

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
UNITED ACADEMICS, AAUP/AFT)	DOCKET NO. 06-27
AND ANTONIO CAMPO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 3, 2006, the United Academics, AAUP/AFT and Antonio Campo (“Grievants”) filed a grievance alleging that the University of Vermont (“University”) violated the collective bargaining contract between the University and United Academics, AAUP/AFT covering full-time faculty by not providing information to Grievants. Specifically, Grievants contend that the University violated Article 9, Section 1, of the contract by denying the request of United Academics for access to the tenure files of other faculty members in connection with a pending grievance concerning denial of tenure to Grievant Campo.

On November 13, 2006, the parties filed a Stipulated Statement of Facts and requested a decision by the Labor Relations Board based on these facts without an evidentiary hearing. The Board granted the parties’ request, and provided the parties with an opportunity to file briefs and reply briefs. The parties filed briefs on November 28, 2006. The parties also filed on November 28 a stipulation to an additional fact. The parties filed reply briefs on December 5, 2006. The following findings of fact consist of the Stipulated Statement of Facts filed by the parties on November 13, 2006, and the additional fact stipulated to on November 28, 2006

FINDINGS OF FACT

1. United Academics, AAUP/AFT, is the exclusive representative of all full-time faculty employed by the University of Vermont. The collective bargaining contract between the University of Vermont and United Academics is effective from December 22, 2005, to June 30, 2008 (“Contract”).

2. The Contract (with “RPT” meaning “Reappointment, Promotion and Tenure”) provides in pertinent part:

...

ARTICLE IX RIGHT TO INFORMATION

1. Upon receipt of a written request from the Union, the University shall make available any information not exempted by law that is necessary for the Union to meet its collective bargaining responsibilities or to administer this Agreement. Such information shall be made available within fourteen (14) calendar days of the Union’s request; if such information is not readily available within said fourteen (14) days, unless otherwise agreeable to the parties, the University shall so notify the Union and shall make the requested information available as soon as reasonably possible. Said information may include, but not be limited to, salary history by college, department rank, sex, type of appointment (e.g. research, clinical, library), length of contract (fiscal year, academic year or other), and employment history including promotions, benefit participation and workload information.

...

ARTICLE XVII PERSONNEL FILES

1. The University will maintain three official files relative to each unit member: a Payroll/Human Resources file, an Academic Record file and, where relevant, a medical documentation file. This provision shall not preclude the existence of duplicative or unofficial files, but such files shall not be considered the official record of the faculty member.
- ...
3. The Academic Record file will be maintained in the dean’s or equivalent administrator’s office. The contents of this file shall be determined by the dean or equivalent administrator, but minimally

will contain copies of curriculum vitae, correspondence with the faculty member, record of disciplinary actions, letters of commendation or complaint, documentation of workload expectations, peer evaluations and observations, student evaluations, RPT documentation and other documents relevant to the faculty member's professional and performance record while employed as a faculty member at the University. At the dean's discretion, student evaluations may be maintained at the department level in lieu of the dean's office. Once an RPT file has been reviewed at all evaluative levels and a final decision on the RPT matter has been made, the RPT file will become part of the faculty member's permanent academic record file.

...

6. In addition to the faculty member, only University administrators and staff members and other individuals authorized by administrators to do so for institutional purposes may access the official files of a faculty member. Except for those occasions where faculty members are carrying out their formal evaluative functions, faculty members may not review the files of other faculty members. On those occasions when faculty are carrying out formal evaluative functions, such faculty will only have access to the RPT file under review and not the entire academic record file of the candidate. When practicable, information shall be provided in computer file format.
7. A representative of the Union may have access to a faculty member's file, provided written authorization has been granted by the faculty member to the custodian of the file.

...

3. The previous contract, effective from February 6, 2003, to June 30, 2005, contained corresponding terms that did not materially differ in language.

4. On May 16, 2006, United Academics made a formal document request pursuant to Article 9, Section 1, for the materials related to the tenure applications of three named faculty members from the Department of Mechanical Engineering. The union sought the materials in connection with its presentation of a grievance on behalf of Professor Antonio Campo, also of the Department of Mechanical Engineering, whose application for tenure had recently been denied.

5. The University did not receive written authorization from any of those three faculty members for the release of the requested materials.
6. On May 17, 2007, the University Contract Administrator rejected this request.
7. United Academics filed a grievance at Step 3 on May 25, 2006. The University denied the grievance on June 9, 2006.
8. On July 3, 2006, United Academics filed this grievance with the Vermont Labor Relations Board grieving the University's decision to deny access to the tenure files of three third-party professors in the absence of a signed release from the professors.
9. In the grievance case of Lori Kutner in May of 2005, United Academics made a request for the curricula vitae of all officers of the library who had applied and been considered for promotion to the rank of Library Associate Professor since the 2002-2003 academic year. The University made that information available without releases despite the fact that the curricula vitae were contained within personnel files of other professors.
10. After initiating the present grievance, United Academics asked for the curricula vitae of two of the three professors (the two who were still at the University) who had been awarded tenure in Professor Campo's department, and the University provided the curricula vitae for those two professors.

OPINION

The issue before the Board is whether the University violated Article IX, Section 1, of the Contract by denying the request of United Academics for access to materials

related to the tenure applications of three named faculty members from the Department of Mechanical Engineering in connection with a pending grievance concerning denial of tenure to Grievant Campo, also of the Department of Mechanical Engineering. Article IX, Section 1, provides in pertinent part: “Upon receipt of a written request from the Union, the University shall make available any information not exempted by law that is necessary for the Union to . . . administer this Agreement.”

In interpreting a similar provision of a contract between the State of Vermont and the Vermont State Employees’ Association, which provided that “(t)he State will . . . provide such . . . information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law”, the Board held that VSEA had the right to request and acquire information reasonably necessary to represent its members in grievance proceedings. Grievance of VSEA, 15 VLRB 13, 22 (1992). Grievance of VSEA, West and Cray, 18 VLRB 461, 484-486 (1995). Here, too, the parties have agreed through negotiating Article IX, Section 1, that United Academics has the right to request and acquire information necessary to represent bargaining unit members in grievance proceedings.

Nonetheless, the University contends that the provisions of Article XVII, Section 7, of the Contract specifically prohibits access of United Academics to the information it seeks unless the union has written authorization from the faculty members whose files the union is seeking to access. Section 7 provides: “A representative of the Union may have access to a faculty member’s file, provided written authorization has been granted by the faculty member to the custodian of the file.” The University has provided United Academics with the curricula vitae of the involved faculty members without the faculty

members' authorization, but declines to provide the tenure files of these faculty members to the Union without authorization. Grievants contend that there must be a clear and unmistakable waiver of the right of United Academics to the information requested for the processing of a grievance, and that Article 1XVII, Section 7, does not constitute such a waiver.

Thus, we must reconcile Article IX, Section 1, and Article XVII, Section 7, to decide this grievance. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980). In construing a contract, the Board may look at the "situation and motive of the parties," and the result "contemplated by the parties when they executed the . . . agreement." In re Gorruso, 150 Vt. 139, at 143, 145 (1988). Grievance of Cole and Cross, 28 VLRB 345, 371-372 (2006).

Article IX, Section 1, involves a right central to the obligation of the bargaining unit representative to represent its members – the presenting and processing of employee grievances. When an employer contends that a union has contractually waived its right to obtain access to personnel files that are relevant to a grievance, the employer bears the weighty burden of establishing that a "clear and unmistakable" waiver has occurred. N.L.R.B. v. New York Telephone Co., 930 F.2d 1009, 1011 (2nd Cir. 1991). A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement; or it may even be implied from the structure of the agreement and the parties' course of conduct. Id. No waiver will be implied, however, unless it is clear that the

parties were aware of their rights and made the conscious choice to waive them. Id. A waiver will not be thrust upon an unwitting party. Id.

When a provision in a collective bargaining agreement conditions union access to employee personnel files on obtaining consent from employees, that provision must be read in the context of the entire agreement to determine whether the parties clearly intended to restrict union access to information relevant to grievances. Id. at 1012. “With so basic a right as access to personnel records for the purpose of processing employee grievances hanging in the balance, an ambiguous expression of intent cannot suffice to carry the employer’s weighty burden”. Id.

In applying these standards here, we conclude that the parties have not clearly intended through negotiating Article XVII, Section 7, to restrict United Academics access to faculty academic record files that are relevant in processing grievances. Article XVII, Section 7, possibly can be construed as the University asserts to prohibit union access to the information it seeks unless the union has written authorization from the faculty members whose files the union is seeking to access. However, it also reasonably can be construed to provide for general union access to a faculty member’s academic record file with the involved employee’s consent without consideration of specific union access to such materials, absent the involved employee’s consent, when the union is performing its representative role in pursuing employee grievances.

This “ambiguous expression of intent” by the parties without other evidence cannot be found to be a clear and unmistakable waiver of the important right of United Academics of access to faculty academic record files that are relevant to the processing of grievances. The parties could have fashioned contract language that would have clearly

demonstrated the parties' intent to condition the operation of Article IX, Section 1, upon compliance with the consent provision of Article XVII, Section 7. Article IX, Section 1, could have started: "Except as provided in Article XVII, Section 7 . . ." Alternatively, Article XVII, Section 7 could have started: "Notwithstanding Article IX, Section 1, a representative of the Union may have access to a faculty member's file only if written authorization has been granted by the faculty member . . ."

The absence of any such clear language, taken together with the lack of pertinent bargaining history and past practice on point, leads us to conclude that Article XVII, Section 7, does not override the right of United Academics of access to faculty academic record files that are relevant to the processing of grievances. There has been no waiver by United Academics of its right to access to such files in carrying out its obligation to present and process employee grievances.

In so concluding, however, we also must respect the general confidentiality of faculty members' academic record files recognized in Article XVII, Section 7. United Academics is entitled to access to such files in processing grievances only to the extent necessary to process the involved grievance. Grievants have a separate grievance pending before this Board in which they allege that the University, in denying tenure to Grievant Campo, committed procedural violations in the review process that materially and adversely affected the outcome of the case, and made an arbitrary and capricious decision, in violation of the Contract.

In the grievance now before us, Grievants are requesting materials in the academic records files of other faculty members in Campo's department that relate to the tenure applications of the faculty members. Access to such information is potentially

relevant to the issues of whether the University committed procedural violations, and made an arbitrary and capricious decision, in denying Grievant Campo's tenure application. Thus, United Academics is entitled to access to such information.

In providing such access, though, we must balance the right to the information with faculty members' confidentiality rights. A union's assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979). The type of disclosure that will satisfy the duty to supply information turns upon the circumstances of the particular case. Id. at 314-315. The type of disclosure needs to take into consideration legitimate concerns for employee confidentiality. Id. at 315-320.

In previous cases, the Board has balanced confidentiality concerns with rights of employees and unions to information necessary to seek to establish allegations of contract violations. In Grievance of VSEA, supra, concerns regarding the confidentiality of employee disciplinary records was accommodated through redaction of the names of the involved employees. 15 VLRB at 22.

In another case involving the dismissal of a state police officer, the Board struggled with the question of how to respect the provisions of 20 V.S.A. §1923(d), providing for the confidentiality of internal affairs records, without negating the officer's right to establish her allegations that she received discriminatory and inconsistent treatment in being dismissed in violation of the collective bargaining agreement. Appeal of Danforth, 23 VLRB 51, 23 VLRB 288. The Board concluded this could be done by requiring that the employer provide the officer with certain summaries of internal affairs records concerning allegations of misconduct against other state police officers. 23

VLRB at 55-57. The Board required that summaries be prepared so that the identities of the involved state police officers is not revealed, and indicated a willingness to issue protective orders as necessary to ensure that the identities of the involved officer is not revealed. Id. The Supreme Court affirmed this ruling. 174 Vt. 231, 240-43 (2002).

Given the circumstances of this case, summaries of materials in the academic records files of the faculty members relating to their tenure applications are neither practical to produce nor sufficient to allow Grievants to seek to determine whether Grievant Campo's tenure application was handled dissimilarly to other faculty members. However, we can craft a remedy that will appropriately balance confidentiality concerns and the right of United Academics to access to information.

The University can provide United Academics with the opportunity to review, at the University, the materials in the academic records files of the faculty members relating to their tenure applications without the opportunity for United Academics to reproduce or copy the materials. In the event Grievants desire to use any materials in the files to seek to establish their allegations in the grievance concerning Grievant Campo's tenure denial, the University can reproduce the materials and provide them to United Academics after redacting the name(s) of the involved faculty member(s). Alternatively, the parties may agree to other methods to provide the pertinent information while protecting the anonymity of the involved faculty member(s). Grievants can use the materials solely for the purpose of processing the grievance, and not for any other purpose. In using such materials, Grievants shall at no time disclose the identity of the involved faculty member(s). The Board will be prepared to issue protective orders as necessary to ensure that the identity of involved faculty member(s) is not revealed.

ORDER

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

1. The Grievance of United Academics, AAUP/AFT and Antonio Campo is sustained;
2. The University shall provide United Academics with the opportunity within fourteen calendar days of this order to review, at the University, the materials in the academic records files of the three faculty members of the Department of Mechanical Engineering relating to their tenure applications without United Academics having the opportunity to reproduce or copy the materials;
3. In the event Grievants desire to use any materials in the files to seek to establish their allegations in the grievance concerning Grievant Campo's tenure denial, the University, absent agreement by the parties on some alternative method, shall reproduce the materials and provide them to United Academics after redacting the name(s) of the involved faculty member(s);
4. Grievants are entitled to use the materials solely for the purpose of processing the grievance concerning Grievant Campo's tenure denial, and not for any other purpose. In using such materials, Grievants shall at no time disclose the identity of the involved faculty member(s); and
5. The Labor Relations Board will be prepared to issue protective orders as necessary to ensure that the identity of involved faculty member(s) is not revealed.

Dated this 9th day of February, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

John J. Zampieri

Joan B. Wilson