

VERMONT LABOR RELATIONS BOARD

KATHLEEN KELLEY

v.

THE DAY CARE CENTER, ET AL.

DOCKET NO. 76-20R

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

Kathleen Kelley was hired by The Day Care Center (Center) of Norwich, Vermont in February, 1975. The terms of her contract were established orally between Kelley and the Director of the Center. She was discharged at the end of November 1975, effective February 10, 1976, and filed a complaint against her employer, charging her dismissal had been an unfair labor practice. Several persons, parents of children attending the Center, filed an Intervenors' Complaint in support of Kelley.

FINDINGS OF FACT

1. Kathleen Kelley is a former employee of The Day Care Center, Inc.; she is a trained and certified pre-school teacher with 15 years experience.

2. The Day Care Center, Inc. (hereafter Center) of Norwich, Vermont is a non-profit corporation. The Center does not affect interstate commerce nor does it provide medical treatment.

3. All staff and parents attending the Center are members of the Corporation.

4. Prior to March 1975, all staff members had individual oral contracts with the employer. Each contract of a full-time teacher called for a 7-hour day, a one-half hour lunch break and free lunches.

5. Contract terms between the administration and Board of Directors (hereafter Board) of the Center and the staff of the Center were formalized by Board adaptation of previously informal contract terms in March 1975. These terms included: full-time staff would work a 7-hour day, and lunches would be provided at no cost to staff.

6. In March 1975, the Board requested the staff to form a committee to represent the staff's positions on its request for benefits and on the operation of the Center.

7. During the summer of 1975, the Board and staff of the Center were told by the Director that the Center was in dire financial straits due to mismanagement.

8. The staff voluntarily agreed to certain cutbacks when informed of the allegedly precarious financial position of the Center.

9. Prior to the onset of the labor dispute, employees experiencing job difficulties were evaluated and given an opportunity for training prior to demotion or dismissal.

10. Prior to the labor dispute, Kelley was a highly regarded teacher. She was praised by Fransway and Dupuy as well as by other staff and was even asked to train other employees experiencing difficulties.

11. The Center receives food furnished by the federal government without cost. The meals furnished free to staff prior to the labor dispute did not cost the Center any money.

12. On or about October 14, 1975, the Director notified the staff that due to the Center's financial straits, employees would have to work longer hours, pay a monthly fee for meals and would no longer be reimbursed for travel expenses. There had been no prior negotiations with the staff or its representatives prior to Fransway's announcement.

13. The staff's reaction was to unanimously and strenuously oppose these unilateral changes in their working conditions.

14. Following Fransway's October 14 announcement, the staff attempted to negotiate with the Board through the Board's staff representatives and through an elected spokesperson.

15. While the staff was organizing its resistance to these unilateral changes, Kelley was perceived as a leader by the Board and administration as well as by the staff. Kelley's vocal and active opposition to the proposed harsher working conditions was well known by Fransway, Dupuy and the Board.

16. The Board considered various proposals in attempting to combat its alleged financial difficulties. Some proposals, e.g. a longer working day, would have had a larger impact on the staff; other proposals, e.g. a surcharge, would have had a larger impact on the parents. The economic interests of the parents were adverse to those of the staff.

17. On November 3, 1975, the Board adopted a proposal increasing staff hours without additional compensation and

decreasing staff benefits despite the strong objections of the staff.

18. Fransway approached Kelley during the dispute and offered to allow her to continue working a 7-hour day. Kelley rejected this offer and continued to oppose the administration and Board.

19. Prior to discharging Kelley, Fransway asked her to take her vacation earlier than planned in order to ensure her absence on December 1, 1975, the date on which the new working conditions were to take effect.

20. At its November 24, 1975 meeting, the Board established a policy under which employees unwilling to work longer hours for the same pay would be terminated and replaced.

21. Kelley was initially fired by Fransway on November 26, 1975, only 4 days prior to the scheduled institution of the harsher working conditions. Fransway's action exceeded his authority under the Center's by-laws.

22. Kelley was never warned about any professional or other deficiencies by her employer prior to her discharge.

23. Fransway repeatedly gave varying and conflicting reasons for firing Kelley in his letter of November 26, 1975, in his letter of January 26, 1976, in his initial statement to the Vermont Department of Employment Security, in his testimony at Kelley's unemployment hearing and in his statements at Board meetings and with members of the Corporation.

24. Kelley was fired by Fransway and later by the Board for her leadership of the staff during the labor dispute.

25. Following Kelley's discharge, the remaining staff was working under threats of dismissal.

26. In Fransway's second termination letter to Kelley, the Director stated that Kelley could appeal her discharge to a mediation council. This council did not exist prior to Kelley's dismissal, has not been operational since then, and was formed solely as a response to the reaction to her termination.

27. At various times during the labor dispute, the administration, Board and parents feared a strike by the staff.

28. Following Kelley's termination, several members of the Corporation informed the Board that it would constitute an unfair labor practice to terminate Kelley for her role in the labor dispute.

29. Following Kelley's termination, Fransway offered to reinstate free lunches if the staff would agree to work the extra hour without pay and not take the issue of increased hours to the mediation council.

30. Fransway admitted to Dr. Joan Smith, Intervenor's representative, that, his stated reasons aside, he would have dismissed Kelley for her role in the labor dispute.

OPINION

Complainant Kathleen Kelley and supporting Intervenors have charged that The Day Care Center committed unfair labor practices in the course of a labor dispute during the fall and winter of 1975-1976. The Respondent Center denied the allegations and additionally claimed immunity from the Vermont Labor Relations Act. The Board rejects the Respondent Center's contention that this Board lacks jurisdiction and finds that the

Center is an employer as defined by 21 V.S.A. Section 1502(7) of the Labor Relations Act.

The crucial issue in this case is whether the Center's termination of Kathleen Kelley constituted an unfair labor practice under Section 1621 of the Labor Relations Act. Under the criteria established by the Vermont Supreme Court [Ohland v. Dubay, 133 VT. 300], the Board is directed to determine this issue. The Board has determined that the Center knew of Kelley's role in the labor dispute, that the Center had fostered a climate of coercion at the work site and that Kelley's discharge, 4 days before the harsher working conditions were to be imposed was suspiciously timed, and that the Complainant has thus met her burden of proof.

The Complainant and Intervenors have maintained that the Center breached its duty under 21 V.S.A., Section 1504(a) of the Labor Relations Act to make and maintain agreements with employees concerning wages, hours and conditions of work. The Board believes that by implementing new and more stringent working conditions without negotiations with its employees, the Center did violate the Labor Relations Act 21 V.S.A., Sections 1504(a) and 1504(b).

Complainant and the Intervenors have further charged that the Center committed illegal acts of coercion. The Board finds that the Director's statement that all employees who continued to oppose the harsher working conditions would be dismissed, the Center's dismissal of Kelley, and the Director's earlier offer

to exempt Kelley from the harsher working conditions violated 21 V.S.A., Section 1621(a)(1) and (a)(3) of the Labor Relations Act. It is important to note within this context that despite the absence of a formal union, the staff, by its meetings, attempts to negotiate with the Board, and election of spokespersons, was engaged in concerted activity under the ambit of the Act. [NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)].

The Complainant and Intervenors also charged that the Center had solicited replacements for staff without disclosing the existence of the labor dispute. The Board, however, considered there was insufficient evidence and thus finds no violation of 21 V.S.A., Section 1621(a)(8) of the Act.

In view of an employee's duty to mitigate damages, we award the Complainant back wages to be computed based on the difference between her base salary of \$7,200.00 at The Day Care Center and what she has earned from the period between April 1, 1976 (the day after the employer filed its answer to the petition) to 30 days from the date of this Order, plus interest at the legal rate and reinstatement at the Center. The Board has taken into account the delay in rendering this opinion and the fact that this delay has penalized the interests of both sides through no fault of their own. For this reason we decline to take into account any raises the Complainant may have received from the Center since her dismissal.

ORDER

Now therefore it is hereby ORDERED that the complaint of Kathleen Kelley be ALLOWED and that she be awarded back pay as provided for above and reinstatement.

Dated this 23rd day of October, 1978, at

VERMONT LABOR RELATIONS BOARD

John S. Burgess
John S. Burgess
William G. Kemsley, Sr.
William G. Kemsley, Sr.
H. James Wallace
H. James Wallace

*Appeal
Dismissed*

*Order and grievance
approved.
Settlement*

*\$8000
made*

June 1982