VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 92-50
BRENDA WRIGHT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 5, 1992, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Brenda Wright ("Grievant"), alleging that the State Agency of Human Services, Department of Social and Rehabilitation Services ("Employer"), improperly separated Grievant's employment by treating Grievant as having resigned from her position, even though Grievant had not resigned. Grievant alleged that she had been separated without just cause, or any other valid basis, in violation of Sections 2.0384, 12.01 and 12.02 of the Rules and Regulations for Personnel Administration, and Article 14 of the 1992-94 collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective July 1, 1992 to June 30, 1994 ("Contract"). Grievant further contended that her separation constituted a constructive discharge without just cause, in violation of Article 14 of the Contract.

Hearings were held before Board members Charles McHugh, Chairman, Louis Toepfer and Leslie Seaver on June 10 and 24, 1993. Mary Lang, Special Assistant Attorney General, represented the Employer. Jonathan Sokolow, VSEA Legal Counsel, represented Grievant. At the June 10 hearing, Grievant withdrew her claim that she was constructively discharged, leaving the sole issue to be decided whether Grievant resigned. The parties filed post-hearing briefs on July 9, 1993.

FINDINGS OF FACT

1. Grievant was employed as a stenographer with the Employer from 1973 to August, 1977. During that period, Grievant received overall performance evaluations of "fully satisfactory" or "consistently meets job requirements/standards". In August, 1977, Grievant was promoted to Human Services Aide. Grievant remained in that position until late 1979 or early 1980, and received satisfactory performance evaluations during that period (Grievant's Exhibit 14, pages 1-21).

2. In late 1979 or early 1980, Grievant became a Day Care Eligibility Specialist. She remained in that position until 1987. During her employment in that position, Grievant received evaluations rating her overall performance as either "frequently exceeds job requirements/standards" or "consistently and substantially exceeds job requirements/standards", as well as letters of commendation from her superiors. Grievant's supervisor noted on two of the annual evaluations that she doubted that there was anyone in the Department who had more job knowledge and skill in the day care field than Grievant (Grievant's Exhibit 14, pages 22-44).

3. In July, 1987, Grievant was selected for the newly created position of Child Care Program Supervisor. In this position, Grievant supervised all the Day Care Eligibility Specialists throughout the State. Grievant was supervised by Helen Keith, the Director of the Child Care Services Division. Grievant worked both in St. Albans and Waterbury, and was compensated for mileage from home to her worksites (Grievant's Exhibit 12, page 1).

4. Beginning in April, 1991, the Employer began to lose Eligibility Specialist positions. As each position was lost, Grievant assumed the caseload involved, in addition to her regular duties. In sum, by October 1991, Grievant had assumed the additional caseload of the equivalent of one and one-half full-time positions. The addition of these responsibilities to Grievant's already demanding workload as a Child Care Program Supervisor caused Grievant a great deal of stress.

5. In November, 1991, Keith told Grievant that a Federal Programs Administrator position was to be created in the Child Care Services Division, and that she would request that it be at pay grade 24. This was two pay grades higher than Grievant's existing position. Keith asked Grievant if she would be interested in the position and Grievant indicated that she would be interested.

6. Since the Federal Programs Administrator position was a newly created position, a classification review by the Department of Personnel was required. Keith submitted to the Department of Personnel the necessary documentation in support of the classification request in December 1991. Keith requested that the position be assigned to pay grade 24 and that it be based in Franklin, which is Grievant's home. Keith denoted Grievant as the occupant of the position (State's Exhibit 1, pages 1-32).

7. The Department of Personnel decided to assign the Federal Programs Administrator position to pay grade 22. Keith attempted to persuade the Personnel classification analyst to

classify the position at a Pay Grade 24, but to no avail. The Department of Personnel also decided that the position should be based in Waterbury, not Franklin.

8. Keith told Grievant of the designation of the position at pay grade 22, and the basing of the position in Waterbury. The effect of these actions by the Department of Personnel was that, if Grievant moved into the position, she would be at the same pay grade as her supervisory position and would lose the mileage reimbursement which she had been receiving. Keith gave Grievant the option of remaining in her supervisory position. On March 18, 1992, Grievant told Keith that she had outgrown her present position and that she wished to move into the Federal Programs Administrator position. Grievant asked that the position be based in St. Albans for one year. Keith then sought, and obtained approval, to have the position based in St. Albans until July, 1993. Grievant accepted the position.

9. Carole Mink was hired to replace Grievant as Child Care Program Supervisor effective May 11, 1992. Keith arranged for Grievant to train Mink in her new duties.

10. In May and June, 1992, Grievant and Keith had various arguments concerning such matters as Grievant's job duties, Keith's management, and the pay grade and location of Grievant's position. Grievant was angry with Keith, and this anger was based primarily on Grievant's belief that, if Keith had truly wanted the Federal Programs Administrator position to be classified at a pay grade 24 and based in Franklin, Keith could have made it happen. After a contentious meeting between Keith and Grievant on

June 4, 1992, Grievant missed much work time over the next two weeks on sick leave and annual leave (State's Exhibit 2, page 1).

11. On June 18, 1992, after an argument with Keith, Grievant left the office and went to her doctor. Grievant's doctor was unavailable, and she made an appointment for the following day. After the appointment on June 19, Grievant provided the Employer with a doctor's note on June 22 indicating that Grievant was being treated for a breast mass requiring biopsy as well as mental health difficulties. The doctor's note further indicated that Grievant should not go to work, and that the doctor would reevaluate Grievant's progress in four weeks (Grievant's Exhibit 7).

12. By letter of June 23, 1992, William Young, Commissioner of Social and Rehabilitation Services, requested that Grievant provide more specific information on the biopsy and mental health difficulties. Young also informed Grievant that, if the "mental health issues are in some way related to work, either Helen (Keith) or I would certainly be willing to meet with you and attempt to be of assistance where appropriate and possible". Young requested that Grievant respond to his request by July 2, 1992 (State's Exhibit 5).

13. Upon receiving Commissioner Young's letter, Grievant contacted Richard Lednicky, VSEA Field Representative, about the letter. Lednicky contacted Sharon Wilson, Personnel Administrator for the Employer, and told her that Young's letter was intrusive. Wilson informed Lednicky that Grievant still needed to provide the requested information. After Lednicky spoke with Wilson,

Grievant understood from discussions with Lednicky that the Employer still needed the information, but that she did not have to respond by July 2.

14. By July 7, 1992, Commissioner Young had not received any response from Grievant. On July 7, Young left a message on Grievant's answering machine to have her contact him. Young also sent Grievant a letter that day asking her to respond to his previous letter, and notifying her that he was converting her sick leave to annual leave due to her failure to provide further information regarding her condition (State's Exhibit 6).

15. During this time, Lednicky and Wilson were in contact with each other over the issue of Grievant providing more information, but had reached no resolution.

16. In early July, 1992, Grievant was in the St. Albans District Office on three occasions while she remained out on sick leave.

17. On July 13, 1992, Commissioner Young again wrote to Grievant, asking her to immediately contact him with the information which he had requested. Young informed Grievant that "failure to respond in any fashion to my request may result in disciplinary action". Young also stated that "it is of great concern to me that you have apparently contacted a division employee, and have also spent time in our St. Albans District Office during your absence from work, yet have not responded to my request" (State's Exhibit 7).

18. Grievant's doctor sent a letter to Commissioner Young dated July 10, 1992. Young did not receive this letter until July

15, 1992. The letter provided in pertinent part as follows:

> As you know, (Grievant) has been undergoing evaluation for a breast mass, and will have undergone this on 7/8/92. She will be having follow-ups with her surgeon. I have no information as yet on the findings of her biopsy.
>
> Her other problem concerning mental health issues will be reevaluated by me on 7/17/92, but I have felt that due to her high level of anxiety and mental distress on seeing her on 6/19/92, that she deserved a time away from work to collect herself. I will be seeing her shortly for reassessing her progress . . .
>
> (Grievant's Exhibit 15)

19. After receiving Young's July 13, 1992, letter, Grievant told Lednicky that she wanted to meet with Young to tell him of her problems with Keith. Lednicky then asked Young whether Young would meet with Grievant. Young indicated to Lednicky that he would prefer to have Keith present during such a meeting, but would meet with Grievant alone. Lednicky understood that Young would not meet with Grievant without Keith present, and so informed Grievant. No such meeting occurred.

20. The Employer viewed Grievant's due date to return to work as July 20, 1992. Prior to July 20, Grievant spoke to Lednicky about resigning. Grievant indicated that she wanted to know whether the Employer would convert her annual leave time during her leave back to sick leave, and allow her to stay on the payroll until her annual leave was exhausted, if she resigned. Grievant requested that Lednicky meet with the Employer to see if the Employer would agree to these conditions. Grievant did not authorize Lednicky to resign for her.

21. Lednicky subsequently arranged to meet with representatives of the Employer on July 20, 1992, in Commissioner

Young's office. Young, Keith, Wilson and Lednicky attended the meeting on July 20. Grievant did not attend the meeting, and Lednicky was there on her behalf. Lednicky indicated that Grievant was willing to resign if the Employer agreed to her conditions to convert her annual leave back to sick leave and to allow her to remain on the payroll until her annual leave expired. The reason for this latter condition, Lednicky explained, was so that Grievant could remain on the State's medical plan for as long as possible. Commissioner Young indicated that the Employer would agree to these conditions. Keith asked Lednicky, more than once, whether he was sure that Grievant did not want to come back to work. Lednicky responded that he was sure. Keith asked Lednicky if there was any problem with notifying staff that Grievant had resigned. Lednicky indicated that was no problem. It was agreed that Lednicky and Wilson would work out the details of the agreement and put it in writing. Wilson agreed to draft the agreement reflecting the understanding of the parties and send it to Lednicky. *Lednicky did not say at the meeting that Grievant had authorized* him to resign on her behalf.

22. It was general practice for Lednicky and Wilson to enter into written stipulations and agreements on settlements. Typically, after a negotiations meeting where a tentative settlement was reached, Wilson drafted the stipulation and agreement, had it signed, and then sent it to Lednicky. Lednicky then sent it to the employee for review and signature. Lednicky did not sign the stipulation and agreement until after the employee had signed it. Most often, affected parties signed the

stipulation and agreement, and there were no problems. However, there have been occasions where the parties thought agreement had been reached, but an affected party did not sign the draft stipulation and agreement and there was no agreement.

23. After the meeting on July 20, Lednicky informed Grievant that the Employer was agreeable to her conditions. Lednicky told Grievant that an agreement would be drafted for her to sign.

24. On July 20, 1992, Keith sent a memorandum to "All Department Staff" which provided:

> I want to inform you that Brenda Wright has resigned from her position in the Child Care Services Division as of 7/20/92. I'm sure that you all join us in wishing Brenda well for the future. I know that many of you have worked with Brenda over the years and am sure that she would welcome a note from you wishing her well (State's Exhibit 8).

25. On July 20 and 21, 1992, Grievant spoke to four eligibility specialists with whom she had worked: Susan Teske, Frances Grassadonia, Dorothy Mailman and Lillian Racine. These employees told Grievant that Keith had informed them that Grievant had resigned. Grievant told the employees that she had not resigned. Grievant informed Teske that she had not resigned since she had not signed an agreement that she had resigned. Grievant told Grassadonia that such an agreement was to be sent to her, and she was not sure she would sign it.

26. On July 20 or 21, 1992, Teske told Keith that Grievant had told her she had not resigned. Within a week of the July 20 meeting, another employee, Buffy Nelson, told Keith that Grievant did not think she had resigned. Keith told both employees that Grievant had resigned, and did not pursue the matter.

27. Wilson adjusted Grievant's time report to reflect the reinstatement of the sick leave at issue (State's Exhibit 9). After the time report was processed, Wilson was then able to determine that Grievant's annual leave expired on September 8, 1992. Grievant was placed on annual leave until September 8, 1992, and she was paid for all work days up to that date.

28. Wilson drafted a Stipulation and Agreement, which provided as follows:

> Brenda Wright and the State of Vermont, Department of Social and Rehabilitation Services, do hereby stipulate and agree as follows, in settlement of a disputed claim:
>
> 1. That with the execution of this agreement, Brenda Wright will be deemed to have voluntarily resigned her position effective 9/8/92.
>
> 2. That for the period 7/20/92 through 9/8/92 Brenda will be on annual leave.
>
> 3. That this agreement is entered in only for the convenience of the parties and shall not be construed or considered to be a precedent for any similar situations. This stipulations(sic) shall not be construed or considered to be an admission of any fact, wrong doing, error, or liability by the State or by Brenda Wright.
>
> 4. That, in consideration of the terms of this stipulation, the parties agree that Brenda Wright waives any grievance or claim of liability against the State of Vermont, any of its subdivisions, and any of the agents or employees thereof, which may arise out of the circumstances leading up to this stipulation.
>
> *(State's Exhibit 10)*

29. The draft Stipulation and Agreement contained signature lines for Commissioner Young, Wilson, Lednicky and Grievant. Wilson signed the stipulation on August 4, 1993. Thomas Moore signed the stipulation on behalf of Commissioner Young, who was on vacation, that same day. Wilson then sent the stipulation to Lednicky on or about August 4.

30. At some point after receiving the stipulation, Lednicky told Wilson that it looked fine. Lednicky sent the stipulation, without signing it, to Grievant. Lednicky subsequently spoke with Grievant about the contents of the stipulation.

31. At some point after July 20, 1993, Keith had Buffy Nelson clean out Grievant's desk, and put Grievant's personal belongings in a box, because the desk was needed. Grievant subsequently took her personal belongings.

32. On August 14, 1992, Nelson sent a memorandum to "All SRS Employees" inviting them to an August 21 dinner in Stowe in Grievant's "honor" since Grievant had "resigned" (State's Exhibit 11).

33. Prior to August 21, 1992, Lynda Murphy, Human Resources Development Chief for the Agency of Human Services, contacted Grievant and asked her if she would meet for an exit interview. Grievant agreed. Murphy routinely conducted exit interviews of employees to discover why employees were leaving, and thought it was important to interview Grievant because of her long tenure. Murphy and Grievant arranged to meet on August 21.

34. On August 15, 1992, Keith resigned as the Child Care Services Division Director.

35. On Friday, August 21, 1992, Grievant came to the Central Office in Waterbury to attend the exit interview. Murphy had a standard set of questions which she asked, and Grievant answered them all. At the conclusion of the interview, Grievant took out the stipulation which had been sent to her and showed it to Murphy. Grievant told Murphy that she was not sure if she had resigned since she had not signed the stipulation.

Grievant asked Murphy what she thought. Murphy told Grievant she did not know, and suggested that Grievant speak to VSEA and/or someone from the personnel staff of the Employer (State's Exhibit 12).

36. That same evening, Grievant attended the dinner in her honor in Stowe. Prior to the dinner, Grievant did not know of Keith's resignation. Child care eligibility staff were present, along with several spouses and friends. During the dinner, Grievant told participants that she had not resigned and showed them the unsigned stipulation.

37. The following week, word of Grievant's representations at the August 21 dinner that she had not resigned reached Commissioner Young and Wilson. Commissioner Young was upset since he believed, in his words, that Grievant was "yanking his chain". On or before August 26, Wilson called Lednicky and inquired about the stipulation. Lednicky told Wilson he would contact Grievant.

38. On August 31, 1992, Lednicky called Wilson to tell her that he had attempted to contact Grievant several times the previous week and was finally successful on Friday, August 28. Lednicky told Wilson that Grievant had changed her mind about resigning, and wanted to return to work. The subject of Keith's resignation was discussed during this conversation.

39. On September 2, 1992, Commissioner Young sent a letter to Grievant which provided in pertinent part as follows:

> Dick Lednicky, VSEA representative, has informed me that you intend to return to work . . . Brenda, we accepted your resignation as presented by Mr. Lednicky on July 20, 1992 and we are actively recruiting to fill your position. It is my position that your status has not changed. Your last day of employment will be September 8, 1992 . . . (State's Exhibit 14)

MAJORITY OPINION

The Issues and Positions Of Parties

At issue is whether Grievant resigned. The Employer asserts that Grievant resigned. Grievant contends that she did not resign, and therefore there was no basis to terminate her employment.

The Employer contends that the necessary framework for analyzing this grievance has been established by Grievance of Baldwin, 13 VLRB 20 (1990), Affirmed, ___ Vt. ___ (February 7, 1992); wherein the Board and the Vermont Supreme Court indicated that oral resignations are valid and enforceable. The Employer submits that the actions of both Grievant and her VSEA representative, Richard Lednicky, prove that Grievant agreed to resign, and did in fact resign. The Employer contends that the draft stipulation and agreement concerning Grievant's resignation, which Grievant never signed, does not thwart the oral agreement reached on Grievant's resignation at the July 20, 1992, meeting. The Employer maintains that this is because the stipulation was drafted, not in anticipation of resolving a dispute, but after it in fact had been settled.

Grievant contends that the Employer bears the burden of proving that Grievant resigned, and that the Employer failed to meet that burden here. Grievant contends that the clear language of the draft stipulation and agreement belies the Employer's claim that Grievant resigned on July 20, 1992. Grievant further asserts that her actions after the July 20 meeting did not clearly indicate that she had resigned. Grievant thus requests that the Board reinstate her to her position with full back pay.

The Applicable Standards

At the outset of analyzing this very difficult case, we concur with Grievant that the Employer bears the burden of proving that Grievant resigned. It is a well established principle that, in cases where employees are discharged, the State bears the burden of persuasion. The collective bargaining agreement gives state employees a vested property interest in continued employment, absent just cause for dismissal. In Re Muzzy, 141 Vt. 463, 472 (1982). Procedural due process protections attach to this property interest. Id. Among the essentials of due process is "the right to have the burden of persuasion cast upon those who would terminate the right under consideration". Id.

We believe that these principles equally apply to resignation cases. Just as in the case of dismissals, termination of employment is at stake. Also, similar to dismissal cases, employees have a vested property interest in continued employment absent a voluntary resignation. Given the crucial importance of an employee's right to continued employment, it is appropriate that procedural due process protections attach to this property interest. Accordingly, the employer, who would terminate such right, should bear the burden of proving that the employee has relinquished this right to continued employment by a voluntary resignation.

That being established, we discuss the Employer's claim that the Baldwin case provides the necessary analysis to decide this issue. The Employer's claim asks too much of that holding. In

Baldwin, the Board concluded that the employer is not precluded from accepting a resignation based on an employee's verbal representations and other actions, if that employee fails to resign in writing. 13 VLRB at 35. Such representations and actions must clearly indicate, and demonstrate conclusively, that the employee has resigned. Id. at 37. Baldwin indeed establishes that oral resignations can be valid and enforceable, as the Employer contends. However, Baldwin does not reach a crucial issue in this case - whether a valid resignation exists when a written agreement on the resignation is contemplated pursuant to verbal discussions, but is never executed.

The law of Vermont is noticeably sparse on this issue, consisting of one decision issued in 1920. In New England Box Co. v. Tibbetts, 94 Vt. 285, the Vermont Supreme Court concluded that if it was the intention and understanding of the parties that when the terms were agreed upon the contract should be reduced to writing, it did not become a perfected contract until such a writing was executed. Id. at 289.

We have looked to federal court decisions in the circuit including Vermont for further guidance. The generally accepted rule is that when parties negotiating a proposed contract express an intent not to be bound until their negotiations have culminated in the execution of a formal contract, they cannot be held bound until that event has occurred. Jim Bouton Corp. v. Wm. Wrigley Jr. Co., 902 F.2d 1074, 1081 (2d Cir. 1990).

However, parties are free to enter into a binding contract without memorializing their agreement in a fully executed

document. Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985). This freedom to contract orally remains even if the parties contemplate a writing to evidence their agreement. In such a case, the mere intention to commit the agreement to writing will not prevent contract formation prior to execution. Id.

On the other hand, if either party communicates an intent not to be bound until the party achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract. Id. In any given case, it is the intent of the parties that will determine the time of contract formation. To discern that intent a court must look to "the words and deeds of the parties which constitute objective signs in a given set of circumstances." Id. There are several factors that help determine whether the parties intended to be bound in the absence of a document executed by both sides: 1) whether there has been an express reservation of the right not to be bound in the absence of a writing; 2) whether there has been partial performance of the contract; 3) whether all of the terms of the alleged contract have been agreed upon; and 4) whether the agreement at issue is the type of contract that is usually committed to writing. Id.

In applying this persuasive authority to this case, we need determine whether a binding oral agreement for Grievant to resign was reached at the July 20, 1992, meeting, despite the absence of the execution of the subsequent draft stipulation and agreement on the resignation. In deciding whether such an oral agreement

was reached, a threshold agency issue exists of whether Richard Lednicky, VSEA Representative, had the authority to bind Grievant by his actions at the July 20 meeting. A settlement agreement will be enforced only if the evidence supports the conclusion that the agent had actual or apparent authority to settle the case on behalf of the principal. NEET v. Silver Street Partnership, 148 Vt. 99, 528 A.2d 1117, 1119 (Vt. 1987).

The general rule with respect to actual authority is that an agent has no authority to compromise or settle a client's claim without the client's permission. Id. at 1120. Apparent authority, unlike express or implied actual authority, does not derive from the manifestation of consent by a principal to an agent of the agent's power to affect the legal relations of the principal. Id. Rather, it derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority. Id. Apparent authority may arise when the actions of the principal, reasonably interpreted, cause a third person to believe in good faith that the principal consents to the acts of the agent. Id. Apparent authority also may arise when the principal knowingly permits the agent to act in a certain manner as if he were authorized. Id. The action or manifestation of authority giving rise to the reliance must be that of the principal, and the reliance by the third person on the action or manifestation of authority must be reasonable. Id.

Discussion

In applying these standards to the facts of this case to determine whether the Employer has met the burden of proving that Grievant resigned, we need first determine whether a binding oral agreement for Grievant to resign was reached at the July 20, 1992, meeting, despite the absence of the execution of the subsequent draft stipulation and agreement on the resignation.

Before discussing the meeting itself, we need to address the threshold agency issue of whether Richard Lednicky, VSEA Representative, had the authority to bind Grievant by his actions at the July 20 meeting. We first conclude that actual authority did not exist since we have found that Grievant did not authorize Lednicky to resign for her.

We also conclude that apparent authority did not exist. The act of resigning from one's employment is of such crucial importance that the mere act of sending Lednicky to a meeting to discuss resignation is insufficient, without more, to cause the Employer to rely on Lednicky's authority to resign on behalf of Grievant. It is Grievant's conduct as the principal which is manifested to the Employer, not the actions of Lednicky at the meeting itself, which is the focus of determining whether apparent authority existed. Grievant's conduct simply provided insufficient basis for the Employer to reasonably rely on Lednicky's authority to bind Grievant.

Moreover, even assuming arguendo that apparent authority did exist, we ultimately conclude that no binding oral agreement to resign was reached at the July 20 meeting. It is a close question

as to whether a binding oral agreement as to Grievant's resignation was reached at this meeting. On the one hand, Lednicky indicated that Grievant was willing to resign if the Employer agreed to her conditions, and Commissioner Young expressed such agreement after Lednicky stated the conditions. Further, Lednicky indicated more than once that he was sure that Grievant did not want to come back to work, and indicated that there was no problem with the Employer announcing Grievant's resignation.

On the other hand, it was agreed that Lednicky and Sharon Wilson, Personnel Administrator for the Employer, would work out the details of the agreement and put it in writing. It was agreed that Wilson would draft the agreement and send it to Lednicky.

In weighing these facts in light of previous practices and subsequent actions of the Employer, we conclude that the Employer has not met the burden of demonstrating that a binding oral agreement as to Grievant's resignation was reached at this meeting. It was general practice for Lednicky and Wilson to enter into written stipulations and agreements on settlements which they reached. Most often, affected parties, including the involved employee, signed the stipulation and agreement and there were no problems. However, there had been occasions when the parties thought agreement had been reached but an affected party did not sign the draft agreement, and there was no agreement. This general practice weighs in favor of there being no binding agreement until the written draft of the agreement is actually executed.

Further, the draft stipulation and agreement actually drafted by Wilson stated that the parties "stipulate and agree . . . (t)hat with the execution of this agreement, Brenda Wright will be deemed to have voluntarily resigned . . ." We cannot construe these words to be without meaning given the rule of contract construction that, if clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). This provision of the draft agreement is clear and unambiguous in indicating that Grievant will be deemed to have resigned with the execution of this agreement. Since Grievant never executed the agreement, this provision also weighs in favor of there being no binding agreement until the written draft of the agreement was actually executed.

The draft stipulation and agreement also contained terms which had not been discussed at the July 20 meeting. Specifically, terms were included providing that the agreement shall not be considered to be an admission of wrongdoing, error or liability by the Employer or Grievant; and that in consideration of the agreement, Grievant waived any claim against the Employer arising out of the circumstances leading to the agreement. This waiver of further claims by Grievant obviously is a significant term, and there being no evidence it was discussed at the July 20 meeting, this is another factor weighing in favor of there being no binding agreement until the draft agreement was actually executed.

In applying the Mediafare Entertainment Corp. factors set forth above, the general practice of Lednicky and Wilson, and the provisions of the draft agreement prepared by Wilson, cause us to conclude the Employer has not met its burden of proving an oral agreement to resign at the July 20 meeting. The general practice indicates that this is the type of agreement that is usually committed to writing and signed. 777 F.2d at 80. Also, the provision of the draft agreement concerning Grievant being deemed to have resigned upon execution of the agreement constitutes an express reservation on the part of the Employer of the right not to be bound until the contract is executed. Id. Further, the provisions relating to no admission of fault and waiver of further claims indicate all terms of the alleged contract had not been agreed upon at the July 20 meeting. Id. Finally, the fact that Lednicky never signed the draft agreement lends further support to the conclusion that there was no binding agreement until the draft stipulation and agreement was actually executed by all concerned. These factors outweigh the fact that the substantive terms of the contract appeared to be agreed to at the July 20 meeting. They also outweigh the representations made by Lednicky at the meeting.

This conclusion does not end our inquiry. We still need to examine whether verbal representations and other actions of Grievant after the July 20 meeting clearly indicate, and conclusively demonstrate, that she resigned. If so, then we must deny her grievance. Baldwin, 13 VLRB at 35, 37.

In analyzing Grievant's actions after July 20, 1992, it is

important to keep in mind that Grievant never informed the Employer during this period that she had resigned, and that she understood, based on her discussion with Lednicky on July 20 (following the meeting that day), that a written agreement would be drafted and sent to her for her signature. All of her actions must be viewed with these facts in mind.

The first actions of Grievant were her representations, all within a few days of the July 20 meeting, to eligibility specialists with whom she worked that she had not resigned. These statements of Grievant were made after the employees told Grievant that her superior, Helen Keith, had told them Grievant had resigned. These representations, coming quickly on the heels of the July 20 meeting, support Grievant's position that she had not orally resigned at that meeting. Although it can be argued that, once Grievant knew Keith thought she had resigned, it would have been reasonable for Grievant to clarify this matter with the Employer, Grievant had no legal burden to demonstrate that she had not resigned. Also, Keith obtained information from employees shortly after the meeting indicating that Grievant had not resigned. It was more incumbent on her than Grievant to clarify the situation. In any event, these actions of Grievant do not clearly indicate that she resigned.

The Employer next contends that Grievant's continued acceptance of leave time after July 20 was a clear indication that she had resigned. This was because, the Employer submits, Grievant was collecting benefits consistent with the conditions which she had placed on her resignation, and acted in every way

consistent with someone who had resigned. A party may become bound to a contract by accepting its benefits, even though the party did not sign it, on the theory of partial performance of the contract. Mediafare Entertainment Corp., 777 F.2d at 80. Skelton v. General Motors Corp., 860 F.2d 250, 259 (7th Cir. 1988).

We do not believe that the Employer has met its burden of showing that these actions of Grievant demonstrated her intent to resign. The draft stipulation and agreement was mailed to Grievant after August 4. During the time that Grievant was waiting for the stipulation, she understood she would have to sign the agreement to effect her resignation. After receiving the stipulation and reading its terms, she was entitled to operate under the assumption that she had not resigned unless, and until, she signed it. The fact that she was allowed to accept benefits for more than a month, benefits to which she was entitled, is more probative of demonstrating that the Employer did not timely ensure that an agreement was signed than it is of her intent to resign. This is not to fully absolve Grievant of some responsibility for the events as they transpired here. It would have been more reasonable for her to act more quickly, and be more open about her status, than her actions indicated.

The Employer further contends that Grievant's actions of attending an exit interview, and a farewell dinner given in her honor, clearly indicate that she had resigned. On the surface, the act of an employee taking part in an exit interview and a farewell dinner would seem to indicate clearly that the employee

had resigned. However, once again, when Grievant's actions are examined, the circumstances are much more ambiguous. She used the exit interview to show the interviewer the unsigned draft stipulation, and tell the interviewer that she was not sure that she had resigned. At the dinner, Grievant told participants that she had not resigned and showed them the unsigned stipulation. Given the ambiguous nature of Grievant's actions on these occasions, we cannot conclude that they clearly indicate an intent to resign.

In sum, we conclude that the Employer has not met its burden of demonstrating that Grievant resigned. The events of the July 20 meeting, and subsequent events, whether considered in isolation or in their entirety, do not clearly indicate that Grievant resigned. We also note that the Employer has demonstrated no significant detrimental reliance in this case since the evidence indicates that, at the time Grievant indicated that she wished to return to work, the Employer had not filled her position.

In fashioning a remedy in this case, Grievant is entitled to be made "whole"; to make her whole is to place her in the position she would have been in had the Employer not terminated her employment. Grievance of Benoir, 8 VLRB 165, 168 (1985). This means that Grievant is entitled to be reinstated, with back pay and benefits.

In conclusion, we would like to reiterate the difficult nature of this case. Representatives of the Employer left the July 20 meeting believing that an agreement had been reached with

respect to Grievant's resignation, only to discover later that Grievant declined to settle once the draft stipulation and agreement was prepared. However, while the Employer *understandably is displeased at such a turn of events*, the Employer cannot require Grievant to be bound by something to which she never finally agreed. This is particularly so given that termination of employment was at stake. Both the Employer and Grievant are at fault and bear some responsibility for this unfortunate matter, but in the final analysis the Employer simply has not met its burden of demonstrating that Grievant resigned. The Employer can avoid a similar occurrence in the future by ensuring that tentative oral agreements are more expeditiously reduced to writing and executed.

Charles H. McHugh, Chairman

Louis A. Toepfer

DISSENTING OPINION

I concur with the majority opinion's statement of the applicable standards for deciding this case, but disagree with the conclusion which they have reached based on those standards.

In applying these standards to the facts of this case to determine whether the Employer has met the burden of proving that Grievant resigned, it first must be determined whether a binding oral agreement for Grievant to resign was reached at the July 20, 1992, meeting, despite the absence of the execution of the subsequent draft stipulation and agreement on the resignation.

Before discussing the meeting itself, it is necessary to address the threshold agency issue of whether Richard Lednicky, VSEA Representative, had the authority to bind Grievant by his actions at the July 20 meeting. I first conclude that actual authority did exist, as I disagree with the majority's findings that Grievant did not authorize Lednicky to resign for her. I believe that implied actual authority existed in this case. Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question. NEET v. Silver Street Partnership, 528 A.2d at 1119. Such authority may be implied from the words used, from customs and from the relations of the parties. Id. Although Grievant testified that she did not authorize Lednicky to resign for her, and the majority has found that there was no such authorization, I believe the circumstances warrant a different conclusion. The Employer expected Grievant to return to work on July 20, and to attend the scheduled meeting that day. When Grievant elected not

to return to work that day, and to send Lednicky to represent her at the meeting in her absence, Grievant gave Lednicky implied permission to resign for her by specifying to him conditions which she had for resigning. These conditions were converting her annual leave time during her leave back to sick leave, and allowing her to stay on the payroll until her annual leave was exhausted. This specifying of conditions constituted Grievant giving Lednicky implied authority to resign for her if those conditions were met.

Even assuming arguendo that implied actual authority did not exist, I conclude that apparent authority did exist. This is because of Grievant's actions prior to the meeting of having Lednicky deal directly with the Employer on questions involving her leave of absence, and having Lednicky arrange for meetings with the Employer, in combination with having Lednicky represent her at the July 20 meeting in her absence. Such actions of Grievant constitute a pattern leading the Employer reasonably to conclude that, when Lednicky appeared at the July 20 meeting without Grievant, Grievant had given Lednicky authority to reach an agreement on her behalf.

Further, I conclude that a binding oral agreement was reached at the July 20 meeting. Grievant's representative, Richard Lednicky, clearly indicated at the meeting that Grievant was resigning. He indicated that Grievant was willing to resign if the Employer agreed to her conditions, and the Employer readily agreed to such conditions. Lednicky further indicated more than once that he was sure that Grievant did not want to

come back to work, and indicated that there was no problem with the Employer announcing Grievant's resignation.

These representations by Lednicky caused management representatives reasonably to conclude that Grievant had resigned. Grievant should be held bound to these representations by Lednicky since Lednicky had apparent authority to bind Grievant at this meeting, and Grievant sent Lednicky to the meeting knowing full well that her conditions for resigning were going to be discussed.

Given the unequivocal nature of Lednicky's representations, the draft stipulation and agreement that the parties agreed at this meeting to have prepared does not change the result that a binding oral agreement was reached at the July 20 meeting when the Medifare Entertainment Corp. factors set forth in the majority opinion are applied. The mere intention to commit an agreement to writing does not prevent contract formation prior to execution, as long as the parties intended to be bound in the absence of a document executed by both sides. Id., 777 F.2d at 80. Here, it is evident that the intent to enter into a written agreement was nothing more than a confirmation of what already had been finally agreed upon. Id. The parties had agreed on the substantive terms of the agreement, and the reason for the written agreement simply was to set forth the results of the mechanical computation of the amount of leave days to which Grievant was entitled pursuant to the parties' agreement, so that her effective date of resignation could be determined.

The majority opinion's reliance on the actual wording of the draft stipulation (i.e, that "with the execution of this agreement" Grievant "will be deemed to have voluntarily resigned"), as an express reservation on the part of the Employer not to be bound until the contract was executed, is misplaced. This language is more reasonably looked at as boilerplate language that should not be given the substantial weight which the majority opinion gives it, particularly given Lednicky's unequivocal representations at the July 20 meeting.

Also, the fact that the draft stipulation and agreement contained other specific provisions which apparently were not discussed at the July 20 meeting does not change my conclusion in this regard. These provisions provided that the agreement shall not be considered to be an admission of wrongdoing, error or liability by the Employer or Grievant; and that in consideration of the agreement, Grievant waived any claim against the Employer arising out of the circumstances leading to the agreement. There is no evidence that Grievant relied on these provisions in any way in deciding not to execute the draft stipulation and agreement and in seeking to return to work. As a result, I place little weight on these provisions as significant terms of an agreement in determining whether a binding oral agreement had been reached at the July 20 meeting. Again, this is particularly so given Lednicky's unequivocal representations at the July 20 meeting that Grievant was resigning.

Also, while it was the general practice of Lednicky and the Employer's Personnel Administrator, Sharon Wilson, to enter into

written stipulation and agreements on settlements, the Baldwin case, discussed earlier, indicates that employee resignations are not necessarily reduced to writing. There, the employee made verbal representations that she was resigning, the employer accepted the resignation, and the resignation was held valid and enforceable. 13 VLRB at 35, 37. Given this precedent, I am not prepared to conclude that an agreement to resign is the type that is usually committed to writing. Mediafare Entertainment Corp., 777 F.2d at 80.

The events subsequent to the July 20 meeting do not change my conclusion that Grievant had clearly indicated that she had resigned. Once she was informed by eligibility specialists shortly after the July meeting that her superior, Helen Keith, had indicated that Grievant had resigned, the reasonable response if she had not really resigned was to inform some member of management that there had been a misunderstanding. Her failure to do so supports the conclusion that she had resigned.

Also, Grievant's continued acceptance of leave time after July 20 was a clear indication that she had resigned. In doing so, she was accepting the benefits of the agreed upon bargain which she had proposed as conditions for her resignation. A party may become bound to a contract by accepting its benefits, even though the party did not sign it, on the theory of partial performance of the contract. Id.; Skelton v. General Motors Corp., 860 F.2d 250, 259 (7th Cir. 1980). Grievant's acceptance of benefits constitutes such partial performance of the contract. If Grievant really had not resigned, it was incumbent on her to

notify the Employer of that fact, rather than accepting leave time for more than a month after the July 20 meeting. It is also relevant that there is no evidence during this period of accepting benefits that Grievant ever told Lednicky that she had not resigned. Also, at some point during this period, Grievant took her personal belongings from the office. Such action is consistent with someone who had resigned from their employment, and lends further support to the conclusion that she had resigned.

Further, Grievant's actions of attending an exit interview, and a farewell dinner in her honor, clearly indicate that she had resigned. If Grievant had not resigned, it made no sense for her to participate in these events. Her questioning during the exit interview as to whether she had resigned, and her statements at the exit interview that she had not resigned, are best characterized as second guessing a decision that was a "done deal".

There is no evidence in this case to conclude that Commissioner Young, who had ultimate authority to accept or not accept Grievant's resignation, even was aware there was a problem until after the farewell dinner. As soon as he heard there was a problem, he took action to confirm the Employer's position that Grievant had resigned. If Grievant really had a disagreement with the terms of the resignation, or an intent to return to work during the period from July 20 to August 21, all she need had done was pick up the phone or write a note to the Commissioner. She did neither. Rather, she just made passing remarks to close coworkers that she was not sure she had resigned

because she had not signed the agreement. These are not the actions of a person that had not resigned. It was only after she learned of the resignation of Keith, and was contacted by Lednicky at the urging of Commissioner Young, that she advised Lednicky that she had changed her mind. The Commissioner, immediately upon learning of this, wrote that it was the Employer's understanding that Grievant had resigned and that the Employer was holding her to that decision. The Employer cannot be expected to wait for more than a month while an employee in a key position procrastinates over her decision.

In sum, I conclude that the Employer has met its burden of demonstrating that Grievant resigned. A binding oral agreement of resignation was reached at the July 20 meeting, and events subsequent to the meeting do not change the conclusion that Grievant had clearly indicated she had resigned. Further, the fact that the Employer has not demonstrated significant detrimental reliance here does not affect the controlling legal conclusion that Grievant resigned.

In closing, I would like to indicate that this is a truly unfortunate case. By all indications, Grievant was an excellent employee whose work problems appeared to stem from assuming an excessive workload, and accepting a transfer to a position which did not have the salary and location which she expected. It is a loss to the State when such an employee terminates employment. However, this does not defeat the ultimate conclusion that Grievant resigned and the Employer was entitled to accept her resignation.

Leslie G. Seaver

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Brenda Wright ("Grievant") is SUSTAINED; and

1. The State of Vermont Agency of Human Services, Department of Social and Rehabilitation Services, shall reinstate Grievant to her position as Child Care Federal Programs Administrator in the Employer's Waterbury Office:

2. Grievant shall be awarded back pay, plus interest, and benefits from the date of her termination of employment until her reinstatement for all hours of her regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

3. The interest due Grievant 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 commencing with Grievant's termination of employment, and ending on the date of her reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation received by Grievant during the payroll period); and

4. The parties shall submit to the Board by January 4, 1994, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing on these issues shall be held on January 4, 1993, at 9:30 a.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont.

Dated this 17th day of December, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer