

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
RICHARD MOYE AND THE)	
VERMONT STATE COLLEGES)	DOCKET NO. 01-21
FACULTY FEDERATION, AFT)	
LOCAL 3180, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 3, 2001, Lyndon State College faculty member Richard Moye and the Vermont State Colleges Faculty Federation (“Grievants”) filed a grievance against the Vermont State Colleges (“Employer”), alleging that the Employer violated Articles 3, 20 and 22 of the collective bargaining agreement between the Employer and the Federation effective September 1, 1999, August 31, 2003 (“Contract”) by not granting Moye an early promotion to full professor. Subsequently, Grievants filed two motions to amend the grievance to add alleged violations of Articles 7 and 8 of the Contract. On November 30, 2001, the Labor Relations Board issued a Memorandum and Order granting the motions to amend the grievance.

Hearings were held in the Labor Relations Board hearing room in Montpelier on January 24 and March 28, 2002, before Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park. Attorney O. Whitman Smith represented Grievants. Attorney Joseph McConnell represented the Employer. Grievants and the Employer filed post-hearing briefs on April 30 and May 1, 2002.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 3

MANAGEMENT RIGHTS

A. All the rights and responsibilities of the Vermont State Colleges, which have not been specifically provided for in this Agreement, shall be retained in the sole discretion of the Vermont State Colleges and, except as modified by this Agreement, such rights and responsibilities shall include but shall not be limited to:

1. The right to manage employees; to determine qualifications and criteria in . . . promotion . . . situations to be applied in conformance with provisions of this Agreement; to . . . promote . . . employees . . .

...

B. The application of such management rights in alleged violation of the provisions of this Agreement shall be subject to the provisions of Articles 14 and 16, Grievance and Arbitration.

...

D. No such management right or responsibility set forth or referred to in this article shall be enacted, applied, or implemented in a manner which is arbitrary or capricious or in contravention of the Agreement.

ARTICLE 7

ACADEMIC FREEDOM

A. The Vermont State Colleges shall continue its policy of maintaining and encouraging full freedom of inquiry, teaching and research. Such academic freedom shall encompass the unconditional freedom of discussion of any material relevant to any course which a faculty member has been assigned to teach and, to this end, there shall be no unreasonable restrictions upon instructional methods.

B. In a faculty member's role as a citizen, he/she shall continue to have the same freedom as other citizens, provided that in his/her extramural utterances he/she shall disclaim any representation on behalf of the Vermont State Colleges when such a representation could reasonably be perceived within the community where such utterance is made.

ARTICLE 8

ANTI-DISCRIMINATION

The parties shall not discriminate against any faculty member . . . by reason of . . . political activity . . .

ARTICLE 20

FACULTY EVALUATION

A. The evaluation of faculty shall be used to improve instruction and to aid in determining whether or not a faculty member shall be reappointed, promoted or tenured.

B. **Performance Areas**

1. The following performance areas shall be considered in the performance evaluation of a faculty member for reappointment, promotion and tenure:

a. **Teaching Effectiveness**, which shall include the faculty member's:

(1) Knowledge of the subject matter

(2) Effectiveness in communicating such knowledge by means or methods such as lecture, discussion, demonstration, laboratory exercise, practical experience, and direct consultation with students.

(3) Ability to help students think critically and creatively.

b. **Scholarly and Professional activity** . . .

c. **Service to College and Community** . . .

C. **Procedures**

. . .

3. **The Faculty Committee**

a. A committee established by each Faculty Assembly shall review each faculty member who is being reviewed for . . . promotion . . . The committee shall evaluate the faculty member's work in the performance areas listed in (B) above using, as appropriate, the standards set forth in . . . Article 22, Promotion . . .

The committee's evaluation shall be incorporated into a letter of recommendation that shall be placed into the faculty member's file . . .

4. The Dean

a. After the committee has placed its letter of recommendation into the faculty member's file, the Dean shall review the faculty member for . . . promotion . . . The Dean shall evaluate the faculty member's work in the performance areas listed in (B) above using, as appropriate, the standards set forth in . . . Article 22, Promotion . . . The Dean's evaluation shall be incorporated into a letter of recommendation that shall be placed into the faculty member's file . . .

5. The President

The President shall decide whether a faculty member shall be . . . promoted . . . according to the provisions of this Agreement . . .

E. Student Evaluations

1. Student evaluation forms shall be designed at each College by agreement among the committee of the Faculty Assembly referred to in C.3 above, a committee selected by students, and the President or his/her designee. Evaluation forms shall include written statements of opinion . . .

9. In assessing teaching effectiveness as provided for in B. above, student evaluations shall only be used in conjunction with other sources of information about a faculty member's teaching such as administrative observations, peer evaluations, and self-evaluations. . . .

ARTICLE 22

PROMOTION

A. In a faculty member's . . . sixth year of service at the College as an associate professor, he/she shall be reviewed for promotion according to the provisions of Article 20 and this Article. . . .

C. Consistent with Article 20, Faculty Evaluation, the Faculty Evaluation Committee shall place its recommendations in the faculty member's personnel file no later than March 6 of that academic year.

D. The Dean or his/her designee shall place his/her recommendation in the faculty member's personnel file no later than April 1 of that academic year.

E. The President shall decide whether or not a faculty member shall be promoted. In making this decision, the President shall consider only the performance of the faculty member and the limit on the percentage of faculty in the senior ranks.

In reviewing the performance of the faculty member, the President shall consider all evaluative materials as provided in Article 20(C)(6) and the faculty member's work in the performance areas listed in Article 20(B)(1). The President shall decide whether or not the faculty member's performance meets either one of the following standards:

1. the faculty member's teaching effectiveness, scholarly and professional growth and service to the College and community are of a high quality and represent a continuous and increasingly responsible contribution since the time of initial appointment or the last promotion.

2. the faculty member's performance in one of the three performance areas has been exceptional since the time of initial appointment or the last promotion.

F. The President shall inform a faculty member in writing by May 1 whether or not he/she has been promoted. Should the President not promote a faculty member, the President shall give the faculty member written reasons for his/her decision. These reasons shall be given as a courtesy and are not subject to the grievance and arbitration provisions of this Agreement except as provided for in (G.) below.

G. A decision of the President not to promote a faculty member shall not be subject to the grievance and arbitration provisions of this Agreement unless (1) the faculty member or the Federation claims the decision violates Article 7 (Academic Freedom), Article 8, (Anti-Discrimination) or the procedures for promotion set forth in this Agreement . . .

J. A faculty member may request and shall be granted early review for promotion by asking the appropriate Faculty Assembly Committee, the Dean, and the President by November 1 to conduct such a review . . .

The procedures for a review of early promotion shall be the same as that provided herein for regularly-scheduled promotion reviews, except that, in making his/her decision on early promotion, the President shall use the standard of whether the faculty member's performance in teaching effectiveness and in one of the remaining two performance areas has been exceptional since the time of the initial appointment or the last promotion.

(Joint Exhibit 19)

2. The Employer hired Moye in 1991 as Assistant Professor of English at Lyndon State College. Moye has been a faculty member continuously from then to the present. During the 1994-95 academic year, Moye applied for early promotion to Associate Professor. The Appointment, Promotion and Tenure Committee (“APT Committee”) reviewed his request and unanimously recommended that Moye be granted early promotion “(b)y virtue of his exceptional performance in teaching and in service, and an equally vital level of scholarly and professional activity”. In its recommendation, the APT Committee stated as follows with respect to Moye’s teaching:

The . . . Committee’s recent review of Dr. Moye’s teaching remains unchanged – he is an enthusiastic, talented and dedicated instructor. His thoughtful approach to the possibilities of each class meeting is enviable; his emphasis upon the learning process rather than the product is mature; his student reviews are exceptional and are strongly supported by the observations of the Academic Dean. Dr. Moye’s continual development of his courses and the English curricula reinforces our view that his teaching performance is excellent, demonstrates clear progress towards tenure, and provides the College with good reason to anticipate further instructional benefits from this valuable member of the faculty.

...

(Grievants’ Exhibit 8)

3. Rex Myers, then Dean of Academic Affairs, agreed with the Committee’s recommendation that Moye be granted early promotion. He concluded that Moye demonstrated exceptional performance in the areas of teaching and service. In his memorandum to then President Peggy Williams on the early promotion request, Dean Myers stated as follows with respect to Moye’s teaching:

The APT Committee characterizes Dr. Moye’s teaching as exceptional in his enthusiasm, talent and dedication. I concur. His student evaluations certainly attest to such an appraisal. His effectiveness as an educator is also manifest in the leadership he has provided as the English Department has redesigned its curriculum. Once again, students are the beneficiaries.

(Grievants’ Exhibit 7)

4. President Williams concurred with the APT Committee and Dean Myers and granted Moye's early promotion request in the Spring of 1995. Moye was reviewed for tenure during the 1996-1997 academic year. The Reappointment, Promotion and Tenure Committee ("RPT Committee") recommended that tenure be granted. The recommendation was not unanimous. In a March 6, 1997, memorandum, the Committee stated as follows with respect to Moye's teaching:

The members of the Committee have no questions as to Dr. Moye's knowledge of the subject matter; his mastery of this material is clear. His ability to communicate this knowledge to all students in a way which reaches them is less evident. Dr. Moye's teaching evaluations are predominantly positive and, in fact, some are positively glowing. Interspersed in these, however, are comments like "lectures too much", "boring," "doesn't involve us in class," etc. These comments were also reflected in Dean Tero's classroom observation letter in which he noted there were "inattentive students" and that "no questions were asked of students." (We should point out, however, that the Dean characterized Dr. Moye as "attentive," "thorough," "cordial," and "respectful" to students who asked questions or made comments during the class.) The Committee notes that issues of this sort were addressed by Dr. Moye during previous reviews. Such work on improving one's classes is commendable. The Committee encourages Dr. Moye to continue with these efforts, as the Committee is not unanimous that his teaching style is appropriate or that it helps all of his students to think critically and creatively.

A majority of the members of the Committee feel that Dr. Moye is an asset to the College and that he should be granted tenure. This is not to say that the Committee did not have concerns about Dr. Moye's teaching effectiveness, but the majority believes that Dr. Moye can, and will, allay those concerns. He will serve the college well in his capacity as a tenured member of the faculty.
(Joint Exhibit 2)

5. In a March 31, 1997, memorandum to President Williams, Paul Tero, then Dean of Academic Affairs, recommended Moye for tenure "without reservation". He stated as follows with respect to Moye's teaching effectiveness:

Members of the RPT Committee raised concern with Dr. Moye's ability to effectively communicate knowledge to his students. While a basis for this concern is apparent in Dr. Moye's file, the preponderance of evidence supports that he is regarded by students as an effective teacher. More importantly, Dr. Moye's self-evaluation presents his sincerity of purpose as a teacher and outlines his efforts to

continually revise and improve his teaching. I firmly believe that he is sincere and that his professional development as a teacher will continue.
(Joint Exhibit 3)

6. President Williams subsequently informed Moye that he was granted tenure in a letter dated April 21, 1997 (Joint Exhibit 4).

7. Carol Moore became Lyndon State College President during the 1998-1999 academic year. Moye requested consideration for early promotion to full professor in an October 24, 1999, memorandum to President Moore, Dean Tero and John Kascenska, Chair of the RPT Committee. In requesting early promotion, Moye submitted a self-evaluation that included a detailed discussion of his teaching effectiveness meeting the standard for early promotion (Joint Exhibits 6, 12).

8. As part of the review of Grievant's early promotion request, on November 29, 1999, Dean Tero observed a class in a Survey of English Literature course taught by Moye. In his classroom visitation report, Tero noted Moye's enthusiasm and stated that "discussion operated at a significant level of discourse and clearly reflected a tight relationship among the method, purpose and design of the course as stated in the syllabus." He concluded: "While lecture was the primary method of instruction, student participation throughout the presentation indicated that students were generally comfortable not only with student-teacher dialogue, but also with more open group discussion that was germane and appropriate to the topic" (Joint Exhibit 14).

9. The RPT Committee reviewed Moye's request for early promotion. RPT Committee members reviewed materials in Moye's personnel file, including student evaluations of his teaching over the past few years. The Committee unanimously recommended Moye for early promotion, concluding that his teaching and service at

Lyndon were exceptional. In a March 3, 2000, memorandum recommending Moye for early promotion, the Committee made the following observations on Moye's teaching:

In reviewing Dr. Moye's file, the committee agreed that his student evaluations reflect a teacher who is highly knowledgeable, prepares in-depth and clearly articulated course materials, and meticulously reviews student teaching assignments, all in an effort to bring out the best in his students. Furthermore, Dr. Moye's self-evaluation clearly indicates the concern that he has for students while providing them with challenging learning opportunities. The committee concluded that his teaching is exceptional.

(Joint Exhibit 13)

10. In reviewing Moye's request for early promotion, Dean Tero reviewed materials in Moye's personnel file, including student evaluations of his teaching over the past few years, and considered the recommendation of the RPT Committee. In a March 31, 2000, memorandum to President Moore, Tero recommended that early promotion not be granted to Moye. Tero concurred with the RPT Committee that Moye's service to Lyndon State College was exceptional, but disagreed that his teaching was exceptional. Tero stated as follows with respect to Moye's teaching effectiveness:

Based upon Prof. Moye's self-evaluation and the Committee's comments, I agree that Prof. Moye is highly knowledgeable, prepares for class thoroughly, and provides extensive written input to students on their assignments. Student evaluations support these conclusions as well. In reviewing student evaluations, I also find a preponderance of comments suggesting dissatisfaction with what is perceived as too much lecture. Several students suggest that Prof. Moye create a more participatory classroom environment, that he ask more questions of students to suggest their cognizance of the material, that students have more opportunity to discuss the material, and that he connect with more of the students. Other students commented that too much material was covered and/or that the speed of presentation was excessive. These latter comments were most apparent in the ENG 301 (Bible).

The prevalence and consistency of student suggestions, coupled with my general examination of the more quantitative ratings of Prof. Moye's teaching evaluations, prohibit me from concluding that Prof. Moye's teaching is exceptional at this time.

I commend Prof. Moye's seriousness of purpose as a teacher and recognize his efforts to continually improve his teaching. I urge him to experiment with varied instructional methods and to involve students more in class activity in order to create a stronger learning environment. I also urge Prof. Moye to identify strategies for insuring that all students are understanding the material under study. (Joint Exhibit 7)

11. Moye sent a memorandum dated April 6, 2000 to President Moore expressing disagreement with Tero's assessment that his teaching effectiveness was not exceptional. Prior to sending this memorandum, Moye reviewed and analyzed the 162 student evaluations in his personnel file. His memorandum set forth his analysis of the student evaluations. He concluded that 78.4 percent of those evaluations were positive, 11.7 percent balanced positive and negative comments, 5.6 percent were neutral, and 4.3 percent were negative. He further noted that, of the 57 student evaluations that spoke directly to the issues of "too much lecture" or had specific suggestions noted by Tero in his recommendation, many of them were presented in a positive context. Moye developed his own criteria for determining positive and negative evaluations. Moye stated that "(i)n no sense . . . can it be said that comments suggesting dissatisfaction with too much lecture represent a 'preponderance'" He concluded that "the student evaluations in my personnel file are, by an overwhelming majority, distinctly positive" (Joint Exhibit 8).

12. In reviewing Moye's request for early promotion, President Moore reviewed materials in Moye's personnel file, including student evaluations of his teaching over the past few years. She considered the recommendations of the RPT Committee and Dean Tero, and Moye's self-evaluation and April 6, 2000, memorandum. She denied Moye's request for early promotion in a letter dated April 28, 2000. She stated no specific reason for her action other than she concurred with Dean Tero's recommendation (Joint Exhibit 9).

13. In a memorandum to President Moore dated May 11, 2000, Moye requested a special conference to discuss his concerns regarding the decision not to grant his early promotion request. He stated:

My concerns arise from the following:

1. Your decision ignores the unanimous recommendation of the RPT Committee.
2. Dean Tero's analysis of my student evaluations is not supported by the data.
3. Your decision, according to your letter of April 28, 2000, relies upon the dean's analysis and makes the same error.
4. Your decision is inequitable seen in light of Linda Mitchell's early promotion to professor last year.
5. Your decision is inequitable seen in light of Jim Bozeman's early promotion to professor this year.

(Joint Exhibit 15)

14. A meeting among Moye, Tero and Moore was held on June 7, 2000, to discuss the denial of early promotion. At the conclusion of the meeting, Tero, who was leaving Lyndon State College for a position with another college, told Moye he should call him after Tero left Lyndon and he would tell him what had happened in his case. Moye subsequently attempted to follow up with Tero concerning this comment. Tero did not contact Moye to explain his comment (Union Exhibits 22, 23, 24).

15. After the June 7 meeting, Moye sent a memorandum that day to Moore indicating his disagreement regarding the conclusions of Tero and Moore that his teaching was not exceptional. Moore responded by memorandum dated June 13, 2000, reiterating her conclusion that Moye's teaching was not exceptional (Joint Exhibits 17, 18).

16. The student evaluation form used at Lyndon State College was approved by the Lyndon Faculty Assembly. In approving the form, the Faculty Assembly indicated that analysis of the form should not be statistical in nature.

17. In considering Moye for early promotion, the RPT Committee, Tero and Moore each reviewed the student evaluations contained in Moye's personnel file from the preceding three years. They did not compile statistical compilations of the student evaluations or otherwise quantify the student responses and comments in the evaluations. Many evaluations were positive, some were negative, and some were mixed. Some evaluations contained comments to the effect that there was too much lecturing and not enough effort by Moye to create a more participative classroom environment through asking more questions of students and providing more opportunity for students to engage in class discussion or other activity (Joint Exhibit 20, Union Exhibit 2A).

18. President Moore has considered three faculty members for early promotion to full professor during her tenure. In addition to Moye, she considered Linda Mitchell and James Bozeman. Mitchell, a faculty member in the College's Business Department, was considered for early promotion to full professor in the 1998-99 academic year, the year prior to the review of Moye. The RPT Committee unanimously recommended that Mitchell not be granted early promotion. Dean Tero recommended that early promotion be granted. In his classroom observation of Mitchell, Tero concluded that Mitchell's teaching style was exceptional. In considering Mitchell's teaching effectiveness when recommending that she be granted early promotion, Tero concluded that "the currency of her curriculum, her particular success with demonstrating relevance in all she teaches, and her providing meaningful real projects for students, evidence her exceptionality as a teacher" (Employer Exhibit 3).

19. In considering Mitchell for early promotion, President Moore reviewed Mitchell's entire personnel file, including all student evaluations, the RPT Committee

recommendation, and Dean Tero's classroom observation and recommendation. She concluded that Mitchell met the standard of exceptional teaching effectiveness, and granted her request for early promotion.

20. In considering Mitchell for early promotion, the RPT Committee, Tero and Moore each reviewed the student evaluations contained in Mitchell's personnel file from the preceding three years. They did not compile statistical compilations of the student evaluations or otherwise quantify the student responses and comments in the evaluations. Many evaluations were positive, some were negative, and some were mixed. Some evaluations contained some ratings and/or comments critical of Mitchell's teaching effectiveness (Union Exhibits 3, 3A, 3B).

21. James Bozeman, a faculty member in the Mathematics Department, was considered for early promotion to full professor during the 1999-00 academic year, the same year as the review of Moye. The RPT Committee unanimously recommended that Bozeman be granted early promotion. Dean Tero also recommended that early promotion be granted based on his review of Bozeman's entire personnel file, including student evaluations, and his classroom observation of Bozeman's teaching. In his classroom observation of Bozeman, Tero concluded that he was responsive to students and effectively used various methods to engage them (Employer Exhibit 2).

22. In considering Bozeman for early promotion, President Moore reviewed Bozeman's entire personnel file, including all student evaluations, the RPT Committee recommendation, and Dean Tero's classroom observation and recommendation. She concluded that Bozeman met the standard of exceptional teaching effectiveness, and granted his request for early promotion.

23. In considering Bozeman for early promotion, the RPT Committee, Tero and Moore each reviewed the student evaluations contained in Bozeman's personnel file from the preceding three years. As was the case with respect to Moye and Mitchell, they did not compile statistical compilations of the student evaluations or otherwise quantify the student responses and comments in the evaluations. Many evaluations were positive, some were negative, and some were mixed. Some evaluations contained ratings and/or comments critical of Bozeman's teaching effectiveness (Union Exhibit 4, 4A).

24. During the same academic year in which his request for early promotion to full professor was being reviewed, Moye was publicly critical of the administration of President Moore on a few issues. Along with other members of the English Department, Moye criticized Moore and Tero for not filling a vacant position in the English Department. English Department Chairperson Alan Boye led the Department's opposition to the decision not to fill the position. In a November 27, 1999, article in the *The Caledonian Record*, a daily area newspaper, it was reported that Boye, with the unanimous approval of the English Department, communicated his dissatisfaction with the decision by an e-mail he sent to Moore and copied to faculty member and other staff at Lyndon. In the newspaper article, Moye was cited as not being encouraged by Moore indicating she would like to meet with the faculty to discuss the English Department vacancy. Moye is quoted in the article as stating: "The English Department has been talking about this for a year now. I don't know what else there is to say" (Union Exhibit 14).

25. In the November 27, 1999, newspaper article, Social Sciences Department Alan Yale is cited as expressing concerns about whether a vacancy in his department

would be filled. Yale is quoted in the article as stating: “I warned the faculty a year or two ago about these things that now appear to be happening”. In the article, Yale is cited as stating he would wait until after a meeting with Moore to pass judgment on the administration’s position. In the Spring of 2000, Moore promoted Yale to Associate Professor and granted him tenure (Union Exhibit 14).

26. In a memorandum sent by e-mail on November 29, 1999 to Moore and Tero, with a copy sent to all Lyndon State College faculty, Moyer was critical of comments on the staffing issue made by Tero. Moyer characterized Tero’s remarks as demonstrating that he “either totally discounts our extensive and detailed statistical and pedagogical rationale for filling the position or that he simply hasn’t read and understood it”. Moyer concluded that Tero “shows a fundamental lack of respect for faculty and what they do at the college. Such an attitude hardly inspires confidence, or trust, or commitment” (Union Exhibits 12, 13).

27. On November 30, 1999, Moyer sent a second memorandum by e-mail to all Lyndon State College staff concerning the English Department vacancy. Therein, he expressed disagreement with Tero’s statement quoted in the November 27 newspaper article that the English Department was “being a bit irrational about (the staffing issue), without thinking of the whole college” (Union Exhibits 14, 15, 16).

28. On December 9, 1999, James Bozeman sent a memorandum by e-mail to all Lyndon State College staff on the November 27, 1999, newspaper article. He stated that “the airing of our ‘dirty laundry’ in the press was unfortunate, as this cannot but negatively impact efforts at recruitment and retention of students. Bozeman expressed support for “the current efforts being undertaken for the betterment of the college”. Nine

Lyndon State College faculty signed this memorandum, including Linda Mitchell (Union Exhibit 17).

29. During the 1998-99 academic year, Lyndon State College was working on a self-evaluation for the New England Association of Schools and Colleges as part of the reaccreditation process. The Lyndon State College administration proposed a year delay in the self evaluation process while changes that had been made were implemented. Moyer, who was a member of the faculty reaccreditation committee, resigned from the committee due to his view that the direction of the self-evaluation process would not result in an accurate self-evaluation. At the time he resigned from the committee, Moyer did not inform President Moore of his reasons for resigning.

30. In November 1999, there was an article in the *LSC Critic*, the campus newspaper, in which Moyer was critical of the administration's delay of the reaccreditation process. Moyer was quoted in the article as stating he "could not support the college on the reaccreditation front", and that the college was "gutting the liberal arts" (Union Exhibit 18).

31. In an Associated Press newspaper article on October 11, 1999, State Senator Susan Bartlett, a member of the Vermont State Colleges Board of Trustees, was quoted as stating that "the state doesn't have enough money to bail out the schools". On October 15, 1999, Moyer sent a memorandum by e-mail to the Chairperson of the State Colleges Board of Trustees, in which he criticized the quoted remarks of Senator Bartlett. Moyer sent a copy of the memorandum by e-mail to all Lyndon faculty, indicating that he would like to present the memorandum "as an electronic petition from faculty". Among his statements in the memorandum were the following:

I would ask how a member of the Board could possibly advocate effectively in the legislature for the VSC when our relationship with the state is seen, not in terms of investment, but of bailing out. If that point of view is representative of the Board as a whole and of the members who also serve in the legislature, I have little hope that the Board can carry out one of its central functions; if that is the point of view of Sen. Bartlett alone, I sincerely hope that the Board will soon speak with a unified voice that will present the case of the VSC to the legislature as one of the value and the necessity of increasing the state's investment in the education of Vermonters and thereby the future of Vermont.
(Union Exhibit 19)

32. Moore was aware of this memorandum and brought it to the attention of Tero.

33. In response to Moyer indicating that he would like to present the memorandum "as an electronic petition from faculty", Mitchell sent a memorandum by e-mail to Moyer, with copies to all Lyndon State College staff. She began the memorandum by stating: "We should not make personal attacks on members of the Board of Trustees". She expressed the view that the trustees and legislators would not respond positively to public criticism. She further stated that "(e)ven if some think the Senator's words were not well-chosen, a personal attack is not going to get us a place at the table." (Union Exhibit 20)

34. Moyer was reviewed for regular promotion to full professor, pursuant to Article 22 of the Contract, during the 2000-2001 academic year. In a letter dated April 26, 2001, Moore promoted Moyer to full professor effective September 1, 2001 (Joint Exhibit 10).

OPINION

Grievants contend that, in denying Professor Moyer's request for early promotion to full professor, the Employer violated the terms of the Contract which bar discrimination against faculty members for exercise of protected rights. Specifically,

Grievants contend that the Employer violated Article 7 of the Contract by discriminating against Moye for exercising his freedom of speech rights as a citizen, and Article 8 of the Contract by discriminating against him due to his non-partisan political activities. Further, Grievants contend that the denial of early promotion to Professor Moye was arbitrary and capricious contrary to the provisions of Article 3(D) of the Contract which proscribes such an exercise of management rights.

At the outset, we emphasize that the Contract allows only a very limited review through the grievance procedure of any promotion decision. Article 22(G) provides in pertinent part:

A decision of the President not to promote a faculty member shall not be subject to the grievance and arbitration provisions of this Agreement unless (1) the faculty member or the Federation claims the decision violates Article 7 (Academic Freedom), Article 8, (Anti-Discrimination) or the procedures for promotion set forth in this Agreement . . .

Thus, the legal standard is not whether we agree or disagree with President Moore's decision not to grant early promotion to Moye. Our review is limited to whether the decision violates Articles 7 and 8 of the Contract or the procedures for promotion set forth in the Contract. Grievants have neither alleged nor established that any procedures for promotion set forth in the Contract have been violated independent of their claimed violations of Articles 7 and 8. Our review then is limited to whether Articles 7 and 8 have been violated.

Article 8 provides in pertinent part that "(t)he parties shall not discriminate against any faculty member . . . by reason of . . . political activity". Grievants contend that this provision of the Contract encompasses the non-partisan political activities of Moye in public opposition to the Lyndon State College administration.

We disagree. In Grievance of Sypher, 5 VLRB 102, 126 (1982); the Board interpreted the applicable language of the Contract as relating to participation in electoral politics. The intent of the provision is to prohibit discrimination because of a faculty member's activity in political parties. Id. at 126-27. Political activity under the language of the Contract does not encompass activities engaged in by a faculty member which are restricted to the internal administration of a state college. Accordingly, Article 8 does not provide protection for the non-partisan activities engaged in by Moye publicly opposing the Lyndon State College administration.

This leaves consideration of Article 7 of the Contract. Article 7 provides in pertinent part: "In a faculty member's role as citizen, he/she shall continue to have the same freedom as other citizens". The Board previously has interpreted this provision as constituting "an expression of the First Amendment rights any public employee has to criticize employers and speak out on public issues". Grievance of Sypher, 5 VLRB at 127. We need to determine whether Moye's actions constitute protected speech on matters of public concern. Id.

We conclude that Moye engaged in protected activities. Through e-mails and the local newspaper, he was critical of the Lyndon State College administration's handling of English Department staffing. He expressed disagreement with the administration over the reaccreditation process through the college newspaper. Through a widely-circulated e-mail, he was critical of a statement made by a state senator and Vermont State Colleges Board of Trustees member on state funding of the State Colleges. The issues addressed by Moye concerning staffing of the English Department, reaccreditation and state

funding of the State Colleges are matters of public concern and thus are protected by Article 7.

Where employees claim management took action against them for engaging in protected activities, the Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. If this is established, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Sypher, 5 VLRB at 129. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In Sypher, 5 VLRB at 131, the Board noted the factors it would examine to determine whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision protected activities;
- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; or
- whether the employer warned the employee not to engage in protected activities.

In applying these factors to the evidence before us, we conclude that Grievant has not sustained his burden of demonstrating that his protected activities constituted a

motivating factor in the decision to deny his request for early promotion. First, although both Dean Tero and President Moore were aware of Moye's protected activities, they engaged in no visible actions or statements showing disfavor to him as a result of his activities. There were no interrogations of Moye, or warnings to him, concerning his protected activities. The evidence does not indicate that a climate of coercion existed that would have tended to interfere with Moye or other faculty members freely exercising their protected rights.

Further, we do not find the timing of the early promotion decision suspect. Although Moye was denied early promotion in the same year he was active in opposing the administration, this temporal proximity alone does not suffice to demonstrate discrimination against him due to his protected activities. Alan Yale, another faculty member of the college who publicly questioned administration actions that year, was promoted and granted tenure that year by Moore. This weakens a claim that Moore was taking action against a faculty member due to protected activities. Further, Moye was only one of several persons in the English Department publicly opposing actions of the administration. The chairperson of the Department, not Moye, was leading the opposition, at least on the English Department staffing issue. Under the circumstances, drawing a link between Moye's protected activities and the timing of the negative early promotion would be based on nothing more than conjecture.

We also do not believe Grievant has demonstrated that he was discriminated against compared to two faculty members - Linda Mitchell and James Bozeman - who, contrary to Moye, publicly supported the administration and were granted early promotion. Grievants have attempted to demonstrate discrimination through a

quantitative analysis of student evaluations done on the three faculty members. We do not find such a quantitative analysis probative. The student evaluation form used at Lyndon State College was approved by the Lyndon Faculty Assembly. In approving the form, the Faculty Assembly indicated that analysis of the form should not be reduced to statistical analysis. Further, none of those considering faculty members at Lyndon for early promotion – the RPT Committee, the Dean, and the President – engaged in such quantitative analysis. Given this treatment of student evaluations at the college, we too are not inclined to find a quantitative analysis probative.

In any event, a review of the student evaluations of Moye, Mitchell and Bozeman does not contribute to a conclusion that Moye's protected activities motivated the negative early promotion decision he received. The Dean and the President have considerable discretion in determining whether a faculty member's teaching effectiveness reaches the required exceptional level to receive early promotion. The student evaluation is just one of many tools used in exercising this discretion. Among other things, the Dean and President needed to consider the level of students taught, the subjects taught, and the types of courses (e.g., introductory overview, self-taught, seminar).

Given these considerations, we cannot conclude that the evaluations are so unbalanced in favor of Moye compared to the other two faculty members so as to demonstrate his protected activities must have motivated his adverse promotion decision. Each set of evaluations contained many positive evaluations and some negative evaluations, and based on them we cannot detect discriminatory intent because Moye was denied early promotion and the other two faculty members received early promotion.

We recognize that Dean Tero made an overstatement in his recommendation on Moyer by stating: “In reviewing student evaluations, I also find a preponderance of comments suggesting dissatisfaction with what is perceived as too much lecture.” Since “preponderance” means a “majority”, and a majority of student comments did not suggest dissatisfaction with too much lecturing by Grievant, this statement is in error. Nonetheless, it does not logically follow from this inaccurate description that Tero and Moore discriminated against Moyer. Additional circumstantial evidence of a significant nature would be needed to support a finding of discriminatory action. That additional evidence is absent.

We also do not find persuasive Grievants’ contention that a conclusion of discriminatory action is supported by the fact that the RPT Committee reached different conclusions from Dean Tero and President Moore on whether Moyer and Mitchell should be granted early promotion. The respective records of the two faculty members allowed for differing conclusions on legitimate grounds. In sum, the weight of the evidence supports a conclusion that Grievants have not demonstrated that Moyer’s protected activities constituted a motivating factor in the decision to deny his request for early promotion.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Richard Moye and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, is dismissed.

Dated this ____ day of June, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

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