

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF PROFESSOR KENNETH)
BURRILL and the VERMONT STATE)
COLLEGES FACULTY FEDERATION,)
AFT LOCAL 3180, AFL-CIO)
v.)
VERMONT STATE COLLEGES)

DOCKET NO. 78-89S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On July 15, 1978, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (hereinafter the "Federation") filed a Petition with the Vermont Labor Relations Board on behalf of Kenneth Burrill, Assistant Professor at Johnson State College. The Petition alleged that, in the denial of tenure to Mr. Burrill, the Vermont State Colleges (hereinafter "VSC") violated several articles of the collective bargaining agreement between the Federation and the Vermont State Colleges (hereinafter "Agreement"). On July 25, 1978, an Answer to the Petition dated July 19, 1978 was filed with the Vermont Labor Relations Board by the VSC. On September 21, 1978, the Board held a hearing on the matter. Representing the VSC was Nicholas DiGiovanni, Jr., and representing the Federation was Mr. Stephen Butterfield. At the close of the hearing the Chairman requested that briefs and requests for findings of facts be submitted to the Board no later than October 12, 1978. The Federation filed its Brief on October 11, 1978 and the VSC filed its Brief on October 12, 1978.

FINDINGS OF FACT

1. Mr. Kenneth Burrill was hired by Johnson State College as an instructor in physical education for the 1972-1973 academic year. When Mr. Burrill was hired he was not given formal written notice that he would be expected to earn a terminal degree in his teaching field or its equivalent before tenure and promotion would be granted. To date, Mr. Burrill has not earned a terminal degree in physical education.

2. In May of 1975 Mr. Burrill was granted a promotion to the rank of Assistant Professor, effective for the 1975-1976 academic year (Grievant's Exhibit #12).

3. On May 30, 1975, Johnson State College published a personnel policy notice, #74-75-1, listing general and specific criteria used by management as a guide in making decisions for the award of promotion and tenure at Johnson State College. One of the specific criteria for promotion and tenure listed in this notice was a terminal degree in the candidate's most immediate area of teaching. However, the notice stated that exceptions would be made in cases where a person had been hired without formal notice of the terminal degree requirement for tenure (Grievant's Exhibit #9).

4. On January 23, 1976, the VSC Board of Trustees approved a new administrative policy and criteria on promotion. According to these criteria a required credential for promotion to Professor at Johnson State College is a "terminal degree in major teaching field, or major professional, artistic or scholarly accomplish-

ment". The new regulations stated that substantial compliance with the new criteria would be necessary for the academic year 1975-1976; full compliance in succeeding years (Employer's Exhibit A).

5. On July 29, 1976, Dr. Fred Stahuber, Mr. Burrill's Divisional Chairman, sent Dr. Edward Elmendorf, President of Johnson State College, a pre-tenure evaluation memo on Mr. Burrill. Dr. Stahuber cited Mr. Burrill's good performance as a faculty member, but warned that his lack of a terminal degree could jeopardize his tenure. A copy of the memo was placed in Mr. Burrill's file, but he did not have an opportunity to see it until he returned to the college in September. It was the first time Mr. Burrill was given notice in writing that he would need a terminal degree in order to be awarded tenure.

6. Mr. Burrill was reviewed for tenure during the academic year 1977-1978, his sixth year at the institution. Under the terms of the Agreement, if the review was favorable he would have received tenure effective in the 1978-1979 academic year. If the review was unfavorable, he would receive a one-year terminal contract for the 1978-1979 year.

7. On April 29, 1977, Kenneth Burrill signed a release authorizing all persons evaluating him to examine his official file (Employer's Exhibit C). A number of Mr. Burrill's student evaluations, however, were kept in a different file which was located in a separate building from the one where his official personnel file was kept. Mr. Burrill's release did not include authorization to examine the contents of that separate file.

8. Mr. Burrill was evaluated for tenure in 1977-1978 according to a 4-step process which involved recommendations from:

- 1) The Professional Studies Personnel Committee;
- 2) The Faculty Assembly Promotion Retention and tenure Committee;
- 3) His Divisional Chairman; and
- 4) The President of the college.

9. The Professional Studies Personnel Committee recommended on December 5, 1977 that Mr. Burrill receive tenure citing his consistently high teaching evaluations (Grievant's Exhibit #1). The recommendation was sent to the Promotion Retention and Tenure Committee of the Faculty Assembly (hereinafter "PRT Committee").

10. The PRT Committee made its recommendation on January 28, 1978 (Grievant's Exhibit #2). The Committee recommended against the awarding of tenure for Mr. Burrill citing his lack of a terminal degree and the apparently small sample of evaluations in his file, which did not support an outstanding performance in teaching. The Committee's recommendation did, however, state that the lack of a terminal degree could have been offset if outstanding performance in teaching had been evident.

11. On January 25, 1978, Dr. Fred Stahuber made his recommendation concerning tenure for Mr. Burrill (Grievant's #3). Dr. Stahuber rated Mr. Burrill's teaching and college community service as excellent and his professional growth as average. His rating of "excellent" was the equivalent of "superior", the highest performance rating which can be given under the VSC criteria on promotion and tenure. However, since the criteria also required a terminal degree or an outstanding level of professional growth in lieu thereof, Dr. Stahuber recommended against tenure.

12. On March 29, 1978, Dr. Edward Elmendorf, President of Johnson State College, wrote a letter to Mr. Burrill informing him that he, Dr. Elmendorf, could not recommend to the VSC Board of Trustees that Mr. Burrill be granted tenure at Johnson State College. Dr. Elmendorf's letter stated that while Mr. Burrill's teaching and college and community service had been judged favorable by his Division Chairman and his professional growth judged average, the performance rating requirement for the award of tenure called for superior teaching and superior professional growth. His letter also cited Mr. Burrill's lack of a terminal degree and stated that the recommendation from Mr. Burrill's colleagues and the recommendation of his Division Chairman would be helpful in understanding the basis for his, Dr. Elmendorf's, decision (Grievant's #4).

13. The Professional Studies Division Personnel Committee and the Division Chairman, Dr. Stahuber, both examined all the student evaluations in the absence of a separate release from Mr. Burrill for the evaluations that were kept in a separate file located in a different building from that in which his official file was kept. The Faculty Assembly PRT Committee, however, did not review these evaluations as is evidenced by their comments concerning the lack of evaluations that were in Mr. Burrill's official file.

14. The PRT Committee recommendation was dated January 28, 1978 and was received in the President's office on January 30, 1978. A copy of the recommendation, however, was not in Mr. Burrill's on February 1, 1978. Mr. Burrill officially checked the contents

of his file on December 22, 1977 and again on March 31, 1978 (Grievant's Exhibit #19). However, during the month of February Mr. Burrill made several visits to the President's office and inquired of Susan Mann, the Administrative Assistant to the Department of Arts and Sciences at Johnson State College, whether anything new had been placed in his file. Grievant's official file was kept in Susan Mann's office and she, along with a few other administrative employees, had authority to place new documents in teachers' personnel files. In response to Mr. Burrill's inquiries about his files during the month of February, Susan Mann informed him that nothing new had been placed in the files. She further stated that to her knowledge the PRT Committee recommendation was not in Grievant's file on February 1, 1978.

15. On April 1, 1977, Professor Robert Warren of Johnson State College was granted tenure by the Vermont State Colleges after undergoing the same 4-step recommendation process as Mr. Burrill during the academic year of 1978-1977. Professor Warren did not have a terminal degree but his teaching evaluations were considerable as reflected by the favorable recommendations of the Faculty PRT Committee, his Division Chairman and the Divisional PRT Committee (Grievant's Exhibit #21). The superior level of his teaching abilities was judged to be evidence of superior professional growth.

16. The academic year 1976-1977 was the first year during which full compliance with the VSC criteria on promotion and tenure was to be in effect (Employer's A).

17. Among Dr. Elmendorf's stated reasons for recommending Professor Warren for tenure even though he did not possess a terminal degree, were 1) that Professor Warren was not given any written notice during his five years of service with the institution that a terminal degree was a necessary requirement for tenure; and 2) that the eight month period between the time the new criteria was published and the time Professor Warren was evaluated was not a sufficient amount of time in which to acquire a terminal degree.

OPINION

The issues presented to the Board by the Grievant in this matter are two-fold:

- 1) Did VSC deny Grievant his right to due process by violating any of the procedures for tenure evaluation as outlined in the Agreement between the VSC and the Federation; and
- 2) Are the reasons given by the VSC for denial of tenure to the Grievant erroneous or an arbitrary or discriminatory application of the criteria developed under Article XX(3) of the Agreement.

1) Due Process

Grievant has raised several issues relating to the denial of due process during his evaluation for tenure including: the composition of the Faculty PRT Committee, violation of the contractual deadline for placing all recommendations in the Grievant's personnel file, and maintenance of a dual filing system.

As to the issue of the composition of the Faculty PRT Committee, we are not persuaded by the Federation's argument that the administration should or could have rejected the Committee's recommendation if it determined that the Committee was improperly constituted. It is not the responsibility of the administration to make such a determination. Our ruling in Domke v. Vermont State Colleges, Docket No. 76-8 (June 30, 1976) is equally applicable to this situation. As we stated in that opinion:

"The VSC is not responsible for any violation of due process or other arbitrary or capricious act of a faculty committee. The VSC does not control the faculty committee or the PRT committee and therefore cannot be held responsible for any misconduct by such a committee."
(Page 7 of the Opinion)

It is the faculty's responsibility to ensure that its committees are properly constituted and that their recommendations for promotion and tenure are equitably arrived at.

The placement of tenure recommendation in Grievant's file in accordance with the contractual deadline of February 1, does raise a due process issue for which the VSC did have responsibility. There is no dispute over the fact that the PRT Committee recommendation was received in the President's office on January 29, 1978. Article XXIV of the Agreement relating to tenure states in part that:

"All evaluations and recommendations shall be forwarded to the faculty member's personnel file no later than February 1 of any year."

The Federation has presented a prima facie case that the PRT Committee recommendation was not in the Grievant's file on February 1, 1978. While the Grievant did not officially check his

file during the month of February, he did periodically check with Mrs. Susan Mann concerning the contents of his file. Mrs. Mann stated that to her knowledge the PRT recommendation was not in the Grievant's file on February 1, 1978, or on any of the other occasions during February when Grievant checked with her.

It was the responsibility of the VSC Administration, once it had the document in its possession, to place a copy of that document in Grievant's file. The burden of proof, therefore, rests with the VSC to show that the document was in fact in the Grievant's file by February 1. In our view, the VSC did not meet this burden merely by establishing that other persons besides Mrs. Susan Mann had the authority to place documents in faculty members' personnel files. The possibility that a third person could have put a copy of the PRT Committee recommendation in Grievant's file by February 1, does not make it a probability that this in fact happened.

Furthermore, the VSC argument that the receipt of documents into the President's office means receipt into Grievant's personnel file, is not persuasive. The purpose of placing recommendations in a faculty member's personnel file by February 1 is so that the faculty member will have sufficient time to review the recommendations and respond to a negative or incorrect assessment of his abilities prior to the President's final determination on April 1. The importance of safeguarding this due process right is particularly evident in light of the facts in the instant case.

The facts establish that many of the Grievant's teaching evaluations were kept in a separate file which was located in a different building from the one in which his official file was kept.

Although Grievant never signed a separate release for this file, both the Faculty Division Committee and his Division CHairman had access to this file without a release. Both of their recommendations were based on all the Grievant's student evaluations and both recommendations unequivocally rated Grievant's teaching abilities very highly.

The Faculty Assembly PRT Committee's recommendation was based only on the student evaluations that were in the Grievant's official file and not on the evaluations in the separate file. In their recommendations the Committee stated that if an outstanding level of instruction by Grievant had been supported by evaluations in his file, this might have offset his lack of a terminal degree and the Committee might have been able to recommend tenure.

It is not necessary for this Board to determine whether the Administration violated the Contract by keeping the dual filing system; or whether the Grievant erred in not signing a separate release; or whether the Faculty Committee erred in not seeking out the information contained in the separate file. The fact remains that the PRT Committee's recommendation was based on erroneous information which the Grievant could have corrected if he had had an opportunity to review the recommendation prior to the President's final decision on April 1. That the President did place some weight on the PRT recommendation is evidenced by his statement that the recommendations from Grievant's colleagues would be helpful to the Grievant in understanding the basis of his (the President's) decision not to recommend tenure.

In Nzomo v. Vermont State Colleges (#250-76 February Term, 1978) the Vermont Supreme Court stated that:

"Defined dismissal procedures, although generous beyond the due process requirement that bind the agency, are binding and must be scrupulously observed."

This ruling is equally applicable to defined tenure evaluation procedures which are bargained for in the Agreement. Denial of tenure is similar to dismissal in that a faculty member who has been denied tenure can only continue to teach for one more academic year. The Administration has a responsibility therefore to scrupulously abide by the procedural due process requirements which are contained in the Agreement. Absent sufficient evidence to rebut the Federation's case that the recommendation was not in Grievant's personnel file on February 1, we can only conclude that the college violated the procedural requirements of Article XXIV of the Agreement, thereby denying Grievant his right to due process during his evaluation for tenure.

The ruling in Nzomo, cited above, does not permit this Board to speculate whether a due process violation was harmless. We are therefore not persuaded by the VSC argument that the lack of a superior teaching evaluation by the Faculty PRT Committee was not prejudicial to the Grievant. This argument is further weakened by the evidence before us that in a prior tenure evaluation made a year earlier by Johnson State College, a superior level of teaching was viewed as evidence of superior professional growth sufficient to offset the lack of a terminal degree. (cf discussion of Robert Warren's tenure, *infra*)

2) Arbitrary Application of Criteria

In addition to the due process issue, this Board must also consider whether the reasons given to the Grievant by the VSC

were erroneous or constitute an arbitrary or discriminatory application of the VSC criteria on tenure and promotion (cf Article XXIV of the Agreement cited below).

The principle reason given to the Grievant by Johnson State College for his denial of tenure was that he had not earned a terminal degree nor was there sufficient evidence in his case of significant professional artistic or scholarly development. Grievant does not have a terminal degree in physical education. However, in 1977, Johnson State College recommended Professor Robert Warren for tenure even though he had not earned a terminal degree in his teaching field and even though full compliance with the VSC criteria had become effective as of that year. Based on the favorable recommendations from Johnson State College, Robert Warren was awarded tenure by the VSC Board of Trustees.

As discussed above, Robert Warren's superior teaching abilities were viewed as evidence of superior professional growth. In Grievant's case the two recommendations which were based on all his student teaching evaluations rated his teaching as superior also. However, this was not viewed as evidence of superior professional growth. His professional growth was rated by his Division Chairman and by Dr. Elmendorf as merely average. As far as any other evidence demonstrating a significant level of professional, artistic or scholarly growth, it is difficult to discern any major differences between the two candidates which could explain the award of tenure in one case and not in the other.

In fact Dr. Elmendorf testified at the hearing that had Dr. Warren been reviewed for tenure in 1977-78, he would not have been granted tenure without a terminal degree. The key difference

between the two candidates was the amount of notice each one received with regard to the terminal degree requirement. Professor Warren had only eight months notice that a degree would be necessary. In Dr. Elmendorf's view this was an insufficient amount of time in which to obtain one. Grievant, on the other hand had fifteen months notice (from September of 1976 to February of 1977) that the new VSC requirements on tenure would be applied to him.

The eight month difference in the amount of notice which each candidate was given make the circumstances of their cases slightly different and, therefore, we cannot say that the VSC applied its criteria in a discriminatory fashion when it decided to award tenure in one case and not in the other. It does, however, seem to us that their decision was arbitrary.

The U. S. Supreme Court has defined the word "arbitrary" as:

"Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance."
United States v. Carmack 329 US 230, 91 L.Ed.209, 67 S. Ct. 252

There is no evidence before this Board that the decision to deny Grievant tenure was based on evidence that the kind of scholarly achievement required by the VSC criteria could be accomplished in fifteen months as opposed to eight months. Nor have we been presented with any principle or fixed standard by which we can determine that fifteen months to obtain a degree is reasonable whereas eight months notice is not. We can only conclude therefore that Grievant was caught in a major policy shift with regard to tenure requirements and Johnson State College, in determining that Grievant had had sufficient notice in which to comply with the new criteria, made an arbitrary decision to draw the line in his case.

Article XXIV of the Agreement relating to tenure states in part:

"In any arbitration of a grievance under this Article based in whole or in part on the reasons for denial, if the Labor Relations Board determines that the reasons are erroneous or that they constitute an arbitrary or discriminatory application of the criteria developed under Article XX(3), it shall remand the case for final determination to a system wide ad hoc committee composed of two members from each of the other three campus colleges, one of them being selected by the Faculty Assembly and one by the administration of each of the respective colleges. A seventh member who shall preside shall be chosen from within the Vermont State Colleges by mutual consent of the college and the Grievant."

This Board is well aware of the parameters of its authority and will not substitute its judgment for that of the academic community regarding the merits of a tenure case. We, therefore, reach no conclusions in this opinion as to whether or not Grievant should or should not be awarded tenure. However, the arbitrary application of tenure criteria in his case at Johnson State College presents substantial policy implications for the entire college system. The system wide review committee provided for in Article XXIV of the Agreement was bargained for by both parties and in our view its purpose is to make final determination on a system wide level in cases such as this one. In view of the arbitrary basis upon which Johnson State College applied the VSC criteria on tenure as well as the due process violation which

occurred during the course of Grievant's tenure evaluation, we conclude that his case must be remanded to the ad hoc committee for a final determination.


ORDER

In accordance with the reasons stated above, it is hereby ORDERED that the grievance of Professor Burrill be remanded to a system wide ad hoc committee as provided for in Article XXIV of the Agreement.

Dated this 16th day of November, 1978 at Montpelier, Vermont.

Vermont Labor Relations Board


Kimberly B. Cheney, Chairman


William G. Kemaley, Sr.


Robert H. Brown