VERMONT LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
VERMONT STATE COLLEGES FACULTY FEDERATION, AFT LOCAL 3180 AFL-CIO	)	DOCKET NO. 79-3S
	)	
v.	)	
	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case.

This is an unfair labor practice complaint brought against the Vermont State Colleges (the "Colleges"). The charges giving rise to this complaint were brought by the Vermont State Colleges Faculty Federation (the "Federation"), which charged that it was an unfair labor practice for the Colleges to refuse to bargain over faculty governance. Faculty governance, as described below, is a procedure by which the faculty assembly is given an advisory role in deciding certain matters of academic concern. The colleges acknowledged that they had refused to bargain over certain aspects of the faculty governance issue although it maintained a willingness to bargain over the substance of certain subjects to which faculty governance might apply.

Hearings were held on March 16, 1979, at which the Federation was represented by Arthur P. Menard, Esq., its attorney. Upon consideration of the evidence and argument of the parties, and for the reasons stated below, the Board dismisses the unfair labor practices Complaint against the Colleges.

FINDINGS OF FACT

1. The Colleges are a State operated, higher education facility operating on several campuses and existing under and by virtue of 16 V.S.A. § 2171 et seq.

2. The Federation is the accredited bargaining representative of the faculty at the Colleges. The parties are in the process of negotiating a collective bargaining agreement. The collective bargaining agreement which the agreement now under negotiation is to supplant includes Article XXVII (Faculty Governance) which provides as follows:

> 1. The Federation, as elected bargaining agent, retains the exclusive right to negotiate and reach agreement on all matters pertaining to wages, benefits, and terms and conditions of employment. Without waiving this right, the Federation recognizes *the desirability of some form of democratic faculty* governance in areas of academic concern. Such faculty governance shall be implemented through a faculty assembly on each campus, consisting of all full-time faculty and ranked librarians only. Presidents and their representatives may request and shall be granted invitations to meetings of the assembly and its committees to present and discuss administrative proposals in the areas listed in (3) below.
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> 2. The existence of the Faculty Assembly as an instrument of faculty governance shall not preclude the President from holding a reasonable number of faculty meetings, with reasonable notice in cases other than emergencies.
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> 3. Recognizing the final determining authority of the President, matters of academic concern shall be initiated by the Faculty Assembly or by the President through the Faculty Assembly which shall consider the matter and respond within a reasonable time. Such matters shall include:
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> A. The selection of Department Chairpersons, Program Coordinators, or other instructional/academic unit coordinators, to be elected periodically by secret ballot by members of that unit.
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> In the event that the President believes that the selection is not in the best interest of the College he may request that the department consider his objections by holding another election.

B. Curricular policy and curricular structure. Any proposal to abolish course offerings must be considered under the terms of this paragraph.

C. Library policies and acquisitions policy.

D. Requirements for degrees and granting of degrees.

E. Policies for recruitment, admission and retention of students.

F. The development, curtailment or reorganization of academic programs.

4. The responsibilities of faculty shall include the initial assignment of their courses and arrangement of their schedules. Such scheduling shall be coordinated by the department chairperson, where present, or by the appropriate academic unit coordinator. Every reasonable effort shall be made, within the department or other appropriate academic unit, to accommodate the desires of the members and to develop a viable schedule, subject to administrative approval. The unit coordinator shall submit in writing to the designated administrator and to the faculty concerned, the unit's schedule; the faculty member's preferences, given in priority order, shall also be supplied to said administrator. Should a dispute arise within a department or other appropriate academic unit, it shall be resolved by the appropriate administrative officer. In the event that the College must either resolve a dispute or revise a departmentally arranged schedule, the appropriate administrator shall make every reasonable effort to act in accordance with the preferences in order of priority.

3. Faculty governance has two aspects: First, a procedural aspect which establishes the faculty assembly as the advisory body to the President and the initiating forum for specified subjects of academic concern; and, second, an aspect of the subject matter of faculty governance which defines the areas of academic concern and regulates the substance of these matters.

4. During the current negotiations, the Federation has raised with the Colleges a demand for the new collective bargaining agreement to include provision for faculty governance generally on the same terms as are set forth above.

5. The Colleges have refused to bargain with the Federation over the procedural aspects of faculty governance. The Colleges justify this

refusal by asserting that it is entitled to restrict its bargaining to the Federation, which is the certified collective bargaining agent of the faculty and is therefore not required to deal with any other organization, including the faculty assembly on any matter appropriate for collective bargaining.

6. Of the specifically enumerated subjects of faculty governance from the agreement provision quoted above, only the subjects specified in paragraph 3A (chairperson and unit coordinator selection) and paragraph 4 (work assignment and scheduling), have been viewed by the Colleges as a mandatory subject of bargaining. The Colleges have bargained with the Federation over the subjects deemed mandatory. The Colleges have refused to acknowledge any obligation to bargain over other matters enumerated in the governance provision quoted above, and have not done so despite Federation insistence on such bargaining.

CONCLUSIONS OF LAW AND OPINION

The Colleges rely on analogy to federal law and its distinction between "mandatory" and "permissive" subjects of bargaining. Further, the Colleges rely on particular provisions of Vermont law which, the Colleges claim, place certain aspects of faculty governance outside the collective bargaining process and wholly within the authority of the Colleges' administration to determine. The Federation relies on 3 V.S.A. § 904, which the Federation claims requires bargaining on "all matters relating to the relationship between the employer and the employees" [§ 904(a)] including "working conditions" [§ 904(a)(3)].

Vermont statutes applicable to this matter do not expressly differentiate between mandatory and permissive bargaining subject. But the absence

of an express distinction does not dispose of the analogy to Federal law since the Federal statute in issue, Section 8(a)(5) of the National Labor Relations Act, does not expressly provide for the distinction between mandatory and permissive subjects of bargaining.

This distinction under Federal law is an interpretive gloss on the statutory language derived from court and administrative decisions under the Act. The distinction is that mandatory subjects must be bargained over and any party not satisfied with the resolution of a mandatory subject may cause an impasse. Permissive subjects, on the other hand, need only be bargained if all parties concur in the appropriateness of the subject, and no party may insist on its position to the point of impasse.

The rationale for this distinction under Federal law is that it would subvert the general intent of labor relations statutes to permit the parties to bargain to impasse over every issue. The distinction was fashioned to avoid the possibility that a bargain concluded on subjects fundamental to the employer-employee relationship could be thwarted by disagreement on some collateral, relatively unimportant issue. Thus, once agreement is reached on matters concerning "wages, hours, and conditions of employment" (the mandatory subjects), Federal law does not permit a party to refuse to conclude an agreement because of unresolved differences on other matters bearing less fundamentally on labor-management harmony.

Analogy between Vermont labor law and Federal labor law is often perilous. Nevertheless, the Board is persuaded that, in general terms at least, a distinction between mandatory and permissive subjects of bargaining must be inferred. Like Federal law, our State labor relations laws have for their purpose the avoidance of wasteful strife in labor-management relations by the encouragement of each party to recognize the

legitimate rights of the other. See National Act § 1(b) and 3 V.S.A. § 901. The process of collective bargaining is the primary mechanism for resolving conflicts between the legitimate rights of the parties, and both Federal and State law make a refusal to bargain an unfair labor practice. See National Act §§ 8(a)(5) and 8(b)(3); 3 V.S.A. §§ 961(5) and 962(4).

To allow a party to insist upon bargaining to impasse on matters collateral to the fundamental issues of labor-management relations under Vermont law is as destructive of our laws' purposes as such insistence is to Federal law. We, therefore, concur with the United States Supreme Court in NLRB v. American Insurance Co., 343 U.S. 395 (1952); and NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) and hold that there is no mandatory duty to bargain over matters not directly bearing on working conditions and other express mandated statutory bargaining subjects.

The question to be decided in this matter is whether the Federation's proposal as to faculty governance is directly related to working conditions and as such is a subject of mandatory bargaining.

In our view, the substantive aspects of faculty governance include both mandatory and permissive bargaining subjects. Mandatory subjects within the faculty governance proposal of the Federation include assignment of course load and course scheduling for faculty. As we have found above, the undisputed evidence in this matter is that the Colleges have remained willing to bargain over these subjects.

The Federation's faculty governance proposal also includes matters of which are permissive subjects of bargaining; i.e., curricular policy, curricular structure, degree requirements, and recruitment and retention policies as to students. In the Board's judgment, these are not mandatory

subjects of bargaining. Therefore, the Colleges are justified in their refusal to bargain over these issues, and no unfair labor practice was committed by that refusal. Accord, Endicott College, Office of NLRB General Council, Case Numbers 1-CA-12171 and 1-CB-3337 (1977); St. John's Chapter of the AAUP v. St. John's University; NLRB Case Number 29-CB-1858 (1975); and Rutgers Council of AAUP and Rutgers, The State University; PERC No. 76-13 (New Jersey Public Employees Relations Commission 1976).

The Board is unable to determine from the record whether the library policy referred to in the Federation's proposal is a mandatory or permissive bargaining subject, but neither does the record establish whether or not the Colleges have refused to bargain over any facet of the subject which may be mandatory. No unfair labor practice has been established on this issue. See 3 V.S.A. § 965(d).

There is an alternative, but equally viable, argument urged by the Colleges to negate any duty to bargain over the substantive issues of faculty governance which we have above identified as permissive; those subjects are for decision by management, not collective bargaining, under Vermont law. The Board of Trustees of the Colleges is empowered by 16 V.S.A. § 2174 to prescribe terms of admission, courses of instruction and educational standards. Therefore, not only are such matters permissive subjects of bargaining under our rationale, they are outside the scope of bargaining required under 3 V.S.A. § 904(a), since that statute excludes matters "prescribed or controlled by Statute." While the Colleges may choose to delegate their responsibilities under this statute, they cannot be compelled to do so through collective bargaining. Accord, Education Association v. School District, 80 LRRM 3393 (Neb. 1972).

Finally, we conclude that the procedural aspects of faculty governance are not mandatory subjects of bargaining and no unfair labor practice was committed by the Colleges in refusing to bargain on these points.

Procedurally, faculty governance establishes the faculty assembly as the initiating body or forum for preliminary resolution of the subjects of faculty governance. Implicit in this procedure is a requirement that the Colleges' administration deal with the faculty assembly, not with the Federation, over certain mandatory bargaining subjects. Although it is permissible for the parties to negotiate on such matters [see 3 V.S.A. § 941(3)], to require bargaining with a body other than the Federation is inconsistent with the concept that a certified employee representative is the exclusive representative. See 3 V.S.A. § 941(h). That exclusivity entitled the employer to demand to bargain only with the certified representative. See Endicott College, supra.

ORDER

The unfair labor practice complaint in this matter is DISMISSED.

Dated this 26th day of April, 1979 at Montpelier, Vermont.

Vermont Labor Relations Board

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Supt reversed order 6/11/80 — Bd ordered VSC to bargain