

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

PROFESSOR HILARY SMITH AND  
THE VERMONT STATE COLLEGES  
FACULTY FEDERATION, AFT  
LOCAL 3180, AFL-CIO

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DOCKET NO. 88-35

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 18, 1988, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation") filed a grievance on behalf of the Federation and Professor Hilary Smith ("Grievant"). The grievance alleges that the Vermont State Colleges ("Colleges") violated Article 8, 18D, 19 and 20 of the collective bargaining agreement between the Federation and the Colleges, effective for the period September 1, 1986 to August 31, 1988 ("Contract"), in not reappointing Grievant, a third-year faculty member at Johnson State College ("JSC"). The grievance alleges that the Colleges discriminated against Grievant on the basis of sex and violated the contractual procedure for evaluation.

Hearings were held on November 17 and December 15, 1988, in the Labor Relations Board hearing room, before Board Members Louis Toepfer, Acting Chairman; William Kemsley, Sr. and Catherine Frank. Stephen Butterfield, Federation Grievance Chairperson, represented the Grievants. Attorney Nicholas DiGiovanni represented the Colleges.

At the November 17 hearing, prior to the introduction of any evidence, the Board denied a Motion for Summary Judgment filed by the Colleges. At the December 15 hearing, the Colleges again moved for summary judgment at the conclusion of the Grievants' case. The Board granted that motion and indicated that a written decision would be prepared.

#### FINDINGS OF FACT

1. Grievant was initially appointed to a full-time faculty position in the Business/Economics Department at JSC for the 1985 Spring semester. This was a temporary, one-semester appointment which was not considered a tenure track appointment. At the time Grievant was being considered for appointment for the 1985 Spring semester, Eric Gilbertson, JSC President, expressed reservations whether Grievant would be able to perform her faculty responsibilities given her family responsibilities and commuting distance. At that time, Grievant was married with one child and had a one to one and one-half hour commute from her home to the JSC campus.

2. President Gilbertson appointed Grievant to a full-time tenure track position for the 1985-86 academic year. Grievant was considered a first-year faculty member that year (Federation Exhibit 1).

3. During the 1985 Spring semester, there were two women faculty members in the Business/Economic Department besides Grievant. The other two women resigned voluntarily after the semester. During the next two academic years, there was one other woman faculty member in the Department. During the 1987-88 academic year, Grievant was the only female faculty member in the Department.

4. At all times relevant, faculty being considered for reappointment were evaluated for teaching effectiveness, scholarly and professional activity and service to the College and community. Article 19, Faculty Evaluation, Contract (Joint Exhibit 1).

5. On January 20, 1986, William Cook, Academic Dean, recommended that Grievant be reappointed for a second year. In his

evaluation of Grievant, Dean Cook indicated that Grievant's file contained no evidence of scholarly and professional growth, and assessing her teaching effectiveness, expressed concern about the number of students, on student evaluations, who "express considerable concern about the limited effectiveness of her performance". Dean Cook cautioned Grievant that her performance in these two areas had to show marked improvement (Colleges Exhibit 4).

6. On February 17, 1986, President Gilbertson informed Grievant that she was reappointed for the 1986-87 academic year. In the letter of reappointment, he informed Grievant that, during the coming semester, she should be addressing "attention to teaching and professional growth, in particular" (Federation Exhibit 2).

7. It is not unusual for faculty members to have "mixed" student evaluations during their first few semesters, and then have increasingly improved evaluations as they obtain more experience.

8. During the 1986 Fall semester, Grievant was chairperson of the Curriculum Committee of the JSC Faculty Committee and, as such, was responsible for calling meetings, giving reports, taking meeting minutes and generally coordinating the work of the committee. Grievant was chairperson of the Curriculum Committee during the 1987 Fall and 1988 Spring semesters (Federation Exhibit 19).

9. Grievant became pregnant during the 1986 Fall semester. She was placed by her doctors in a high risk category. During the 1986 Christmas break, Grievant's doctors told her to work on a more limited basis. Doctors instructed Grievant to work just three days a week teaching classes and to perform no other work activities. Grievant taught only three classes during the 1987 Spring semester, compared to

her normal four courses. Dean Kennedy agreed to allow Grievant to teach only three courses as long as she made up one course the following academic year. The medical restriction placed on Grievant limited her opportunity for professional development during the 1987 Spring semester.

10. Dean Kennedy recommended to President Gilbertson that Grievant be reappointed for the 1987-88 year in a December 24, 1986, evaluation. He noted that scholarly and professional development had occurred and that Grievant had performed college and community service, but that Grievant had not documented this in her permanent file. The Dean indicated the importance of Grievant documenting her efforts in these areas. In evaluating Grievant's teaching effectiveness, Kennedy noted that Grievant's student evaluations were "mixed" and stated that she "needs to work on better organization of the classes and should try to increase her general level of preparation". The Dean indicated that it was "absolutely critical for (Grievant) to make significant improvement over the next two semesters" (Colleges Exhibit 8).

11. On February 25, 1987, President Gilbertson informed Grievant of her reappointment for the 1987-88 academic year. In informing Grievant of a number of expectations she would have to meet during the coming year, the President stated, "we look for greater evidence of professional and scholarly growth and significant improvement in the evaluations of your teaching" (Federation Exhibit 3).

12. Grievant gave birth two months prematurely to a daughter on April 13, 1987. Grievant's daughter remained in the hospital for three months and one week due to complications from the birth.

Grievant performed no work for JSC during this period, spending much of the time in the hospital or caring for her other daughter.

13. On August 27, 1987, Dean Kennedy sent a letter to Grievant, informing her that the JSC administration needed to see better teaching evaluations and substantial evidence of sustained professional development. He stated that unless Grievant was able to demonstrate some very dramatic change over the next semester, the prospects for continuation on the faculty were not good (Colleges Exhibit 10).

14. Grievant's baby daughter continued to have problems resulting from her premature birth into the 1987 Fall semester. She had chronic lung disease and it was important that she be nursed because she had such high nutritional needs. Grievant informed Dean Kennedy that she was going to bring her infant to campus during the semester to nurse her. Kennedy expressed no objection.

15. Grievant was scheduled to teach four courses for the 1987 Fall semester, including one course which met at 8:30 a.m. on Tuesdays and Thursdays. The JSC administration made an accommodation that, due to Grievant's nursing, she would not be required to teach back-to-back courses. Grievant told the administration that she would rather teach back-to-back courses than teach at 8:30 a.m., given her one and one-half hour commute and having to nurse the baby. Grievant was told that the 8:30 a.m. assignment could not be changed.

16. On September 17, 1987, Grievant received a letter from Dean Kennedy which provided as follows:

Unfortunately, we have received several complaints concerning your child. Apparently the noise the baby makes when she cries is both distracting and unnerving to your

fellow employees, who do have the right to a workplace that is quiet and businesslike. They also expressed concern about the well-being of the child.

I realize how difficult your situation is and I certainly do not wish to add any additional burden. However, I think that you have to make some other arrangements for child care - as have others on the staff who have or have had infants.

Walter Wallace was faced with a somewhat similar situation with his new child and he was able to find child care in Johnson that would give him access to the child throughout his workday. Perhaps you could contact Walter and see if he could provide you with any detailed information that would assist. Please let me know how we can resolve this problem (Federation Exhibit 25).

17. A few days after receiving this letter, Grievant met with Dean Kennedy. Grievant told Kennedy that she was upset by the comparison to a male faculty member who did not have a child with similar health problems. She told him that she needed to nurse the baby and could not have her off-campus. Grievant told Kennedy of an office in another building where she could move. Kennedy approved of the office move.

18. Prior to the 1987 Fall semester, Grievant had very little documentation in her personnel file concerning scholarly and professional development. During the 1987 Fall semester, Grievant entered into her personnel file the following documentation concerning her professional development during her first five semesters at JSC, 1985 Spring semester - 1987 Spring semester:

- During the Spring 1985 semester, she sought out four computer software packages, relevant to the Hospitality and Hotel Management curriculum, which were acquired and used at JSC.

- Attendance at a symposium on management education at Hartwick College, from which she was attempting to put together a team-taught course at JSC.

- During the summer of 1986, she and her husband drew up a plan to open a food service operation in Port Henry, New York. They made an offer on a property which they ultimately withdrew due to unclear title and attachments to the property (Federation Exhibits 13 and 14).

19. At no time subsequent did Grievant submit any documentation to her file on professional development after the summer of 1986.

20. On November 12, 1987, Dean Kennedy observed a class of Grievant's in which Grievant spent the first half of the class reviewing an exam. Kennedy was present only for that portion of the class, and then left. Prior to the class, Grievant had spoken with the Dean's secretary, who had informed Grievant that the Dean was going to visit the class, and Grievant told her that she was going to be reviewing exams that day. Grievant decided not to change the class plans for that day so that the class would stay on schedule. Dean Kennedy subsequently did a written evaluation of the class he observed, which evaluation was placed in Grievant's personnel file. He indicated that it was not a good class to observe because of the review of exams, and noted that he would need to observe a second class. He did express concern about the "general appearance and manner" of Grievant, which, he stated, "was casual to the point of appearing careless" (Federation Exhibit 24).

21. Grievant and Dean Kennedy subsequently agreed to a second observation by the Dean, which was done later in November or early December. Kennedy told Grievant he thought the class was very good. Kennedy did not prepare a written evaluation of this class observation. He did the observation prior to evaluating Grievant for reappointment.

22. The student evaluations of Grievant for the Spring 1987 semester and Fall 1987 semester were somewhat improved from those of the Fall 1986 semester (Federation Exhibit 36C).

23. On November 13, 1987, Grievant's Department Chairperson, John Pierce, and a fellow Department faculty member recommended that Grievant be reappointed for the 1988-89 academic year (Federation Exhibit 31). The JSC Faculty Promotion, Retention and Tenure Committee unanimously recommended Grievant's reappointment on December 4, 1987 (Federation Exhibit 34). The Promotion, Retention and Tenure Committee made 10 recommendations on retention during the 1987-88 year. In each case, the Committee recommended retention. Dean Kennedy and President Gilbertson agreed in each case except with respect to Grievant.

24. On or about the beginning of the Spring semester in January of 1988, John Pierce, the Chairperson of Grievant's Department, told Grievant that bringing her infant daughter to the campus was "unprofessional" and that he was "disgusted" by Grievant having brought her baby with her on a faculty retreat. Pierce further stated that Grievant's baby was "forever banned" from the Department and that he "never wanted to see her again". He stated that he "did not want to hear anything" about the necessity of Grievant having to nurse the baby and that she should "get a pump". Pierce further stated to Grievant that women with babies who work are part of the reason society is falling apart. The day after this incident, Grievant complained of Pierce's behavior to Associate Dean Cynthia Green. Green agreed with Grievant that Pierce's remarks were inappropriate and that she would speak to him. Green subsequently spoke to Pierce



about this incident. On January 18, 1988, Pierce distributed a document to faculty in the Business/Economics Department in which he asked them to indicate whether they thought that Grievant should find alternative day care arrangements for her daughter (Federation Exhibit 26).

25. On January 18, 1988, Dean Kennedy recommended that Grievant not be reappointed for the 1988-89 academic year. His letter of recommendation provided: 1) that there was no evidence of professional development in the file, nor did he know of any that was not documented; that Grievant chaired the College Curriculum Committee, though there was no evidence that service in this role had been effective, and that she also worked within the department on curriculum development; and 3) that the overall tenor of the Grievant's student evaluations had improved somewhat over the past few semesters, but remain disappointing, and that his own observations supported the conclusion that Grievant had not developed into a good classroom instructor. In sum, Kennedy indicated that weakness in any one of the three major areas for evaluation would not be that serious, but that, unfortunately, Grievant had difficulty in all these areas (Federation Exhibit 15).

26. On February 26, 1988, President Gilbertson informed Grievant by letter that he had decided not to reappoint her. The President indicated that he had concluded that Grievant's performance in none of the areas of teaching, scholarly and professional growth, and service was sufficient to warrant continued reappointment (Federation Exhibit 20).

27. Subsequent to Grievant's receipt of President Gilbertson's letter, and before her filing of a grievance, Pierce told Grievant that he "would advise very strongly against charging sex discrimination".

#### OPINION

The first issue is whether the Colleges discriminated against Grievant on the basis of her sex in failing to reappoint her to a fourth year as faculty member at JSC.

The complainant carries the initial burden of establishing a prima facie case of discrimination. The complainant must establish that she belongs to a protected class; that she was qualified for the position in question; that, despite her qualifications, she was rejected; and that after the rejection, the position was still open and the employer continued to seek applicants having qualifications like those of the person rejected. McDonnell Douglas Corp. v. Green, 411 US 792 (1973). State of Vermont v. Whitingham School Board, 138 Vt. 15, 19 (1979). Grievance of Rogers, 11 VLRB 101, 125 (1988).

Once the complainant establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. McDonnell Douglas, supra, at 802. Should the employer carry its burden, the complainant must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, supra, at 804. Texas Department of Community Affairs v. Burdine, 450 US 248, 253 (1981).

In applying these standards to this grievance, we first consider whether a prima facie case of discrimination has been established. The Colleges contend that it has not been established because Grievant was not qualified for reappointment and because the Colleges ultimately hired another woman to replace her. We disagree with the Colleges and conclude that a prima facie case has been established.

The burden of establishing a prima facie case is a relatively light one, and not onerous. Burdine, supra, at 253. Whittingham, supra, at 19. The burden of demonstrating that Grievant is qualified for reappointment is limited to showing that she possesses the basic skills necessary for reappointment. Powell v. Syracuse University, 17 EPD 6405, 6408 (1978). A prima facie case that a faculty member is qualified for reappointment is made out by a showing that some significant portion of the departmental faculty and evaluators for reappointment hold a favorable view on the question. Zahorik v. Cornell University, 729 F2d 85, 93-94 (1984).

Here, Grievant's performance during her three years of employment as a faculty member, and favorable recommendations from two departmental faculty members and the Faculty Promotion, Retention and Tenure Committee, indicate that she is at least minimally qualified for reappointment.

We also disagree with the Colleges that the prima facie case was not made because the Colleges ultimately hired another woman to replace Grievant. In the context of an academic setting involving long-term employment progressing towards tenure review after six years, the replacement of a third-year faculty member such as Grievant with a new-hired woman is insufficient to defeat a prima facie showing

of discrimination. It is sufficient for the complainants to demonstrate that the position remained open after the non-reappointment and the Colleges continued to seek applicants having qualifications like those of the person rejected. That showing having been met, a prima facie case has been established.

The burden shifts to the Colleges to articulate some legitimate non-discriminatory reason for Grievant's non-reappointment. Here, the Colleges have articulated such a reason. The reason for non-reappointment given by President Gilbertson and Dean Kennedy is that Grievant's performance in the three major areas for evaluation for teaching performance - scholarly and professional activity, college and community service and teaching effectiveness - was insufficient to warrant reappointment. The evidence of Grievant's performance in these areas is sufficient to raise a genuine issue of fact as to whether the Colleges discriminated against Grievant on the basis of her sex. Burdine, supra, at 254-255.

Thus, we proceed to the final step of the analysis. The Federation and Grievant must prove that the legitimate reason offered by the College was not the true reason, but was a pretext for discrimination. We conclude by a preponderance of the evidence that the proffered reason was not a pretext for sex discrimination against Grievant.

Grievant had ample warning from Dean Kennedy and President Gilbertson that her performance, particularly with respect to teaching effectiveness and scholarly and professional activity, had to be substantially improved for her to be reappointed to a fourth year. While it is apparent that her teaching effectiveness somewhat improved,

she offered little or no evidence of further scholarly and professional activity subsequent to the Summer of 1986. There was at least some basis for President Gilbertson's and Dean Kennedy's reasoning that Grievant's performance did not warrant reappointment.

The evidence does not show that this reason was a pretext for discrimination. No actions by Dean Kennedy or President Gilbertson during the evaluation process leading to the non-reappointment decision, or at any time earlier, demonstrated a bias against Grievant because she was a woman. The JSC administration made some accommodations to Grievant during her difficulties resulting from her pregnancy and the subsequent birth of a premature baby (i.e., allowing her to carry a lighter teaching load while she was pregnant, not assigning her to back-to-back courses so that she could nurse her baby, approving Grievant's office move so that she could have her baby on campus with minimum disruption to other faculty members). The fact that the JSC administration did not change an 8:30 a.m. class assignment of Grievant does not demonstrate sex discrimination. The difficulty this caused Grievant was due largely to her choice to have a lengthy commute from her home to campus, and the Colleges cannot be held accountable for this.

Also, this is not a case where the evidence demonstrated that faculty members integrally involved in the reappointment decision demonstrated bias against Grievant. c.f. Grievance of Rogers and VSCFF, 11 VLRB 101 (1988). While actions of Grievant's Department Chairperson demonstrated bias by him against Grievant because she was a woman, he was not formally involved in the reappointment process and the Associate Academic Dean discussed the Chairperson's inappropriate actions with him.

Thus, having determined that Grievant and the Federation have not carried their burden of proof that Grievant was discriminated against on the basis of sex, we turn to deciding the other issues raised by Grievant and the Federation.

It is alleged that the Colleges violated Article 18, Section D, of the Contract, by not making every reasonable effort to accommodate the desires of Grievant and to develop a viable schedule by assigning Grievant to teach an 8:30 a.m. class, Tuesdays and Thursdays, during the 1987 Fall semester. As discussed above, the difficulty this schedule caused Grievant was due largely to her choice to have a lengthy commute. The Colleges are not obligated to accommodate this personal choice by Grievant under the Contract provisions.

It is further alleged that the Colleges violated the Contract procedures for evaluation, contained in Articles 19 and 20, resulting in a negative recommendation by the Academic Dean, and a negative action by the President, on Grievant's reappointment decision which are tainted by procedural errors. Specifically, it is alleged: 1) that the Academic Dean failed to record and enter into the personnel file the results of a favorable classroom observation which would have improved Grievant's record in the area of teaching effectiveness; 2) that the Dean omitted to evaluate Grievant's professional development, although it was documented in her file; and 3) the President evaluated Grievant's committee service by a standard which was in violation of the Contract.

We conclude that there were no Contract violations by the Colleges in this regard. The Dean was not required by the Contract to enter into the personnel file the results of a second classroom

observation which he had done of Grievant during the 1987 Fall semester. Article 19, Section F, provides that a written evaluation must be done of the first classroom observation but, with respect to subsequent observations, it simply provides "subsequent observations shall be done at the option of either the faculty member or the Dean or his/her designee". We will not read terms into a contract, unless they arise by necessary implication. In re: Stacy, 138 Vt. 68, 71 (1980). For us to conclude that the Contract required the Dean to enter an evaluation of the second observation into Grievant's personnel file would be to inappropriately read terms into the Contract.

Further, the evidence does not indicate that the Dean failed to properly evaluate and credit Grievant's professional development, where Grievant entered no documentation into her personnel file of professional development subsequent to the summer of 1986. Finally, the President is required by the Contract to evaluate a faculty member's service to the college, including service on committees, in reappointment decisions, and there is no evidence in Grievant's case that he operated contrary to the terms of the Contract in this regard.

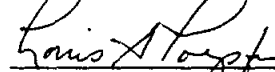
ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

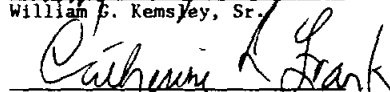
The grievance of Professor Hilary Smith and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, is DISMISSED.

Dated this 17<sup>th</sup> day of January, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Louis A. Toepfer, Acting Chair

  
William G. Kemsley, Sr.

  
Catherine L. Frank