidavits of Scott Cameron, State Commissioner of Personnel, and Ronald Albee, Commissioner of the Department of Agriculture. Subsequently, the State filed the deposition of Barbara Monti, taken on August 17, 1987. Grievant filed a response to the State's supplemental motion on September 10, 1987. In the response, Grievant did not raise any issue of fact with respect to the affidavits of Commissioners Cameron or Albee. Therefore, the Board accepts the statements made in the affidavits to be true for purposes of ruling on the motion for summary judgment and/or dismissal to the extent the affidavits are not specifically contradicted by Grievant in her deposition, pursuant to VRCP 56(e). Oral argument occurred on the State's motion on October 8, 1987. Michael Seibert, Assistant Attorney General, presented

argument for the State. Attorney Joseph Kozlik presented oral argument for Grievant.

We note at the outset that whether the State's motion is treated as a motion for summary judgment or a motion for dismissal, our treatment is the same. If we consider matters outside the pleadings in deciding this motion, as we are doing herein, then the provisions of Rule 56(c) and (e) of the Vermont Rules of Civil Procedure apply. Rule 56(c), which has been adopted by the Board pursuant to Section 11.1 of the Board's Rules of Practice, provides in pertinent part with respect to summary judgment:

...Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

The materials on file indicate that there is no genuine issue with respect to the following material facts: Effective August 8, 1986, Grievant resigned from her position as Director of Development, Department of Agriculture, "in consideration of the acts and promises to be performed by the State as set forth" in a July 24, 1986, stipulation and agreement entered into by Grievant and the State; the stipulation and agreement provided in pertinent part that the State agreed to enter into a contract or series of contracts with Grievant to provide professional services with a value of \$25,000 during fiscal year 1987 (July 1, 1986-June 30, 1987)[See Exhibit A to Grievance]. Between August 8, 1986, and March 5, 1987, no contract was agreed upon. On March 5, 1987, at a meeting with Grievant and her attorney,

Ronald Albee, Commissioner of the Department of Agriculture, informed Grievant that the State was willing to comply with the terms of the July 24, 1986 stipulation and agreement and enter into the professional services contract or contracts (Affidavit of Ronald Albee; Deposition of Barbara Monti, pages 114-115). Grievant responded at the meeting by indicating that the professional services contract or contracts provided for in the July 24, 1986, stipulation and agreement were no longer a viable option and that she would pursue other courses of action (Albee Affidavit; Monti Deposition, pages 113-115, 118-119). Grievant or her attorney discussed several options for resolving the dispute during the meeting; one of the options discussed was reinstating Grievant to the Director of Development position (Albee Affidavit; Monti Deposition, pages 115-116). Albee indicated that there was another person filling the position and made it clear to Grievant that he would not agree to reinstate Grievant (Albee Affidavit; Monti Deposition, pages 116-118).

These uncontradicted facts are sufficient for us to conclude that this grievance is untimely filed and thereby grant the State's motion. Section 23.1 of the Board's Rules of Practice provides that the Board will hear and make final determination on the grievances brought before it, provided such grievances are "filed within 30 days after receipt of notice of final decision of the employer".

In her grievance, Grievant alleges that her resignation was tantamount to a dismissal and essentially is seeking to rescind her

resignation and requests that the Board reinstate her. We note that only by converting the resignation into a discharge can this controversy come before the Board. Further, only by then finding that this conceptual discharge is without cause can the Board require remedial action. In re Grievance of Bushey, 142 Vt. 290 (1982). Assuming for purposes of ruling on this motion that the resignation was converted into a discharge, the time for grieving the failure of an employer to rescind a resignation runs from the date the employer refuses to rescind the resignation; that denial being the "final decision" of the employer. Grievance of Baron, 8 VLRB 57, 61-64. Grievance of Downey (Docket No. 81-75, Unpublished decision, February 18, 1982).

Here, assuming, for purposes of ruling on this motion, that Grievant had standing to grieve the failure of the State to reinstate her and that the grievable time period, if any, did not begin earlier, the very latest the grievable time period began was March 5, 1987. On that date, Commissioner Albee made it clear to Grievant that the State would not rescind Grievant's resignation and reinstate her. Grievant was required to file a grievance within 30 days of that "final decision". Here, the grievance was filed April 23, 1987, 49 days after notice of the final decision of the State. Thus, the grievance was filed 19 days late and is untimely. Accordingly, it is dismissed. Grievance of Roy, 147 Vt. 403 (1986). Grievance of Baron, *supra*.

In so deciding, it is unnecessary for the Board to rule on other issues raised by the State in its Supplemental Motion for Summary

Judgment and/or Dismissal. It is also unnecessary to decide any other motions pending before the Board in this matter.

Now therefore, based on the foregoing reasons, it is hereby
ORDERED:

The State's Supplemental Motion for Summary Judgment and/or Dismissal is GRANTED and the Grievance of Barbara Monti is DISMISSED.

Dated this 22nd day of October, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh
Charles H. McHugh, Chairman

Catherine L. Frank
Catherine L. Frank

Louis A. Toepfer
Louis A. Toepfer