

Contemporary Guidance Services, Inc. and Local 868, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Delores Beckham and Kevin Mulvey. Cases 2-CA-21761, 2-CA-21917, and 2-CA-21931

October 23, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On July 27, 1990, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Contemporary Guidance Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gail I. Auster, Esq., for the General Counsel.
Bradley B. Davis, Esq., of New York, New York, for the Respondent.

SUPPLEMENTAL DECISION

ELEANOR MACDONALD, Administrative Law Judge. On September 29, 1988, the National Labor Relations Board issued its Decision and Order at 291 NLRB 50, finding that Respondent Contemporary Guidance had unlawfully discharged Dolores Beckham and Kevin Mulvey, and ordering Respondent to reinstate its employees and make them whole for any loss of earnings or other benefits.¹ On April 24, 1989, the United States Court of Appeals for the Second Circuit enforced the Order of the Board based on a consent judgment. Through inadvertence, the consent judgment was not entered at that time. On February 8, 1990, the parties agreed to the entry by the court of the consent judgment to be effective from April 24, 1989. On May 25, 1989, the Regional Director for Region 2 issued a compliance specification and notice of hearing alleging certain amounts of backpay due for the two employees named above and specifying that as to Mulvey the backpay continues to accrue until a valid offer of reinstatement is made to him.

¹The Board's Decision and Order affirmed the decision in the underlying case issued by Administrative Law Judge Snyder on March 29, 1988.

Respondent filed an answer alleging that Mulvey was given a valid offer of reinstatement, that state and Federal regulations make it impossible to reinstate him to his former position, that the computation of backpay includes improper increases given without the consent of the Union, and that neither Beckham nor Mulvey made adequate efforts to find alternate interim employment.² During the instant hearing, Respondent amended its answer to state that Respondent "has adopted qualifications for recreation counsellors making it impossible to reinstate Mr. Mulvey into any . . . position at [Respondent's facility], and further has abolished the position of recreation counsellor at the Chelsea residence."

This matter was heard by me in New York, New York, on November 27 and 28 and December 15, 1989.

On the entire record, including my observations of the witnesses and on due consideration of the briefs filed by the General Counsel and the Respondent in March 1990, I make the following³

FINDINGS OF FACT

I. DOLORES BECKHAM

Respondent and the General Counsel agree that Beckham was discharged on October 15, 1986, and that she was reinstated on November 19, 1988. The parties stipulated that Beckham was earning \$144 per week at the time of her discharge in 1986 and that there were across-the-board increases of 8 percent on July 1, 1987, 6 percent on July 1988, and 6 percent on July 1, 1989. The General Counsel claims that Beckham is owed \$14,096, plus interest, and that she is entitled to vacation and benefits for sick days and personal days. The General Counsel and Respondent stipulated that Beckham is entitled to 19 days of vacation time, 3 days of personal leave, and 12 days of sick leave for the backpay period. The parties agreed that Respondent shall have the option of crediting Beckham with the accrued benefits or of paying her the amounts outright. One day after entering into the above stipulation, counsel for Respondent asserted on the record that most employees work a 7-hour day and that the stipulation referred to 7-hour days. After being pressed by counsel for the General Counsel, counsel for Respondent conceded that he should have specified an 8-hour day as to most employees. The evidence shows that Beckham worked 10 hours per day; that is, on Saturday and Sunday from 8 a.m. to 6 p.m.

Yuri Feynberg, Respondent's director of residential services, testified that a day's vacation referred to an 8-hour day, "unless the person is a part time employee whose vacation time will be pro-rated in accordance with the number of hours that employee works." Respondent's "Policies and Procedures" provide that a part-time salaried employee who works 20 or more hours per week on a permanent basis receives "sick personal and vacations days on a prorated basis." The record establishes that Beckham worked 10-hour days rather than 8-hour days. Thus, her benefits should be prorated accordingly.

²Other contentions of Respondent which attempted to relitigate matters decided in the underlying proceeding and enforced by the Second Circuit were stricken from Respondent's answer.

³I note that much of Respondent's brief is based on assertions of fact that are totally unsupported by the record before me. I have found the facts based on the testimony and evidence and based on my credibility resolutions.

Beckham was a weekend counselor who performed tasks related to the care of moderately retarded residential clients of Respondent. Beckham gave out medication, accompanied clients on recreation trips, taught life skills, and helped with the cooking and the selection of clothing and the like.

In addition to Beckham's weekend job with Respondent, Beckham is a full-time teacher in the New York City Public School System. When school is not in session in the summer, Beckham holds full-time summer employment.

Beckham described her search for interim employment after she was discriminatorily discharged by Respondent. She looked at advertisements in the major New York City newspapers as well as local newspapers. She also applied to two department stores for employment for the 1986 holiday season. The department stores were not willing to employ her for weekends only; they required weekday work as well. In 1987, Beckham continued to consult the newspapers everyday; she also checked the school bulletin board for part-time jobs, and she submitted a resume to the Shields Institute. In the second quarter of 1987, Beckham obtained employment at Clairol answering questions from consumers. The Clairol job was 3 days a week from 6 p.m. to midnight. Beckham had to quit this job after 4 weeks because the late hours meant that she got home very late and could not carry on her duties in school the next day. Beckham also obtained work with an agency named Magi and she worked two Saturdays training adults in a State program. Magi had no further need for Beckham in 1987 after she completed the two sessions. During the third quarter of 1987, in addition to consulting the daily newspapers, Beckham applied for part-time jobs with Federal Express, a correctional facility, and a community college. She was not successful in obtaining employment although she had several interviews. In the fourth quarter of 1987, Beckham again checked newspaper advertisements on a daily basis, she contacted friends in the mental health field, and she had an interview at Adelphi University, but she did not get a job.

Beckham continued consulting advertisements and submitting resumes in the first quarter of 1988, but she did not obtain employment. Respondent does not dispute the backpay specification for the second quarter of 1988. In the third quarter of 1988, Beckham registered with the New York State Employment Service and she called the service regularly to see if it had weekend employment for which she might apply. One job in Beckham's field was available, but not for Saturday or Sunday. Beckham also sought work in daycare programs during this time, but she was not successful. In the fourth quarter of 1988, Beckham continued to look in newspapers and she sent out resumes. In addition, a friend gave her a lead for a tutoring position, but when Beckham called the job had been filled. Finally, Beckham was reinstated by Respondent.

Beckham did not have copies of the advertisements she responded to nor did she have copies of most of the letters of application she sent out. She did not retain most of the letters of rejection.

Respondent's brief misstates the testimony concerning the number of hours worked by Beckham every week; I shall disregard the argument made on this basis. In addition, Respondent's brief urges that Beckham should be denied backpay because she did not retain copies of letters and applications she prepared while she was seeking interim employ-

ment following her discriminatory discharge. This contention is totally without merit. Respondent's burden in this proceeding was to show that Beckham's efforts to find interim employment were not reasonably diligent. Manifestly, Respondent did not meet this burden. Beckham was a strong and convincing witness with a particularly impressive demeanor while testifying. There is no basis for discrediting any of her testimony. I find that she was extremely diligent in seeking interim employment. Respondent has not shown that the General Counsel's computations of backpay should be changed. Therefore, in accordance with Appendix A of the compliance specification, Respondent should pay to Beckham \$14,096 plus interest. Further, in accordance with the stipulation entered into at the instant hearing, Respondent should credit or pay to Beckham 19 days of vacation, 3 days of personal leave, and 12 days of sick leave based on a 10-hour workday.

II. KEVIN MULVEY

A. Background

Mulvey testified that he was a recreation counselor for developmentally disabled adults: he planned day trips for clients of Respondent at the Chelsea I residence and he accompanied the clients on the trips. His regularly scheduled days of work were Saturday and Sunday, 10 a.m. to 6 p.m. When Respondent was short staffed he was often called in to work as a counselor during the week for up to 24 or more additional hours. The parties stipulated that Mulvey was earning \$4.16 per hour at the time of his discharge and that the across-the-board increases of 8 percent, 6 percent, and 6 percent applied to his backpay as well. The General Counsel claims that Mulvey is owed \$5747, plus interest and that his backpay continues to accrue so long as he has not been made a valid offer of reinstatement. The backpay computation used by the General Counsel is based on an average of 20 hours of work per week.⁴

The decision of Administrative Law Judge Snyder in the underlying case found that Mulvey was a "recreation counselor at the Chelsea residence on weekends and Wednesdays."⁵ This finding was not disturbed by the Board in its Decision and Order that Mulvey be reinstated to his former job or, if that no longer exists, to a substantially equivalent position. The finding as to Mulvey's job title and duties is, of course, binding in the instant proceeding. Counsel for Respondent stated on the record at the hearing before me that Respondent does not claim that Mulvey was ever offered reinstatement as a weekend recreation counselor.

Mulvey was discharged by Respondent on November 12, 1986. At that time he also had a part-time job as a "telemarketer" or telephone salesman from 6 to 11:30 p.m. 5 days per week. If he was asked to work extra hours at Respondent's facility, he did not attend the telemarketing job.

⁴ Respondent does not challenge the General Counsel's method of computing the backpay for Mulvey.

⁵ The Chelsea residence is on Ninth Avenue in New York City. It houses developmentally disabled adults. In addition, certain offsite apartment residences clustered around the the main residence are considered part of the Chelsea residence. The Chelsea residence proper is called "Chelsea I" and the clustered apartments are called "Chelsea II."

B. *Efforts to Seek Interim Employment*

After his discriminatory discharge by Respondent, Mulvey asked the Union for help in finding part-time employment; he also checked newspaper advertisements and spoke to friends about finding work. He did not obtain part-time employment during the fourth quarter of 1986 but he continued to work part time at the telephone selling job. From February 1987 to April 1988, Mulvey held a full-time job and was not seeking part-time employment. The General Counsel does not seek backpay for this period.

In the second quarter of 1988 after Mulvey was laid off from his full-time job, he again maintained regular contact with the union hiring hall and looked in one daily New York City and two local newspapers for part-time employment. He did not find a job. In the third quarter of 1988, he continued looking for part-time work by scanning the help wanted ads in the daily newspapers and keeping in touch with the Union. He also interviewed at an alcoholic rehabilitation center for part-time security work. He did not obtain part-time work during this quarter. In the fourth quarter of 1988, Mulvey continued to look for job openings in newspapers and through the Union. Mulvey was interviewed by a hospital and by a private guard agency for security work. He also went to an interview at a museum. Mulvey obtained a job at the A.S.P.C.A. where he worked for 1 day. Although he loves animals, Mulvey found that he could not bear the noise and the stench at the location, so he did not return to work after the first day.

On January 12, 1989, Mulvey obtained work at the National Organization for Women. He worked 20 hours per week. In March 1989, Mulvey obtained full-time employment at the museum where he had been interviewed in 1988, and he continued to work part time at the National Organization for Women 8 hours per week at \$6 per hour. In the third quarter of 1989, he worked part time 20 hours per week and in the fourth quarter of 1989, he worked 30 hours per week at this part-time job.

Mulvey did not retain copies of any job applications he submitted nor did he have copies of any rejection letters he received.

C. *Eligibility for Reinstatement*

Mulvey testified that he has earned 124 college credits but has not obtained any degree. From 1969 to 1971 he worked in a hospital for the criminally insane; a part of the population was mentally retarded.

Yury Feynberg, the director of residential services for Respondent, testified that Respondent operates community residences such as Chelsea and also three intermediate care facilities. According to Feynberg, only the intermediate care facilities employ recreation counselors at the present time.⁶ At the Chelsea residence, the weekend personnel perform recreational duties in addition to their other duties.

Feynberg testified that Respondent changed its job description for recreation counselor after October 1988 in order to comply with Federal regulations issued at that time. The job description dated June 1984 for "recreation counselor" stated the qualifications for the position as follows:

A minimum of a Baccalaureate degree in recreation, art, music or physical education, *or* an Associate degree in recreation and one year of experience in recreation, *or* a high school diploma with two years experience in recreation, *or* one year experience plus completion of comprehensive in-service training in recreation, *or* demonstrated proficiency and experience in conducting activities in one or more recreation programs.

The newly adopted job description for "recreation counselor" states the job qualifications as follows:

A minimum of a bachelor's degree in recreation or in a specialty area such as art, dance, music, physical education, etc.— one year of experience in mental retardation and a driver's license.

Judy Trent, a regional director of the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD), is in charge of program certification. Trent explained that this means that she is a manager in the division of quality assurance with the responsibility for the survey and certification of programs such as the Chelsea residence operated by Respondent. It is Trent's responsibility to enforce state and Federal regulations relating to programs such as that maintained by Respondent at its Chelsea residence. The OMRDD issues regulations. Part 686.6 (a)(2) of these regulations requires community residences such as Chelsea to develop and implement personnel policies which deal with, *inter alia*, "qualifications, education and skills required" for staff members.⁷ Trent testified that Respondent is required to maintain employee job descriptions. OMRDD is concerned about employee qualifications only when the applicable regulations are specific as to the requirements for a particular job function. Trent stated that part 686 of the regulations does not specify any particular qualifications for the position of recreation counselor; in fact, the regulation does not even require such a position to be maintained by Respondent.⁸ If a person employed as a recreation counselor is performing the job adequately, OMRDD would not be concerned with the employee's level of education or other qualifications. Trent also testified that no Federal regulations set qualification requirements for a recreation counselor. Thus, Respondent was free, as far as state and Federal oversight were concerned, to set any educational requirements for the position of recreation counselor at any of its facilities at issue here.

Trent stated that Respondent was able, under applicable regulations, to employ a part-time recreation counselor with a high school degree and a minimum of 8 months' experience at any of its facilities at issue here.⁹ Respondent need not require that a recreation counselor at any of its facilities, either community residences or intermediate care facilities, possess a baccalaureate degree or a degree in recreation.

Trent testified that as to an intermediate care facility, the Federal regulations require that each one shall employ at least one qualified mental retardation professional on the staff. The qualified professional may be trained in any one of a number of disciplines. If the agency decides that the

⁷The regulations became effective on January 31, 1988.

⁸All that is required of Respondent is that it provide recreation services and opportunities for its clients. However, if an employee is employed in the title "recreation counselor," a job description must be maintained for the position.

⁹These are Mulvey's qualifications.

⁶The General Counsel contends that Mulvey may be reinstated to a position at an intermediate care facility or a community residence.

qualified professional shall be a professional recreation staff member, then the individual must have a bachelor's degree in recreation or in a specialty area such as art, dance, music, or physical education. There is no requirement of any level of experience in the Federal regulations for the professional recreation staff member. Respondent has not asserted nor has it presented any evidence that at any of its intermediate care facilities it has decided that the qualified mental retardation professional on staff shall be a professional in the field of recreation.

Trent also testified that Respondent is free to require its weekend counselors to perform recreation activities at any of its facilities at issue here without meeting the qualifications for a professional recreation staff member.

Trent compared the two job descriptions for recreation counselor quoted above; she testified that there was nothing in state or Federal regulations which required Respondent to amend the qualifications set forth in the 1984 job description so as to make them more rigorous.

Respondent also employs staff in the title of "Counselor." The June 1984 job description stated the qualifications for this position as:

A minimum of a high school diploma and one year work experience in a program(s) for the mentally retarded.

In 1986, Respondent issued a job description for "Weekend counselor" which provides that the qualifications are:

A minimum of a high school diploma.

Feynberg testified that the new job description for recreation counselor quoted above was drafted in October 1988 and approved by Respondent's board of directors in December 1988. I note that the document is undated although all the other job descriptions in Respondent's files bear a date of adoption or revision. Further, the purported 1988 revision is on different paper and written in a different style from all the other job descriptions placed into evidence.

On November 10, 1988, counsel for Respondent wrote to the Regional Office that Mulvey was not eligible for reinstatement because he did not meet the qualifications for the position of a residence counselor (a high school diploma and 1 year working in a program for the mentally retarded). Enclosed was the 1984 job description for counselor quoted above. Significantly, Respondent did not draw to the Region's attention the 1986 job description for weekend counselor, also quoted above, which requires only a high school diploma but not 1 year's experience.¹⁰ Also, Respondent did not cite the 1984 job description for recreation counselor pursuant to which Mulvey was hired in December 1985 and under which he was still qualified.

In its letter to the Region, Respondent did not enclose the new job description for recreation counselor which, according to Feynberg, was in the process of being approved by the Board and which required a baccalaureate degree and some experience. If this new job description had been in draft form when Respondent communicated with the Regional Office in November 1988, Respondent would have used the qualifications statement to buttress its position that

Mulvey was not eligible for reinstatement. I conclude that Feynberg's testimony that the new job description was drafted in October and approved by the Board in December 1988 is not accurate. I conclude that the purported 1988 revision was made solely for the purpose of denying reinstatement to Mulvey and to defeat the processes of the Board. Although Feynberg testified that the revision was made to comply with Federal regulations, Trent convincingly gave expert testimony that this was not true.

It is obvious that Respondent was attempting to use any reason or excuse to avoid reinstating Mulvey. Respondent cited an inapplicable job qualification for counselor, Respondent did not inform the Regional Office of its current requirements for recreation counselor or weekend counselor and Respondent drafted new requirements solely to prevent Mulvey from being reinstated by Respondent.

Feynberg testified that the Chelsea I and II residences now employ approximately 18 counselors.¹¹ According to Feynberg, there is no need to employ recreation counselors at Chelsea I, because the clients' level of function has improved since the time they entered the facility 14 years ago. Then Feynberg conceded that of the 14 clients at Chelsea I, only 2 or 3 have been there for 14 years. Feynberg could not say when the others came. At first Feynberg testified that the clients take recreational trips unaccompanied by a staff member. Then he changed his testimony to state that the weekend counselors at Chelsea perform recreation functions as needed and that they do in fact accompany the clients on trips.

Respondent operates three intermediate care facilities. At the Barry location, there are 25 counselors, including 6 weekend counselors. The position of recreation counselor was vacant at the time of the hearing. At the Schaffner location, Respondent employs 20 counselors, including 4 weekend counselors of whom 1 is a recreation counselor. At the East Village facility, there are 25 counselors, or whom 5 are weekend counselors. The position of recreation counselor was vacant.

Feynberg testified that since December 1988, Respondent has applied the revised December 1988 criteria to all job applicants for the position of recreation counselor. This assertion is not supported by Respondent's own personnel records, further buttressing my finding that the revision of 1988 is a sham.

The evidence shows that on March 4, 1989, Respondent hired Jerzy Magda as a weekend recreation counselor at the Barry location. His application lists his college education as "medical academy in Krakow, Poland." His work history is described as "maintenance." The application was left blank in the area that was reserved for "subjects of special study or research work." Feynberg testified that Magda was a medical doctor specializing in physical therapy, with 6 years' experience in physical therapy. Then Feynberg changed his testimony to say that Magda had knowledge of physical therapy and recreation and that he was a recreational therapist working with the handicapped. I do not credit Feynberg. Magda did not list any specialty on his application; he indicated 6 years of attendance at a medical academy but no work experience with the handicapped. Further, Feynberg changed his description of Magda's expertise to suit Respondent's position in this case. Clearly, Magda did not meet

¹⁰ Mulvey would have met this standard.

¹¹ There is no longer a Chelsea III.

Respondent's purported revised criteria of 1 year's experience in mental retardation.

Moreover, Respondent's records reveal that it has hired counselors who lack 1 year's experience working with the mentally retarded. Employee Robert Butcher was hired by Feynberg himself on June 29, 1989, as a part-time overnight counselor. Butcher listed no experience with the mentally retarded on the papers submitted with his application. Then, in October 1989, Feynberg approved his change in status to a full-time overnight counselor. At that point, Butcher had barely 4 months' experience with the mentally retarded. On May 1, 1989, Feynberg approved the hiring of James Collins as a weekend counselor; Collins listed no experience with the mentally retarded, but like Mulvey he had experience at a facility dealing with criminals. On June 16, 1989, Feynberg approved the hiring of Naomi Mack as a part-time weekend counselor; she listed 3 months' training in mental retardation at a trade school but no other qualifying experience. The examples cited here do not exhaust other similar examples to be found in Respondent's personnel records.

D. Discussion and Conclusions

It is clear from the brief discussion of the evidence above, that Respondent's personnel practices with regard to qualifications for hiring are not uniform and do not adhere to Respondent's purported job descriptions and standards. Respondent cannot be said to have shown that Mulvey is not eligible for reinstatement. All that was shown was that Respondent had tried to mislead the Regional Office and me about its personnel requirements and practices. By contrast, the General Counsel has shown that state and Federal regulations do not bar Mulvey's reinstatement. Further, given Respondent's clear desire to avoid reinstating Mulvey and its willingness to go to any lengths to rid itself of him, I am convinced that Respondent abolished the position of weekend recreation counselor at Chelsea I so that it could argue that there was no position at Chelsea I to which Mulvey could be reinstated. It is clear from Feynberg's testimony that the weekend counselors at Chelsea I perform recreation services, and Trent testified that Respondent is obligated to furnish those services. Feynberg's asserted reasons for the abolition of the recreation counselor's position were retracted by him on the witness stand, and he offered no other convincing rationale for eliminating Mulvey's position.

To sum up, I find that Mulvey is eligible for reinstatement as a recreation counselor at Chelsea I or at one of Respond-

ent's intermediate care facilities.¹² Mulvey is also eligible for reinstatement as a weekend counselor at Chelsea I or at Respondent's intermediate care facilities. Because Respondent discharged Mulvey from Chelsea I, and as I have found that Respondent abolished the position of weekend recreation counselor at Chelsea I in order to avoid reinstating Mulvey, I find that a proper offer of reinstatement to Mulvey must be reinstatement to his former position at Chelsea I. Respondent has never made such a proper offer of reinstatement.

Further, I find that Respondent has not shown that Mulvey did not make a reasonably diligent search for interim employment after his discriminatory discharge. Mulvey testified convincingly about his search for work and his occasional successes. There is no requirement such as is urged by Respondent that he keep a diary of all of his efforts. The General Counsel's calculations of net backpay are reasonable and Respondent has not shown by any competent proof that they should be altered in anyway. Thus, Mulvey is entitled to net backpay of \$5747 plus interest pursuant to the amended backpay calculations through the fourth quarter of 1989, and his rights are reserved in futuro until Respondent makes a proper offer of reinstatement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Contemporary Guidance Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall pay to Dolores Beckham the sum of \$14,096 plus interest and, at its option, shall either credit Beckham with or pay to Beckham a sum equal to 19 days of vacation, 3 days of personal leave, and 12 days of sick leave calculated on the basis of a 10-hour workday. Respondent Contemporary Guidance Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall pay to Kevin Mulvey the sum of \$5747 plus interest; Respondent remains responsible for complying with the Board's reinstatement Order, 291 NLRB 50 (1988); Mulvey's rights are thus reserved in future. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment, minus the tax withholdings required by Federal, state, and local laws.

¹² There is no record evidence before me to permit me to make any distinction, for purposes of reinstating Mulvey, between the desirability of Chelsea I or an intermediate care facility.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.