

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
JUNE ROSENBERG AND THE)	DOCKET NO. 06-40
VERMONT STATE COLLEGES)	
FACULTY FEDERATION, UPV/AFT)	
LOCAL 3180, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 26, 2006, the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180, AFL-CIO (“Federation”) filed a grievance on behalf of itself and June Rosenberg, a part-time faculty member at Lyndon State College. The Federation alleged that the Vermont State Colleges (“Employer”) violated Articles III, VII and XVIII of the collective bargaining contract between the Federation and the Employer for part-time faculty, effective September 1, 2000 to August 31, 2006 (“Contract”); by not assigning any courses to Rosenberg for the Fall 2006 semester. Grievants contended that the Employer discriminated against Rosenberg due to her union activities, acted in a manner that was arbitrary and capricious, and violated the procedures for assigning courses to part-time faculty.

The Labor Relations Board conducted a hearing on April 19, 2007, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Richard Park and James Dunn. Russell Mills, Federation Grievance Chairperson, represented Grievants. Attorney Nicholas DiGiovanni, Jr., represented the Employer. At the hearing, Grievants withdrew the allegation that Rosenberg was discriminated against due to union activities.

The Federation and the Employer filed post-hearing briefs on May 10 and 11, 2007, respectively.

FINDINGS OF FACT

1. The Federation represents a bargaining unit of part-time faculty at the four campuses of the Colleges.
2. The Contract provides in pertinent part as follows:

...

ARTICLE III 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 determine qualifications and criteria in hiring . . . ; to hire, . . . assign . . . 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 XII and XIII (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 XII GRIEVANCE PROCEDURE

...

D. The following steps shall be followed for the processing of grievances:

Step one

1. Within thirty (30) calendar days after the grievant could reasonably have been aware of the alleged violation, . . . the grievant (or his/her representative) shall hand deliver a written and dated grievance to the President of the College or his/her designee. If hand delivery is not

possible, the grievance shall be sent certified mail, return receipt requested. The clock may be stopped during all recesses in excess of seven (7) calendar days provided the grievant or his/her representative notifies the College in writing. The clock shall start again at the conclusion of the recess. . .

Step two

1. In the event the grievance is not settled in Step 1, the grievant or his/her representative may present his/her grievance at Step 2 within fifteen (15) calendar days of receipt of the Step I answer. At this step the grievance shall be presented in writing to the Chancellor. . .

...

F. Failure to Adhere to Time Limitations:

...

2. Failure of the grievant to comply with the time limitations of the grievance steps set forth in this article shall preclude any subsequent filing of the grievance.

...

ARTICLE XVIII

SEMESTER APPOINTMENTS AND ASSIGNMENTS

...

B. 1. In planning appointments and assignments for forthcoming semesters, the College shall distribute a teaching availability form to each part-time faculty member . . . by April 1 for the fall semester appointments and assignments . . . The teaching availability form shall request the part-time faculty member to provide the following:

a) Availability by days of the week and times of the day to teach in the forthcoming semester. The part-time faculty may also indicate preference as to which days of the week and times of the day he/she would like to teach, as well as other relevant considerations.

b) Indication of courses which the part-time faculty is interested in teaching.

...

6. It is understood that the distribution and receipt of a teaching availability form by part-time faculty does not obligate the College in any way to provide an appointment or a particular assignment to the part-time faculty member.

...

8. The teaching availability forms will be sent to and considered by the department chairperson or other appropriate administrator in establishing department schedules. In addition, part-time faculty may consult with the department chairperson regarding department scheduling for an upcoming semester, and if the department holds a meeting to discuss scheduling, part-time faculty shall be free to attend and

participate. The employer will notify the part-time faculty of such scheduled meetings in a timely fashion.

...

D. The College shall consider the information provided by the part-time faculty on the teaching availability form in planning for semester assignments.

E. The College reserves the right to give preference to full-time faculty for teaching courses on an overload basis or to individual administrators prior to offering courses to part-time faculty.

F. Except as provided in Section E and Section H, and except that no individual may be assigned more than eleven (11) credits per semester.(sic) Two (2) available teaching assignments with a minimum of six (6) credits per semester shall be first offered to bargaining unit members on the basis of seniority as defined in (G) below and on the basis of:

1. The academic qualifications of the part-time faculty, including teaching ability.
2. The availability and stated preferences of the part-time faculty as indicated on the teaching availability form.
3. Experience in teaching available courses.
4. The curricular needs of the department.

G. The term "seniority" as used in this Article shall be based upon the number of credits taught by part-time faculty at a particular campus-based college within the VSC. Part-time faculty shall accumulate seniority at each campus based upon the number of credits taught at that campus. The starting date for calculating this number of credits shall be the Fall semester for 1986. After a seniority list is developed and distributed, any part-time faculty may grieve factual errors in the list and such matters are arbitrable.

H. In addition to the normal non-unit assignment of courses that may occur consistent with this article, the Colleges may offer assignments to individuals without following the procedures above. Such assignments shall be limited to individuals with exceptional qualifications or expertise or in extraordinary circumstances.

...

(Joint Exhibit 1)

3. June Rosenberg is a part-time faculty member in the Psychology Department at Lyndon State College. She has taught at the college since 1993 and has taught 138 total credits. She has more seniority than any other part-time faculty member in the Psychology Department except Norrine Williams (189 credits) and Sarah Kresser (158 credits).

4. Rosenberg received a Bachelor of Arts degree in Speech from St. John's University in 1967, and a Master of Arts degree in Speech Pathology/Audiology from Queens College in 1973. Rosenberg is pursuing a doctorate degree in Educational Leadership from Argosy University (Colleges Exhibit 7, Federation Exhibit 8).

5. Rosenberg taught between 6 and 10 credits a semester from the Spring of 2001 through the Fall of 2005. During this period, she taught the Introduction to Psychology course, the Human Growth and Development course, and the Introduction to Academic Community course. Rosenberg was not assigned any courses to teach during the Spring 2006 semester (Colleges Exhibits 8 and 16).

6. Rosenberg taught sections of the three-credit Introduction to Psychology course on several occasions from the Spring 2001 semester through the Fall 2005 semester. She taught one section in Spring 2001, one section in Spring 2004, one section in Fall 2004, one section in Spring 2005, and one section in Fall 2005 (Colleges Exhibit 8).

7. Rosenberg regularly taught sections of the three-credit Human Growth and Development course from the Spring 2001 semester through the Fall 2005 semester. She taught one section in Spring 2001, one section in Summer 2001, two sections in Fall 2001, two sections in Spring 2002, one section in Summer 2002, three sections in Fall 2002, two sections in Spring 2003, one section in Summer 2003, two sections in Fall 2003, one section in Spring 2004, one section in Fall 2004, one section in Spring 2005, and one section in Fall 2005 (Colleges Exhibit 8).

8. Rosenberg taught sections of the two-credit Introduction to Academic Community course from the Fall 2003 semester through the Fall 2005 semester. She

taught one section in Fall 2003, two sections in Fall 2004, one section in Spring 2005, and two sections in Fall 2005 (Colleges Exhibit 8).

9. Rosenberg filed a grievance concerning her assignments for the Spring 2002 semester which was decided by the Labor Relations Board in a 2-1 decision holding that Rosenberg had been discriminated against because of her previous grievance activities. 25 VLRB 253 (2002). The Employer appealed this decision to the Vermont Supreme Court, and the Court reversed the Board in a decision issued May 5, 2004. 176 Vt. 641.

10. Rosenberg filed a grievance concerning her lack of teaching assignments for the Spring 2006 semester. In a decision issued February 12, 2007, the Labor Relations Board determined that the Employer did not violate the provisions of the Contract by not assigning Rosenberg any courses. The Board concluded that the Employer did not violate the procedures for assigning courses to part-time faculty, and did not discriminate against Rosenberg due to her grievance activities. 29 VLRB 12.

11. Lori Werdenschlag, a full-time tenured faculty member in the Psychology Department at Lyndon, was Department Co-Chair during the 2004-2005 academic year and Department Chair during the 2005-2006 and 2006-2007 academic years. She was responsible for recommending course assignments in the Psychology Department for the Fall 2006 semester.

12. Among the duties that Werdenschlag had as Psychology Department Chair was the preparation of course offerings, schedules and assignments in the department. She recommended assignments and offerings to Donna Dalton, Dean of Academic and Student Affairs.

13. Rhonda Korol, a full-time tenured faculty member in the Psychology Department at Lyndon, has served as Chair of the Social Science Team for the past four or five years except for the Spring 2005 semester. Among her duties as Chair of the Social Science Team has been to recommend to Dean Dalton the faculty to be assigned to teach the various sections of the course SSC 1030, *Exploring the Social Sciences*.

14. On or around January 9, 2006, Rosenberg submitted a completed Teaching Availability form for the Fall 2006 semester. Her completed form indicated that she was “interested in teaching the following course(s)”:

PSY 1010	<i>Introduction to Psychology</i>
PSY 1050	<i>Human Growth & Development</i>
PSY 1040	<i>Human Interaction</i>
PSY 4020	<i>Tests and Measurements</i>
INT 1020	<i>Introduction to Academic Community</i>
SSC 1030	<i>Exploring the Social Sciences</i>
EDUC 1020	<i>Educational Psychology</i>

Rosenberg also stated on the availability form that she was interested in teaching “any other Psychology course”, “any Education course”, and “any other appropriate course” (Federation Exhibit 15, Colleges Exhibit 9).

15. In accordance with practice, Dean Dalton’s administrative assistant forwarded Rosenberg’s teaching availability form to all the individuals involved in the scheduling of specific courses for which Rosenberg had expressed an interest. These individuals were Werdenschlag, Korol, the co-chairs of the Education Department (Professors Tim Sturm and Barry Hertz), and the two faculty members involved in the scheduling of INT 1020 (Colleges Exhibit 9).

16. Rosenberg had previously taught four of the seven courses that she specifically listed on the teaching availability form: PSY 1010, *Introduction to Psychology*; PSY 1050, *Human Growth and Development*; INT 1020, *Introduction to Academic Community*; and EDUC 1020, *Educational Psychology*.

17. Four of the seven courses specifically listed by Rosenberg were taught only by full-time faculty and/or administrators: *Introduction to Psychology*, *Human Growth and Development*, *Human Interaction*, *Educational Psychology*. One other course – PSY 4020 *Tests and Measurements* – was not offered during the Fall 2006 semester (Colleges Exhibit 10; Federation Exhibits 4, 7, 7A).

18. 18 of 19 sections of INT 1020, *Introduction to Academic Community*, offered during the Fall 2006 semester were taught by full-time faculty and/or administrators. The remaining section was taught by Donna Keely. Keely was Director of the First-Year Experience at Lyndon. The Employer asserts that she is an administrator. Neither her appointment letter nor the job classification description for her position indicates that she is an administrator or that her position is classified as “exempt”. Other job classification descriptions entered into evidence for persons classified as administrators indicate that the employee occupying the position is an administrator or the position is “exempt” (Federation Exhibit 4, Colleges Exhibit 10).

19. SSC 1030, *Exploring the Social Sciences*, the remaining course of the seven listed by Rosenberg, had part-time faculty teaching some of the sections. Many sections of the course were taught by full-time faculty or administrators, including Psychology Department Professor Korol teaching one section. Three sections of the course were taught by part-time faculty members Dennis Sweet, Chris Raymond and Jon

Fitch. Sweet, Raymond and Fitch had all taught this course previously. They all had less seniority as part-time faculty members than Rosenberg. Prior to the Fall 2006 Semester, the number of credits they each had as part-time faculty members at Lyndon were as follows: a) Sweet had nine credits, b) Raymond had 19 credits, c) Fitch had 3 credits (Colleges Exhibit 16).

20. *Exploring the Social Sciences* is a core course required of all students. It is an offering of the Social Sciences Department. It is an integrated social sciences course that examines the complex nature of human social processes associated with family and community life. It uses the methods and perspectives of the different disciplines in the social sciences – i.e., anthropology, economics, geography, history, political science, psychology and sociology. It is taught by a social scientist from one of the disciplines (Colleges Exhibits 11-15, Federation Exhibit 16).

21. Rosenberg had not taught *Exploring the Social Sciences* previously. Korol received Rosenberg's teaching availability form and was aware that Rosenberg had expressed interest in teaching the course. There were no discussions between Korol and Rosenberg about Rosenberg teaching the course. Korol was aware of Rosenberg's prior experience teaching in the Psychology Department and that Rosenberg had greater seniority as a part-time faculty member than Sweet, Raymond and Fitch. Korol and the Social Science Team determined that Rosenberg was not qualified to teach the course. Included among Korol's reasons were that Rosenberg had not previously taught the course, her academic degrees were not germane to the course, and she did not have a broad background in the social sciences. Korol viewed graduate level social sciences

training as a desired component of a faculty member teaching the course, and found Rosenberg lacking in this training.

22. Fitch previously was a full-time faculty member at Lyndon. He retired after many years of service. He was the “brainchild” of the *Exploring the Social Sciences* course when he was a full-time faculty member and was one of the faculty members that developed the course. Fitch’s full-time faculty service does not count towards determining seniority for appointment to courses as a part-time faculty member (Federation Exhibit 2).

23. Sweet has taught at Lyndon Institute since 1985 on a part-time and full-time basis. Lyndon Institute is an independent secondary school. He is Social Studies Department Chair, and has taught high school level courses in United States History, Honors United States History, and Consumer Economics. Sweet has a Bachelor degree in Secondary Education from the University of Vermont, and a Master of Education degree from Lyndon State College. He has not taken graduate level courses in the social sciences. Sweet has taught *Exploring the Social Sciences* four semesters over two years, and has performed capably teaching the course (Federation Exhibit 17).

24. Raymond has taught at Lyndon Institute since 1991. He has taught social studies course, grades 9-12. Included among the courses he has taught are: United States History, World Civilizations, Applied Social Studies, and Advanced Placement European History. Raymond has a Bachelor degree in Outdoor Education and Recreation from Lyndon State College. Raymond has had no graduate level training. Raymond has taught *Exploring the Social Sciences* two or three times, and has performed capably teaching the course (Federation Exhibit 17).

25. EDU 3540, *Reading and Literacy Development*, an upper level Education Department course at Lyndon, was taught by part-time faculty member Nancy Woods during the Fall 2006 semester. This course introduces and promotes the use of child and adolescent literature for the development of thought, language, literacy, and multicultural perspectives in the classroom. Woods had less seniority than Rosenberg. Rosenberg did not discuss with anyone in the Education Department an interest in teaching this course. Rosenberg had not previously taught this course. Two Education Department full-time faculty members indicated to Dean Dalton that they did not believe Rosenberg was qualified to teach this course due to concerns about her expertise and the currency of her knowledge on the course content (Colleges Exhibits 10, 15).

26. Prior to 1992, Rosenberg taught the following courses at Johnson State College and/or Community College of Vermont: Reading Methods and Materials, Language and Reading, Reading in the Content Area, Introduction to Reading Disabilities, Aiding the Reading Disabled Student, Learning Disabilities, Literature for Children, Introduction to Early Childhood Education, Introduction to Speech and Language Disorders (Colleges Exhibit 7).

27. PSY 6140, *Developmental Psychology*, an upper level Psychology Department course at Lyndon, was taught by part-time faculty member Shirley Richardson during the Fall 2006 semester. The content of the course addressed childhood and adolescent development. Richardson had less seniority than Rosenberg. Rosenberg had not previously taught this course at Lyndon or anywhere else (Colleges Exhibits 10, 16).

28. Werdenschlag had taught the *Developmental Psychology* course several times over the years. She was unable to teach the course during the Spring 2005 semester and had to search for a replacement as Psychology Department co-chair. She examined the qualifications and backgrounds of all the department faculty members, including Rosenberg, and concluded that none of them were capable of being assigned the course. Linda Metzke, a full-time faculty member in the Lyndon Education Department, recommended Shirley Richardson to teach the course. Richardson was hired to teach the course. She taught the course successfully. When the course was offered again in the Fall 2006 semester, Richardson again was assigned to teach the course. Werdenschlag did not consider Rosenberg for teaching the course.

29. Three part-time faculty, including one Psychology Department member, were assigned courses at Lyndon for the Spring 2006 semester although they submitted teaching availability forms with no courses listed. Six part-time faculty, including one Psychology Department member, were assigned courses at Lyndon for the Fall 2006 semester although they submitted availability forms listing no specific courses (Federation Exhibits 21, 23).

30. By memorandum dated April 27, 2006, Tim Sturm, Federation Grievance Counselor at Lyndon State College, submitted a Step One grievance to Lyndon State College President Carol Moore concerning Rosenberg not being assigned to teach any courses for the Fall 2006 semester (Federation Exhibit 1, Colleges Exhibit 2).

31. Russell Mills, Federation Grievance Chair, sent a letter dated May 11, 2006, to William Reedy, Colleges General Counsel, which stated in pertinent part: "This is to notify you that I am stopping the clock for all grievances and all grievable matters, at

all campuses, effective the end of the academic year at each campus (generally the day after commencement). The clock will restart on the first calendar day of the fall semester” (Federation Exhibit 1).

32. There was a Step One grievance meeting on May 12, 2006, on the grievance filed by Sturm concerning Rosenberg not being assigned to teach any courses for the Fall 2006 semester. By memorandum dated May 25, 2006, President Moore informed Sturm that she was denying the grievance (Federation Exhibit 1, Colleges Exhibit 3).

33. Mills sent a Step Two grievance on September 12, 2006, to Colleges Chancellor Robert Clarke concerning Rosenberg not being assigned to teach any courses for the Fall 2006 semester. September 5, 2006, was the first day of classes for the Fall 2006 semester (Federation Exhibits 1 and 29; Colleges Exhibit 5).

OPINION

Grievants contend that the Employer violated Articles III and XVIII of the Contract by not assigning any courses to June Rosenberg, part-time faculty member at Lyndon State College, during the Fall 2006 semester.

There is a threshold issue on the timeliness of this grievance. The Employer contends that this grievance was untimely processed and should be dismissed. The Employer maintains that Grievants violated the requirement of Article XII, Section D, of the Contract to file a Step Two grievance “within fifteen (15) calendar days of receipt of the Step One answer” by filing the Step Two grievance well beyond the 15 day limit. This should result in dismissal of the grievance, the Employer asserts, because Article

XII, Section F, provides that “failure of the grievant to comply with the time limitations of the grievance steps set forth in this article shall preclude any subsequent filing of the grievance.”

Grievants contend that the Step Two grievance was filed in a timely manner. Grievants assert that the letter the Federation Grievance Chair sent to the Employer’s General Counsel dated May 11, 2006, stating that “I am stopping the clock for grievances and all grievable matters . . . effective the end of the academic year at each campus”, allowed them to wait until September 2006 to continue processing this grievance. Grievants rely on the Article XII, Section D, provision that “the clock may be stopped during all recesses in excess of seven (7) calendar days provided the grievant or his/her representative notifies the College in writing. The clock shall start again at the conclusion of the recess . . .”

The Employer contends that the Contract does not support Grievants’ position. The Employer asserts that since the stopping the clock provision appears only in the section of Article XII dealing with initial filing of the grievance, it is clear that the provision only affects the initial filing of grievances. Once a grievance has been filed, the Employer asserts, the clock is not stopped unless by mutual agreement. The Employer maintains that this interpretation of the contract language also is logical since it may be difficult during a summer recess for the Federation to contact faculty to discuss the specifics of a possible grievance, but once a grievance is filed the Federation can process the grievance on its own and the availability of the faculty member is not as crucial.

Grievants assert to the contrary that the Contract is clear that the grievance clock may be stopped by either party during recesses of more than a week, and nowhere does

the Contract state that the ability to stop the clock during recesses can be exercised only prior to the initial filing of a grievance. Grievants contend that, to the extent that the placement of the stopping of the clock language in the section on initial filing of grievances is significant, at most it introduces an element of ambiguity concerning the scope of application of contract language that is otherwise clear. Grievants maintain that the Employer's proposed interpretation of the contract language is contrary to the clear intent of the provision to recognize that faculty members are not necessarily available during long recesses to deal with grievances. It would be inconsistent with this intent, Grievants assert, if faculty were permitted to stop the clock prior to filing grievances at the first step, but following that initial filing could be required to schedule and attend grievance meetings and respond to grievance denials at every step even though they were not on campus and may even be out of the country.

In determining the timeliness of this grievance, we look to precedents established by the Board and the Vermont Supreme Court. The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Cole and Cross, 28 VLRB 345, 367 (2006). Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). An area where the Board has favored the dismissal of grievances on procedural grounds has been if grievances were not timely filed at earlier steps of the grievance procedure. Under contracts between the Federation and the Employer providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure.

Grievance of Levin and VSCFF, 26 VLRB 171, 187-191 (2003). Grievance of Sypher and VSCFF, 5 VLRB 102, 120-121 (1982). Grievance of Peck and VSCFF, 1 VLRB 329, 331-32 (1978); *Affirmed in pertinent part*, 139 Vt. 329, 331-32 (1981).

The determination whether the Contract requires that this grievance be dismissed on timeliness grounds turns on the interpretation of the provision of the Contract dealing with the stopping of the grievance clock. 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). If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). Extrinsic evidence under such circumstances is inadmissible as it would alter the understanding of the parties embodied in the language they chose to best express their intent. Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).

However, where the disputed language is sufficiently ambiguous, it is the duty of judicial or quasi-judicial bodies to construe a contract so as to ascertain the true intention of the parties. Grievance of Gorruso, 150 Vt. 139, 143 (1988). In such circumstances, it is appropriate to look to the extrinsic evidence of past practice and bargaining history to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. Grievance of Majors, 11 VLRB 30, 35 (1988).

We conclude that the stopping of the grievance clock provision of the Contract is not clear and unambiguous. Both parties offer plausible interpretations of this provision. Extrinsic evidence of past practice and bargaining history does not aid us in interpreting the contract language, unfortunately, as the parties have presented no such evidence.

Given the ambiguous contract language and the state of the evidence, we cannot conclude that the Contract requires that this grievance be dismissed on timeliness grounds. Once the Federation notified the Employer that it “was stopping the clock for grievances and all grievable matters . . . effective the end of the academic year”, this provided notice to the Employer that the Federation viewed the stop the grievance clock language of the Contract as stopping the clock on active grievances as well as potential grievances. If the Employer disagreed with the Federation’s construction of the Contract language, it was incumbent on the Employer to notify the Federation of its belief that the clock stoppage only applied to situations where grievances had not yet been filed. Instead, the Employer was silent. It would be unfair and unjust to conclude that Grievants waived the right to pursue this grievance on timeliness grounds in the face of ambiguous contract language, absence of evidence on past practice and bargaining history, and silence by the Employer.

We turn to addressing the merits. Grievants allege that the Employer acted contrary to the procedures for assigning courses to part-time faculty in violation of Articles III and XVIII through not assigning any courses to Rosenberg for the Fall 2006 semester. Grievants claim violations with respect to three categories of courses: a) courses previously taught by Rosenberg which she specifically indicated a preference for teaching on the teaching availability form; b) courses not previously taught by Rosenberg which she specifically indicated a preference for teaching on the teaching availability form; and c) any other courses in the Psychology and Education Departments. We discuss each of these categories in turn.

Rosenberg had previously taught four courses that she specifically listed on the teaching availability form. Three of these courses were taught only by full-time faculty and/or administrators during the Fall 2006 semester. According to Article XVIII of the Contract, the Employer has the right to give preference to full-time faculty and administrators prior to offering courses to part-time faculty. Thus, Rosenberg had no contractual right to be assigned any of these three courses.

During the Fall 2006 semester, 18 of 19 sections of the *Introduction to Academic Community* course, the only remaining course previously taught by Rosenberg that she specifically listed on the teaching availability form, also were taught by full-time faculty and/or administrators. This leaves one section of this course that Rosenberg arguably was entitled to teach. This section was taught by Donna Keely, Director of the First-Year Experience at Lyndon.

The Employer asserts that Keely is an administrator. However, neither Keely's appointment letter nor the job classification description for her position indicate that she is an administrator or that her position is classified as "exempt". An "exempt" classification means that the position is exempt from coverage of the provisions of the federal Fair Labor Standards Act; a professional staff member of the Employer holding such a position is an administrator. Grievance of VSCFF and Rosenberg, 29 VLRB 12, 27 (2007).

Other job classification descriptions entered into evidence for persons classified as administrators indicate that the employee occupying the position is an administrator or the position is "exempt". Failing any other specific evidence introduced by the Employer

to demonstrate that Keely is an administrator, we conclude by a preponderance of the evidence that the Employer has failed to demonstrate that Keely is an administrator.

This places both Rosenberg and Keely in the same position of part-time faculty member, with no preference as an administrator, in the assignment of courses. In such situations, Article XVIII, Section F, of the Contract provides that an available teaching assignment shall be offered on the basis of: a) seniority; b) academic qualifications, including teaching ability; c) availability and stated preferences as indicated on the teaching availability form; d) experience in teaching available courses; and e) the curricular needs of the department.

There is no evidence distinguishing the academic qualifications of Rosenberg and Keely. There also is no evidence relating to curricular needs favoring either Rosenberg or Keely. The Employer makes no assertion that Keely has as much seniority as Rosenberg. Therefore, the Board must assume Rosenberg's greater seniority which, taken together with her experience and stated preference in teaching the *Introduction to Academic Community* course, means that she was entitled under the Contract to be offered the section of the course before Keely. The Employer violated the Contract by offering the course to Keely rather than Rosenberg.

We next examine courses not previously taught by Rosenberg which she specifically indicated a preference for teaching on the teaching availability form. One of these courses, *Human Interaction*, was taught only by full-time faculty and/or administrators during the Fall 2006 semester. Thus, Rosenberg had no contractual right to be assigned this course. Another of these courses, *Tests and Measurements*, was not offered during the Fall 2006 semester.

The remaining course, *Exploring the Social Sciences*, had part-time faculty teaching some of the sections. Although many sections of the course were taught by full-time faculty or administrators, three sections were taught by part-time faculty members Dennis Sweet, Chris Raymond and Jon Fitch. Sweet, Raymond and Fitch had all previously taught this course. They all had less seniority as part-time faculty members than Rosenberg.

In applying the standards set forth in Article XVIII, Section F, of the Contract, we conclude that the Employer did not violate this section by selecting Fitch over Rosenberg to teach *Exploring the Social Sciences*. Fitch was the “brainchild” of the *Exploring the Social Sciences* course when he was a full-time faculty member and was one of the faculty members that developed the course. This would make his academic qualifications for teaching the course far superior to those of Rosenberg. It was reasonable for the Employer to conclude that the distinction in academic qualifications, along with Fitch having previously taught the course, override Rosenberg’s greater seniority as a part-time faculty member.

A closer question exists with respect to the other two part-time faculty members who taught the course, Sweet and Raymond. Graduate level social sciences training is considered a desired component of teaching the course, and neither Sweet nor Raymond had this training. However, neither did Rosenberg.

When academic qualifications are considered, it is difficult to distinguish between Sweet and Rosenberg. They both had Master degrees, albeit neither one of them possessing the advanced degree in the social sciences field. They both had experience teaching in the social sciences. Sweet had broader experience, teaching history and

economics, although these courses were at a high school level. Rosenberg's breadth of teaching was more limited, teaching courses in the psychology, but she taught these courses at the college level.

The greatest distinctions that can be drawn between Sweet and Rosenberg are with respect to seniority and experience in teaching the *Exploring the Social Sciences* course. Rosenberg had greater seniority than Sweet but had never taught *Exploring the Social Sciences*. Sweet had taught the course multiple times and had performed capably. It was reasonable for the Employer to conclude that Sweet's experience in teaching the course took precedence over Rosenberg's seniority when considered together with their similar academic qualifications.

The determination whether the Employer violated the Contract in assigning Raymond to teach *Exploring the Social Sciences* rather than Rosenberg is the most difficult. Rosenberg had the edge in academic qualifications. It is difficult to distinguish among them with respect to teaching experience in the social sciences. However, Rosenberg has a Master degree, whereas Raymond has had no graduate level training. Rosenberg had greater seniority than Raymond but had never taught *Exploring the Social Sciences*. Raymond had taught the course multiple times and had performed capably. Although it is a close question, we ultimately conclude that it was reasonable for the Employer to conclude that Raymond's experience in teaching the course outweighed Rosenberg's seniority and edge in academic qualifications.

In sum, the Employer did not violate Article XVIII of the Contract in making teaching assignments for the *Exploring the Social Sciences* course. The Employer also

did not act in an arbitrary or capricious manner in making the assignments in violation of Article III of the Contract.

Finally, we examine Grievants' allegation that the Employer violated the Contract by not assigning Rosenberg to teach any other courses in the Psychology and Education Departments. In addition to listing specific courses that she was interested in teaching on the teaching availability form, Rosenberg also stated on the form that she was interested in teaching "any other Psychology course" and "any Education course". The Employer contends that the only courses that should be considered in this case are the specifically identified courses from the availability form. Grievants contend that this position by the Employer is inconsistent with the Employer's practice of providing teaching assignments to some part-time faculty even though they did not list specific courses on their availability form.

It is true that the Employer in the past has assigned several part-time faculty members at Lyndon, including Psychology Department members, to teach courses that they did not list when they submitted availability forms. However, such a practice does not result in a conclusion that a part-time faculty member can legitimately claim a violation of a contract, based upon a general statement on the availability form that they can teach any courses in certain departments, when they are not offered courses in these departments.

Article XVIII, Section B.1.b, states that the faculty member should provide on the teaching availability form an "indication of courses which the part-time faculty is interested in teaching". Article XVIII, Section F, provides as one of the bases for the Employer to consider in making course assignments "the stated preferences of the part-

time faculty indicated on the teaching availability form”. The evident intent of these provisions is that the faculty member needs to indicate specific courses he or she is interested in teaching so that the department chair can make a reasonable judgment whether a part-time faculty member is suitable for an available course for which he or she has indicated a specific interest. In the absence of such specificity, it places a heavy and unreasonable burden on the department chairperson to sort out the person’s qualifications against all available courses in the department. If a faculty member has not indicated specific preferences, then he or she cannot reasonably lay claim to a course or courses.

The fact that there are occasions where the Employer assigns courses to part-time faculty, even though they have not indicated preferences for the courses on the availability form, does not defeat this conclusion. Such assignments have been made in cases where a faculty member and department chair met to discuss assignments, and as a result an assignment was made to teach a course that was not previously requested by the faculty member. Also, if a department holds a scheduling meeting which part-time faculty members attend, discussion may lead to assignment to a course or courses that were not listed on the availability form. Both of these options are provided for in Article XVIII, Section B.8, of the Contract.

The Employer has not forfeited its right to assign a course to someone because that person did not list the course on the availability form. This right is established by the language of Article XVIII when considered in its entirety, as well as the management rights provisions of Article III granting the Employer the right to assign employees. This right of the Employer cannot reasonably be construed to somehow create an entitlement

of a faculty member to a course that they did not specifically indicate an interest in teaching.

Thus, we conclude that the Employer violated the Contract by not assigning Rosenberg to teach one section of the two-credit *Introduction to Academic Community* course during the Fall 2006 semester, and the grievance is denied in all other respects. In determining a remedy for this violation, we are seeking to make Rosenberg “whole”. To make an employee whole is to place the employee in the position he or she would have been in if the Contract had not been violated. Grievance of Lowell, 15 VLRB 291, 339-40 (1992). Grievance of Sherbrook, 13 VLRB 359, 361 (1990).

Grievants request as a remedy that Rosenberg be awarded salary for the teaching assignment at her applicable salary rate, accrued seniority as if she had taught the course, and benefits that she was entitled to under the Contract as if she had taught the course. This is a reasonable remedy to make Rosenberg whole for the violation of the Contract.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of June Rosenberg and the Vermont State Colleges Faculty Federation is sustained to the extent that the Vermont State Colleges violated the Contract by not assigning Rosenberg to teach one section of the two-credit *Introduction to Academic Community* course during the Fall 2006 semester, and the grievance is denied in all other respects;

2. The Vermont State Colleges shall pay Rosenberg the salary she would have received for teaching the *Introduction to Academic Community* course during the Fall 2006 semester, plus interest at the legal rate of 12 percent per annum, which interest shall run from the date Rosenberg would have received payment for the course and ending on the date that she receives such payment;
3. Rosenberg shall accrue seniority as if she had taught the *Introduction to Academic Community* course during the Fall 2006 semester; and
4. Rosenberg shall be granted benefits that she was entitled to under the Contract as if she had taught the course.

Dated this 19th day of July, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

Richard W. Park

James J. Dunn