

VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: |) | |
| |) | |
| VERMONT STATE COLLEGES |) | DOCKET NO. 05-33 |
| FACULTY FEDERATION, AFT, |) | |
| UPV LOCAL 3180, AFL-CIO |) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 2, 2005, the Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO (“Federation”) filed a grievance with the Vermont Labor Relations Board. The Federation alleged that the Vermont State Colleges (“Employer”) violated Article 19, Sections 2 and 6, of the collective bargaining agreement (“Contract”) between the Federation and the Employer by not consulting with the Faculty Assembly at Vermont Technical College (“VTC”) on whether the Bioscience Technology program at VTC should be terminated. The Federation requested as a remedy that the Bioscience program be reinstated, and that the Employer be required to comply with Article 19 of the Contract prior to any future termination of the Bioscience program or any other academic program in the Employer’s system.

The Labor Relations Board conducted a hearing on February 2, 2006, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Carroll Comstock and Richard Park. Russell Mills, Federation Grievance Chairperson, represented the Federation. Attorney Nicholas DiGiovanni, Jr., represented the Employer. The parties filed post-hearing briefs on February 23, 2006.

FINDINGS OF FACT

1. The Federation represents a bargaining unit of all full-time faculty and ranked librarians of the Employer. The Contract covering employees in this bargaining unit provides in pertinent part:

...

ARTICLE 14

GRIEVANCE PROCEDURE

A. Special Conferences

Any individual faculty member or group of faculty members shall have the right to discuss any concerns/complaints with the President of the College or his/her designee and to have such matters considered in good faith in a “special conference” with or without the intervention of the Federation.

...

3. Any adjustments resulting from a special conference shall not be inconsistent with the terms of this Agreement and shall not be considered as evidence or as precedent by any administrative agency, arbitrator or board of arbitration with respect to any grievance which may arise at that College or any other College.
4. If a matter has not been satisfactorily resolved through special conference, the concerned party(ies) may file a grievance . . .

...

ARTICLE 19

FACULTY GOVERNANCE

...

- C. 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:

...

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

...

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

...
(Joint Exhibit 1)

2. The Biosciences program has existed at VTC since the Fall of 1996. At that time, and until 2003, it was called the Biotechnology program. It is a two-year program, leading to an Associate Degree. Graduates of the program are prepared for advanced education in the field or seek employment in such positions as laboratory technicians.

3. Dr. Ann Gnagey is an Associate Professor at VTC. Since 1997, she has served as the Director of the Biotechnology, then Bioscience, Program. She has been the only full-time faculty member in the program. Dr. Joan Richmond Hall, who is based in the Sciences Department, has taught courses in the program on a part-time basis.

4. Since its inception, the Biotechnology program has had trouble attracting a large number of students. The number of first-year students usually has been in the 10 – 12 range. Retention of students has been a problem, as many students have left the program after one year. One reason for the retention problem has been that the program has had a substantial percentage of VAST (Vermont Academy of Science and Technology) students who are spending their last year of high school at VTC. Many V.A.S.T. students have gone to another college after one year at VTC.

5. There are two policies of the Colleges that deal with academic program review. One is Policy 101, entitled “Review and Approval of Existing Academic Programs”, which calls for the periodic review of all programs of the Colleges. The other is Policy 109, entitled “Annual Enrollment Review of Existing Academic Programs”, which primarily deals with programs with low enrollments and low graduation rates (Colleges Exhibits 1, 2).

6. Pursuant to Policy 101, the Colleges Board of Trustees reviews several programs a year regardless of their enrollment or graduation numbers. Pursuant to the policy, most programs at the Colleges are reviewed at least once every five years. Once the review of a particular program is completed, the Board of Trustees places the program in one of four categories: a) approve, b) approve with follow-up report required, c) approve with conditions and follow-up report required, or d) terminate (Colleges Exhibit 1).

7. The purpose of Policy 109 is to set up guidelines for annual enrollment review so that low-enrolled programs are examined and addressed. Under the policy, “while the presidents have considerable discretion in which programs they designate as low-enrolled and thus recommend for further review”, a program is generally subjected to Policy 109 review if it demonstrates more than one of the following characteristics: a) fewer than 20 students in associate degree programs, b) fewer than five graduates in any of the preceding three years, and c) significant number of upper level courses in the program with enrollment below accepted course minimums. After review of a particular program is completed, the program is placed in one of the same four categories as used for Policy 101 reviews (Colleges Exhibit 2).

8. Allan Rodgers was President of VTC from mid-2000 through December 2005.

9. The Biotechnology program was first subject to a Policy 109 review in June 2001, when it was one of the five associate degree programs at VTC designated as “low-enrolled. It was again designated as “low-enrolled” in June 2002 and subject again to a Policy 109 review (Colleges Exhibits 3, 4).

10. The Biotechnology program was subject to a Policy 101 review in 2003. As part of that process, President Rodgers submitted an enrollment report in June 2003 to the Board of Trustees. The report indicated that the number of students in the program had varied from 12 to 17 since its inception. The report also indicated that there were an average number of three graduates a year from the program during the preceding five years. As a “recommendation”, President Rodgers stated: “The program should be reviewed for closure with a decision made by Fall of 2003, with the possibility of no new students accepted for the Fall of 2004” (Colleges Exhibit 5).

11. The Biotechnology program underwent the Policy 101 review during the Fall of 2003. Part of this process included the Biotechnology Program Committee Report dated September 11, 2003. This report highlighted the strengths and weaknesses of the program, and included several recommendations. One of the recommendations was to change the name of the program to “Applied Biosciences Technologies”. After deliberating on the program, President Rodgers asked to extend the deadline for reporting on the program until the Fall of 2004 to see whether enrollments improved (Colleges Exhibit 6, Federation Exhibit 8).

12. After considering the Biotechnology Program Committee Report, the Board of Trustees in October 2003 placed the program on the “conditional approval” list with the understanding that there would be an additional report on the program in September 2004. The Board of Trustees approved the recommended name change of the program (Colleges Exhibit 7).

13. Five students graduated from the Biosciences program in May 2004. There were between 15 and 19 students enrolled in the program in the Fall of 2004 (Federation Exhibit 17, Colleges Exhibits 12 and 17).

14. VTC and the University of Vermont entered into an agreement on December 14, 2004, concerning the VTC Bioscience/UVM Biological Science 2 + 2 Program. The agreement applied to VTC graduates from the Bioscience Program who achieved a minimum of a 3.0 GPA, and who seek admission to the UVM College of Agriculture and Life Sciences (“CALS”) as of Fall 2005 to pursue the Bachelor of Science degree through the CALS Program in Biological Science. The agreement provided that UVM would waive the admissions application fee for these students applying to the UVM Program in Biological Science, and established a process for review of applications of these students that ended with the Director of the Program in Biological Science. The seeking of this agreement was one of the recommendations made by the Biotechnology Program Committee during the Policy 101 review in 2003 (Federation Exhibit 11).

15. By the end of December, 2004, VTC had over 600 applicants for the college as a whole. At that time, there were no applicants for the Biosciences program. President Rodgers met with his cabinet, consisting of VTC Deans, on a few occasions to discuss what to do with the Biosciences program. He decided that it was best to close enrollments for the program for the Fall of 2005.

16. On January 17, 2005, President Rodgers met with Ann Gnagey and Joan Richmond Hall. President Rodgers told them that he had decided it was best for the program not to take applicants for the Fall 2005 semester given anticipated low

enrollments for the program. He mentioned to them that he was meeting with the VTC Faculty Assembly on the issue on January 20 (Federation Exhibit 12).

17. The VTC Faculty Assembly is the governance body for the college. It holds monthly meetings during the academic year. The meeting is usually on the third Thursday of each month. Its membership consists of the approximate 70 full-time faculty bargaining unit members. A quorum to conduct Assembly business is 15 members.

18. On January 20, 2005, President Rodgers appeared before the VTC Faculty Assembly. He told the Assembly that three programs were not having new students enrolled for the Fall 2005 semester due to low enrollment/low applications. The three programs he mentioned were Biosciences, Web Technology and Pharmacy Technology. President Rodgers did not tell the Assembly that the Biosciences program would be closing. The Assembly asked President Rodgers few questions on this matter. There were 20 – 30 faculty members present at the meeting (Federation Exhibit 1).

19. During the morning of January 20, 2005, prior to the Faculty Assembly meeting, VTC Dean of Academic Affairs Linda Lucas sent an e-mail message to VTC Registrar Michael Dempsey that provided in pertinent part: “Allan is going to announce at faculty assembly today that he will not be accepting students in the fall for biosciences, pharmacy or WDIM. Pat will be taking care of pharmacy, but I would like lists of currently enrolled students in the other two so that I can send them letters ((Federation Exhibit 13).

20. On January 21, 2005, Dean Lucas sent letters to students currently enrolled in the VTC Bioscience Technology program. Lucas informed the students that “(o)n Thursday, January 20, College President Allan Rodgers announced that Vermont

Technical College would no longer be accepting student enrollment for” the Bioscience Technology program. She stated that “projected student interest in the two-year program does not appear adequate to support this program in the future”. She further stated: “The college is fully committed to your graduation of the Bioscience program here at Vermont Tech. Students currently enrolled in these programs will be able to continue their studies and graduate. I want to reassure you that the college will continue to offer you the academic courses you need to graduate with a degree in Bioscience Technology” (Federation Exhibit 21).

21. At some point between the middle and end of January, 2005, President Rodgers gave the Admissions Office a directive to neither process nor deny applications to the Biosciences program. Applications to the program that were received between January and April 2005 were not returned to the applicants. There was no communication with the applicants during that period informing them that they would not be considered for admission. Prior to this time, the VTC Admissions Office had responded to student inquiries and applications concerning the Biosciences program by sending out program information, making telephone calls to interested potential students, and sending names to the program for follow-up. After this point, the Admissions Office took no such action on inquiries and applications concerning the Biosciences program. In years prior to 2005, Gnagey engaged in recruiting activities for the Biosciences program in January. She did not engage in such activities after January 17, 2005, for the following academic year.

22. Gnagey met with President Rodger’s cabinet on February 3, 2005, to urge that students be admitted to the program for the Fall of 2005.

23. On January 28, 2005, Stephen Belitsos, VTC Chapter Grievance Officer for the Federation, sent a letter to President Rodgers, which provided in pertinent part:

As Chapter Grievance Officer for the VTC Faculty Federation, I am requesting a Special Conference on behalf of Ann Gnagey. Specifically, we are saying that, as a result of the discontinuance of courses for the Bioscience Technology Program, the College was in violation of Article 19, Faculty Governance, of the Agreement between the VSC and the Federation. . . We are specifically requesting that the Faculty Assembly be allowed to review and comment on the President's plan to close off admissions to the Bioscience Technology Program and we are asking for written assurance that all students currently enrolled in both the two and three year degree Programs will be allowed to complete their degree requirements in Bioscience Technology (Joint Exhibit 2, Colleges Exhibit 8).

24. President Rodgers met with Federation representatives in a special conference on February 10, 2005. He indicated that students already in the program would be allowed to complete their degree requirements. He also indicated he would allow the Faculty Assembly to review and comment on the non-enrollment of students in the Biosciences program.

25. After this meeting, President Rodgers sent an e-mail message that day to Faculty Assembly Moderator Scott Sabol which stated: "At the next faculty assembly meeting, please put forward the request for comments on non-enrollment of students for fall 2005 in the bioscience program". Sabol responded that he would put the issue on the agenda of the next Faculty Assembly meeting (Colleges Exhibits 9, 10).

26. As of February 1, 2005, there were two applications for the Bioscience program. As of February 1 the preceding year, there were seven applications to the program (Federation Exhibit 15).

27. On March 4, 2005, Belitsos sent a letter to President Rodgers, which provided in pertinent part:

As Chapter Grievance Counselor for the VTC Faculty Federation, I am notifying you that we are filing a grievance on behalf of Ann Gnagey and Joan Richmond Hall. This is a Step I Grievance filed by the Vermont State Colleges Faculty Federation. Specifically, we are saying that, as a result of the discontinuance of courses for the Bioscience Technology Program, the College was in violation of Article 19, Faculty Governance, of the Agreement . . . We are specifically requesting that the President acknowledge his oversight in not bringing this issue to the attention of the Faculty Assembly prior to instituting any actions resulting in the curtailment of the program. Additionally, we are asking that the President rescind his “stop enrollment” order until the Faculty Assembly is allowed to review and comment on the President’s plan to close off admissions to the Bioscience Technology Program and we are asking for written assurance that all students currently enrolled in both the two and three year degree Programs will be allowed to complete their degree requirements in Bioscience Technology (Joint Exhibit 3).

28. The agenda for the March 17, 2005, meeting of the Faculty Assembly included “Applied Bioscience Program” under “Special Business” (Federation Exhibit 5, Colleges Exhibit 11).

29. President Rodgers attended the March 17 Faculty Assembly meeting and discussed the Biosciences program. He distributed and discussed documents which addressed the enrollment history of the program, its prior Policy 101 and Policy 109 reviews, cost estimates on maintaining the program, and other matters relating to the program. Among the items discussed by President Rodgers was that there were five applications for the program for the Fall of 2005. Members of the Assembly asked questions of President Rodgers. After the presentation by President Rodgers, Gnagey addressed the Assembly. She presented information on the program and discussed her views in support of the program (Colleges Exhibit 12).

30. Following the March 17 Faculty Assembly meeting, Sabol sent President Rodgers an e-mail message that day requesting use of his time at a March 24 Faculty Assembly meeting to continue discussion on the Bioscience program. President Rodgers

responded that he was “willing to concede all of the time” unless Sabol or the Executive Committee had other specific items they wanted him to address (Colleges Exhibit 13).

31. Gnagey appeared before the Faculty Assembly again on March 24. She presented information to the Assembly and took the position that students should be admitted into the Biosciences program for the Fall of 2005.

32. On March 25, 2005, President Rodgers sent a memorandum to Belitsos responding to the March 4 grievance. The memorandum provided:

On the above referenced matter, I find the following:

1. On February 10, 2005, we met in special conference and you requested that faculty assembly convene to discuss enrollment closure of the bioscience program.
2. This has occurred at two faculty assembly meetings held on March 17 and March 24, 2005. Therefore, this specific requested remedy has occurred.

Additionally, in your requested remedies, you sought written clarification on the obligation of the college regarding enrolled students. It is included herein for your reference.

Vermont Technical College will make every reasonable effort to allow students enrolled in the bioscience program as of January 15, 2005 to complete their degree program at VTC in order or through an agreed upon arrangement that transfers credits to a similar degree program at another institution. Students who are completing the program at VTC must remain in good academic standing and be continuously enrolled on a full-time basis at VTC for the remainder of their degree program. Any applicable laws will take precedence in this process.

On the matter of contract violation, I would point out that, according to our records, two prior enrollment closures (Rehabilitation Technology and Accounting) occurred without faculty assembly review.

Therefore, I hereby deny the grievance (Joint Exhibit 4).

33. Faculty Assembly Moderator Scott Sabol sent President Rodgers a memorandum dated March 30, 2005, setting forth on behalf of the Faculty Assembly comments and recommendations regarding the Bioscience program. Sabol indicated in

the memorandum that the “Assembly believes that the argument to terminate enrollment in the Bioscience program may have merit”, but that “the argument to terminate enrollment does not yet appear compelling to us.” He further stated: “The Assembly suggests that looking for ways to free up resources so that Bioscience may continue for two additional years, so that improved analyses and communications can be performed, with benchmarks set and met as a criterion for continuation, may be in the best interests of the College” (emphasis in original) (Federation Exhibit 6, Colleges Exhibit 14).

34. After considering the memorandum from Sabol, President Rodgers closed admissions to the Biosciences program for the Fall of 2005. He communicated this decision to VTC Director of Admissions Dwight Cross on April 25, 2005, and instructed him to inform applicants that the program was not enrolling new students for the Fall of 2005. Cross so informed the applicants, and VTC did not accept any applicants for the program for the Fall of 2005.

35. VTC holds an Open House in the Spring of each year for prospective students and their parents. Prior to 2005, the Biosciences program was included in the Open House. In 2005, the Open House was in April. The Biosciences program was not invited to participate in the Open House.

36. On August 31, 2005, President Rodgers announced that Joan Richmond Hall, who was teaching in the Bioscience program on a part-time basis, and Thomas Raffensperger, Library Director, “will be conducting a research study on leveraging bioscience resources”. In the announcement, he included the following “project purpose”:

The Bioscience degree program at Vermont Tech represents an important area of technology education for the college. Unfortunately, to date, the college has had difficulty attracting students to the program in sufficient numbers to justify the expenditures required to keep the program viable. As a result, the college is

seeking alternative ideas for leveraging the considerable resources of the bioscience program.

The purpose of the project is to determine the feasibility of leveraging those existing resources to 1) increase enrollment in bioscience-oriented programs; 2) expand degree offerings; 3) alter the current program for more marketability; and/or 4) alter the format of the program to be used as multiple degree platform. (Colleges Exhibit 15)

37. In November 2005, Hall and Raffensperger issued a report on the review and revision of the Bioscience Program. As of the date of the hearing on this grievance, the report was still being considered by the new administration at VTC (Colleges Exhibit 16).

38. The 2005-2006 VTC course catalog did not list the Bioscience Technology program as a college program. The 2004-2005 catalog had included the Bioscience Technology program (Federation Exhibits 22, 24).

39. There are as many as 12 students projected to graduate from the Biosciences program this Spring.

OPINION

The Federation contends that the Vermont Technical College President violated Article 19 of the Contract by not consulting with the VTC Faculty Assembly prior to terminating enrollment of new students in the Bioscience Technology program for the Fall 2005 semester. The Colleges respond that the President had no obligation to bring his decision to not enroll new students to the attention of the Faculty Assembly. The Colleges further contend that, even assuming that there was an obligation to consult with the Assembly, the President satisfied any contractual obligation when he met with the

Assembly on January 20, 2005, and disclosed his plan to close the program to new students.

We first address whether the President was obligated by the Contract to bring his decision to not enroll new students to the attention of the Faculty Assembly. Article 19 of the Contract provides: “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”. Included among “matters of academic concern” is the “curtailment . . . of academic programs”. The Employer contends that the decision to stop the enrollment of new students in a program is not a “curtailment” of a program because curtailment means that the program is actually being closed, and the non-enrollment of new students is not the same as final termination of a program.

We disagree with the Employer’s interpretation of the word “curtailment”. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). *Black’s Law Dictionary* (6th Ed., West Pub. Co., 1990) defines “curtail” as “to shorten, abridge, diminish, lessen, or reduce”. Thus, curtailment of a program may constitute something less than closure of a program. The non-enrollment of new students squarely fits within the dictionary definition of “curtail”. Accordingly, we conclude that the VTC President had a contractual obligation to consult with the Faculty Assembly with respect to the matter of academic concern of the non-enrollment of students in the Bioscience program for the Fall 2005 semester.

We next address the Employer’s contention that the President satisfied any contractual obligation when he met with the Assembly on January 20, 2005, and

disclosed his plan to close the program to new students. In providing in Article 19 that “matters of academic concern shall be initiated . . . by the President through the Faculty Assembly which shall consider the matter and respond within a reasonable time”, the Employer and the Federation contemplated the President providing advance notice to the Faculty Assembly of a matter so that the Assembly could meaningfully consider the matter and have a reasonable time to respond.

The President did not meet this contractual obligation merely by announcing to the Faculty Assembly on January 20 without advance notice that the Biosciences program would not have new students enrolled for the Fall 2005 semester, and then allowing a brief opportunity for questions and comments at the meeting. This did not provide the Faculty Assembly with the meaningful consultative role envisioned by Article 19. In so proceeding, the President did not provide the Assembly with the opportunity to adequately consider the matter and have a reasonable time to respond.

Nonetheless, the Employer contends that, even if the President did not satisfy his contractual obligations on January 20, 2005, he effectively granted the remedy subsequently requested by the Federation in its special conference request and first step grievance. As a result, the Employer asserts that the grievance is moot.

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988). Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to

a protected legal interest, or is merely speculating about the impact of some generalized grievance.” Id. at 424.

When the employer, through the grievance procedure, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met and has dismissed the grievance, even though the employer had not admitted to any contract violations. Grievances of Cray, 25 VLRB 194, 216-217 (2002). Grievance of Rennie, 16 VLRB 1, 5-6 (1993). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990). The Board reasoned that, to provide an adequate basis to assert jurisdiction, a grievance must be more than an argument over contract interpretation. Id. It also must be a request for action that the Board has the authority to order. Id.

In applying these precedents here, we conclude upon an examination of the grievance processing of this case that the actual controversy requirement has not been met. The Federation’s requested remedy in its Step One grievance was as follows:

We are specifically requesting that the President acknowledge his oversight in not bringing this issue to the attention of the Faculty Assembly prior to instituting any actions resulting in the curtailment of the program. Additionally, we are asking that the President rescind his “stop enrollment” order until the Faculty Assembly is allowed to review and comment on the President’s plan to close off admissions to the Bioscience Technology Program and we are asking for written assurance that all students currently enrolled in both the two and three year degree Programs will be allowed to complete their degree requirements in Bioscience Technology.

The President essentially granted the remedial actions requested by the Federation short of an admission that he had violated the Contract. He provided written assurances that the current students in the program would be allowed to complete their degree requirements. He also allowed the Faculty Assembly an opportunity to review and comment on his plan of non-enrollment of new students. He appeared before the

Assembly on March 17 to discuss his plan in detail and respond to their questions and comments. He gave them time to further discuss the issue at another meeting of the Assembly on March 24, and considered a March 30 memorandum from the Assembly before taking action in April to close admissions to the Biosciences program for the Fall 2005 semester. Prior to then, he had given the VTC Admissions Office a directive to neither process nor deny applications to the programs. While the directive had the effect of discouraging applicants from pursuing admissions to the program, such a directive fell short of a “stop enrollment” order.

The fact that the President did not admit to a violation of the Contract does not mean that the actual controversy requirement has been met. As discussed above, we have consistently held that a grievance must be more than an argument over contract interpretation. When the employer has provided as a remedy the most that the Board could award as a remedy, the Board has dismissed the grievance even though the employer has not admitted to any contract violations. That is the case here. Thus, we dismiss this grievance.

ORDER

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

Dated this 14th day of April, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

Carroll P. Comstock

Richard W. Park