

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

ROBERT GOBIN

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DOCKET NO. 90-8

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 29, 1990, Professor Robert Gobin ("Gobin") of the University of Vermont filed a grievance with the Vermont Labor Relations Board. The grievance is 63 pages long, when attachments and cover letter are included. Subsequently, pursuant to Section 18.3 of the Board Rules of Practice, the Board requested that Grievant file a concise statement of the nature of the grievance. Grievant filed such a statement on February 20, 1990.

On May 14, 1990, the University of Vermont ("University") filed a Motion to Dismiss Or, In the Alternative, Defer. The University moved to dismiss the grievance for failing to state a cause of action or "grievance" cognizable under the provisions of 3 VSA §902(14). In the alternative, the University moved that the Board defer to the final decision reached in the University's internal grievance process. Grievant filed a response to the University's Motion on May 31, 1990.

Hearings were held before Board members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver on June 19, 20, July 12 and August 6, 1990. Attorneys Arthur Menard of Chelsea, Massachusetts, and Francine Bazluke, University Associate General Counsel, represented the University. James Suskin, Vermont-NEA General Counsel, represented Grievant.

At the outset of the June 19 hearing, the Board indicated that it would reserve judgment on the University's Motion to Dismiss, and would deny the Motion to Defer. Upon the conclusion of Grievant's case on August 6, 1990, at which Grievant was the sole witness, the University renewed the Motion to Dismiss on the following bases: 1) that the Board lacked jurisdiction over Grievant's claims in that they do not constitute an actionable grievance because Grievant has failed to name any specific rule or regulation that has been discriminatorily applied against him; and 2) even if the Board finds that there is an actionable grievance, Grievant has failed to make out a prima facie showing of discrimination.

The Board adjourned the proceedings on August 6, 1990, at the point the University renewed its motion, and provided the parties with an opportunity to file briefs and reply briefs on the Motion to Dismiss. On September 17, 1990, the University filed a Memorandum of Law in Support of the Motion to Dismiss. Grievant filed a Memorandum in Opposition to the University's Motion on September 18, 1990. The University filed a Reply Brief on October 9, 1990. Grievant filed a Reply Brief on October 11, 1990.

#### FINDINGS OF FACT

1. Grievant has taught health and physical education in the Department of Human Development Studies in the University of Vermont's College of Education and Social Services since 1965.

2. Grievant was hired as an assistant professor, and at the time of hiring his salary was approximately \$1200 higher than the mean salary for University of Vermont assistant professors. Grievant was promoted to associate professor at the beginning of the 1969-1970

academic year, and became full professor at the beginning of the 1972-1973 academic year. Over the years, as Grievant acquired more rank and experience, his relative salary compared to other UVM faculty as a whole did not keep pace so that by the 1988-1989 academic year Grievant's salary was approximately \$6000 lower than the mean salary for full professors at the University (Grievant's Exhibits 75B, 75C).

3. Compression is a salary phenomenon which is characterized by a narrowing of differences to a significant degree between the salaries of continuing faculty members and the salaries of those faculty members who are newly hired in a particular year, adjusting for similarities and differences in responsibilities. In issuing guidelines for distribution of salary adjustments for faculty members on April 1, 1988, University Provost John Hennessey provided that "(i)n assigning salary increases, unit administrators and deans and directors must take into account historical patterns that may have compressed or widened salary differences inappropriately among individual faculty members" (Grievant's Exhibits 32, 104).

4. Prior to the dispute over Grievant's salary for the 1988-1989 academic year at issue herein, Grievant did receive decompression adjustments to his salary in two earlier years in which he did not appeal his salary determination. Grievant received a decompression salary increase of \$500 for the 1980-1981 academic year. He received a decompression salary increase of \$550 for the 1987-1988 academic year. These decompression adjustments were in addition to other salary increases he received during those years.

5. Prior to the 1988-1989 academic year, Grievant appealed salary determinations in two earlier academic years for salary compression reasons. In neither of those years did Grievant receive a

decompression adjustment as a result of his appeals.

6. The University set aside .5 percent of its total salary pool for the 1988-1989 academic year for salary decompression adjustments (Grievant Exhibits 64, 68).

7. In May, 1988, Beverly Nichols, the Chairperson of the Department of Human Development Studies, informed Grievant that he was to receive a 7.5 percent salary increase for the 1988-1989 academic year. This compared to a 7.2 percent Department average for the 1988-1989 year (Grievant's Exhibit 35).

8. On July 20, 1988, Grievant initiated an appeal related to his salary for the 1988-1989 academic year. In the letter to Nichols initiating the appeal, Grievant stated as follows in pertinent part:

. . . There is reason to believe that my past and current salary status has been historically compressed for reasons unrelated to professional performance spanning my twenty-three years of service to UVM.

Request is therefore made that you: 1) identify the criteria and standards applied to all department faculty when making your assessment for historic salary compression, 2) indicate how those criteria and standards, approved by due process, apply to my particular salary status and, if appropriate, 3) adjust my salary status for next year accordingly. (Grievant's Exhibit 42)

9. As a result of the internal University appeals process, Grievant received no decompression salary increase for the 1988-1989 academic year.

10. Throughout the internal appeals process, the University administration took the position that the standards or criteria Grievant sought concerning the assessment of historical salary compression did not exist. There is no evidence to indicate that such

standards or criteria did exist, and no evidence to indicate that Grievant was dissimilarly treated in this regard compared to other faculty members at the University (Grievant's Exhibits 55A, 91).

11. During the internal appeals process, Grievant sought to have the University provide to him individual salary data for identified University faculty members. The University administration provided Grievant with summary salary data and salary data which was disguised so that the identity of the faculty member receiving such salary could not be ascertained. The University administration declined to provide individual salary data identifying specific faculty members, claiming that such information was confidential (Grievant's Exhibits 71, 72, 91, 104).

#### MAJORITY OPINION

We have decided to grant the University's motion to dismiss this grievance for the failure of Grievant to show a cause of action over which we have jurisdiction. When the University filed its motion to dismiss prior to the hearing, we were unsure whether Grievant had stated a cause of action in the confusing 63 page grievance he had submitted, but opted to schedule hearings to provide Grievant with the opportunity to clarify precisely what he was claiming. After the benefit of four days of hearings, we now have concluded that he has not stated a cause of action over which we have jurisdiction and that he has failed to establish a prima facie case showing the discriminatory application of a rule or regulation against him by the University. We grant the University's Motion to Dismiss pursuant to V.R.C.P. 41 (b).

The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Bovnton v. Snelling, 147 Vt. 564, 565 (1987), which statutory definition provides:

'Grievance' means an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule of regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 VSA §902(14).

Since no collective bargaining agreement applies here, the issue is whether a cause of action based on "discriminatory application of a rule or regulation" has been established. In cases where grievants claim a "discriminatory application of a rule or regulation" pursuant to 3 VSA §902(14), the VLRB has followed the Vermont Supreme Court guidance that discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988). Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination. Id.

In his lengthy grievance filed with the Board and in his testimony before the Board, Grievant cited provisions of the Officers Handbook, Provost Hennessey's Guidelines for Distribution of Salary Adjustments for Officers of Instruction, and College of Education and Social Services (CESS) By-Laws in support of his grievance.

At the outset, we conclude that Provost Hennessey's Guidelines do not constitute a "rule or regulation" within the meaning of 3 VSA

§902(14). The Officers Handbook and the CESS By-Laws are formally adopted rules governing, respectively, the administration of the University and a college within the University. On the contrary, the Provost's Guidelines are issued autonomously by the Provost, without formal review, and are intended to only "guide", not govern, the administration of the University. Even assuming arguendo that the Guidelines are a rule or regulation, Grievant has neither alleged in his grievance nor established in his testimony that the guidelines were applied to him differently than other faculty members. Thus, he has not shown a cause of action in this regard over which we have jurisdiction.

We further note preliminarily that the grievance filed herein is untimely to the extent that it contains any allegations concerning the University actions pre-dating the review of Grievant's salary for the 1988-89 academic year. Grievances filed with the Board are heard only after exhaustion of any administrative procedures in the University. Article 18, Section 1, Board Rules of Practice. The Officers Handbook provides that grievances must be submitted within 30 days "of final action by the Vice-President for Academic Affairs, or the President if the appeal is made to him/her". Section 270.6(B)(1). Grievant originally filed the grievance now before us on July 20, 1988, with his Department Chairperson, concerning his salary status for the 1988-89 academic year. Clearly, at this point, the time had expired to grieve any actions occurring during preceding academic years.

These two preliminary determinations having been made, we turn to specifically addressing the three allegations made by Grievant.

Grievant's first allegation is that the lack of a rational basis for linking University faculty salaries to specified variables has resulted in his relative salary status being historically compressed for reasons unrelated to merit. In order to establish that he has filed a grievance over which we would have jurisdiction concerning this allegation, Grievant would have to point to a rule or regulation concerning specific salary decompression standards and allege that the rule was applied dissimilarly to him than to other faculty members in the same circumstances under the applicable rule. Grievant has cited no such rule, and made no such specific allegation in his grievance. Nor has his testimony provided evidence of any dissimilar application of a rule or regulation against Grievant. It is evident that the specific standards or criteria he seeks governing allocation of salary decompression monies are not contained in any University rule or regulation. The fact that no such rule or regulation exists means Grievant has no statutory basis to pursue a grievance on this allegation.

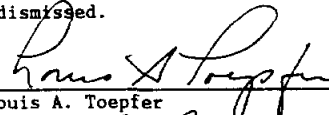
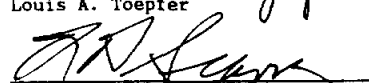
The second allegation by Grievant is that his rights to due process were violated, contributing to the decline of his relative salary status. We have reviewed the provisions of the Officers Handbook and CESS By-Laws Grievant cited in his grievance to support this allegation, together with the specifications set forth by Grievant to support this allegation and his testimony, and have concluded that in no instance has Grievant alleged or shown that he was treated dissimilarly to other faculty members in the same circumstances under the applicable rule.



We recognize that one of Grievant's chief claims in this regard is that he was hampered in presenting his grievance because he was denied access to relevant salary data on specified faculty members. However, in the context of establishing that he has filed an actionable grievance on this point, he must allege that faculty members in similar circumstances to him were provided access to such salary information under an applicable rule. He has made no such allegation.

The third claim made by Grievant is that a rational basis exists for adjusting his 1988-89 salary upward. Grievant cited no rules or regulations to support this claim independent of the preceding two allegations. Thus, no basis exists to conclude that he has made an allegation over which we have jurisdiction in this regard.

Accordingly, we conclude that Grievant has failed to establish a cause of action meeting the statutory definition of "grievance" and we conclude that this matter should be dismissed.

  
Louis A. Toepfer  
  
Leslie G. Seaver

#### DISSENTING OPINION

I disagree with my colleagues that Grievant has failed to establish a cause of action over which we have jurisdiction. I further conclude that Grievant has stated a prima facie case of discrimination.

While I agree with the majority view that the grievance filed herein is untimely to the extent that it contains any allegations

concerning University actions pre-dating the review of Grievant's salary for the 1988-89 academic year, I disagree with their other preliminary determination that Provost Hennessey's Salary Guidelines do not constitute a "rule or regulation" within the meaning of 3 VSA §902(14). I so conclude since the Guidelines provide that "because (s)ections... of the Officers Handbook do not deal specifically with salary, these guidelines are written to serve as a supplement to those sections" (Grievant's Exhibit 32). This indicates that the Guidelines are intended to have the same authoritative force as the Officers Handbook and also constitute a binding rule of the University.

I conclude that the grievance filed herein sufficiently alleges a "discriminatory application of a rule or regulation" by contending that the lack of a rational basis for linking faculty salaries to specified variables has resulted in his relative salary status being historically compressed for reasons unrelated to merit. The Officers Handbook permits a grievance over an alleged "violation of due process" and an allegation "that a decision had no rational basis". Both of these allegations are made by Grievant concerning his salary compression claim. These claims, taken together with the provision of Provost Hennessey's Guidelines that the University must take into account historical patterns that may have compressed or widened faculty salary differences inappropriately and the fact that Grievant was denied access to salaries of identified faculty members, establishes that a cause of action has been properly pleaded.

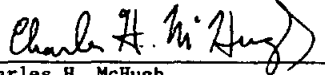
Grievant also alleges that he has been dissimilarly treated to other faculty members because his salary has been historically compressed in relation to them. He claims this violates the

provisions of the Officers Handbook and Provost Hennessey's Guidelines requiring that there be a rational basis for decisions and that historical patterns which may compress salaries be taken into account when assigning salary increases. This without more sufficiently alleges a "discriminatory application of a rule or regulation" pursuant to 3 VSA §902(14). Thus, Grievant has stated a cause of action over which we have jurisdiction.

Further, at the hearings before the Board, Grievant has established a prima facie case of discrimination. The evidence Grievant presented concerning his salary relative to his peers, which at this point in the proceedings is not rebutted, raises the inference that Grievant's salary has been compressed in relation to his peers at the University. At this point in the proceedings, no rational basis exists for this compression because the University has failed to provide Grievant with individual salary data for specified faculty members. Such salary information could be used to demonstrate whether a rational basis exists for his salary relative to his peers. It is inappropriate for the University to contend Grievant has not demonstrated dissimilar treatment when the University has failed to provide him with that information.

Our rules of procedure suggest that all pleadings should be interpreted in a liberal fashion. Particularly should this be so when considering such a lengthy and inartful complaint as we have before us in this case. We therefore should be very circumspect about deciding cases on mere legal technicalities. It follows then that if the

University is to ultimately prevail, it should be required to rebut the prima facie case established by Grievant by a preponderance of the evidence. I would deny the University's Motion to Dismiss.

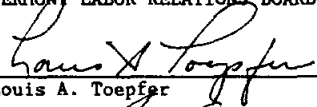
  
Charles H. McHugh


ORDER

Now therefore, based on the foregoing reasons, it is hereby ORDERED that the Grievance of Robert Gobin is DISMISSED.

Dated this 9th day of February, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Louis A. Toepfer

  
Leslie G. Seaver