

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	
JUNE ROSENBERG AND THE)	DOCKET NO. 08-35
VERMONT STATE COLLEGES)	DOCKET NO. 08-36
FACULTY FEDERATION, UPV/AFT)	DOCKET NO. 08-37
LOCAL 3180, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The above-captioned three grievances have been consolidated for hearing and decision. On August 26, 2008, the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180, AFL-CIO (“Federation”) filed a grievance, Docket No. 08-35, on behalf of itself and June Rosenberg, a part-time faculty member at Lyndon State College.

Grievants 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, 2006-August 31, 2010 (“Contract”), by not assigning any courses to Rosenberg for the spring 2008 semester. Grievants contended that the Employer discriminated against Rosenberg due to her age and union activities, acted in a manner that was arbitrary and capricious, and violated the procedures for assigning courses to part-time faculty.

The Federation filed a second grievance, Docket No. 08-36, on August 26, 2008, on behalf of itself and Rosenberg. Grievants alleged that the Employer violated Articles III, VII and XVIII of the Contract in not assigning any courses to Rosenberg for the summer 2008 semester. Grievants contended that the Employer discriminated against Rosenberg due to her age and union activities, acted in a manner that was arbitrary and capricious, and violated the procedures for assigning courses to part-time faculty.

The Federation filed a third grievance, Docket No. 08-37, on August 26, 2008, on behalf of itself and Rosenberg. Grievants alleged that the Employer violated Articles III, VII and XVIII of the Contract in not assigning any courses to Rosenberg for the fall 2008 semester. Grievants contended that the Employer discriminated against Rosenberg due to her age and 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 the three grievances on January 29, 2009, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Richard Park and James Kiehle. Russell Mills, Federation Grievance Chairperson, represented Grievants. Attorney Nicholas DiGiovanni, Jr., represented the Employer. The Federation and the Employer filed post-hearing briefs on February 19 and 20, 2009, 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:

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 VII
ANTI-DISCRIMINATION

The parties shall not discriminate against any faculty member or against any applicant for employment in positions in the faculty by reason of age, race, creed, marital status, color, sex, religion, national origin, citizenship, union activity, political activity, sexual orientation, or membership or non-membership in the Federation.

...

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 November 15 for the summer session appointments and assignments, . . . by January 15 for the fall semester appointments and assignments, and . . . by August 15 for the spring 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 full-time or part-

time professional staff members, supervisory or managerial employees prior to offering courses to part-time faculty.

F. After deciding upon any assignments under Section E, the College shall consider the following factors in deciding whether a part-time faculty member will receive an available assignment.

Where the following factors are deemed to be equal, seniority, as defined in subsection (G) below, will prevail in available assignments for a minimum of six credits per semester (nine credits for those in the highest pay grade). These factors are: (1) the credentials and qualifications (including sub-specialties and areas of particular expertise) of both current unit members and other available faculty members from within and outside the College; (2) the teaching experience of both current and other available faculty members from within and outside the College; (3) evaluations and work performance of unit faculty members; (4) the stated availability of unit faculty members. These decisions shall not be made arbitrarily and capriciously.

...

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 within each academic department, any part-time faculty may grieve factual errors in the list and such matters are arbitrable.

...

APPENDIX A MINIMUM DEGREE REQUIREMENTS

A. Except for those faculty who were bargaining unit members prior to September 1, 2006, minimum degree requirements for part-time faculty members shall be a Masters degree or equivalent experience in the appropriate field of study.

...

(Joint Exhibit 1)

3. Article XVIII, Sections E – H, of the collective bargaining contract between the Federation and the Colleges for the part-time faculty effective 2000-2006 contained different provisions than the comparable sections of Article XVIII in the 2006-2010 Contract. The sections of the 2000-2006 contract provided:

- 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 3)

4. June Rosenberg began as a part-time faculty member at Lyndon State College in 1993. She has taught courses in the Psychology Department with the exception of a semester in 2000 when she taught in the Education Department. She has taught 140 total credits. She has not taught since the fall 2005 semester. She has more seniority than most other part-time faculty members (Colleges Exhibit 40, Federation Exhibit 1).

5. Rosenberg received a Bachelor of Arts degree in Speech from St. John’s University in 1967, and a Master of Arts degree in Communication with a specialty in Speech Pathology from Queens College in 1973. As of the summer of 2007, when the Employer was considering course assignments for the spring 2008 semester, Rosenberg had completed all requirements for a doctorate degree in Educational Leadership from

Argosy University degree except for her dissertation. Rosenberg ultimately received the doctorate degree in November 2008. Among her experiences are: speech/language pathologist at Staten Island Development Center in New York from 1968 to 1972, teacher of deaf/hard of hearing from 1972 to 1975 at the Staten Island Development Center, Director of Speech/Hearing Clinic at the Staten Island Development Center from 1976 to 1977, Director of Speech and Hearing Handicapped Programs at BOCES Southern in New York from 1981 to 1982, and Evaluator/Consultant in Speech Pathology and Learning Disabilities from 1983-1984. She has a professional endorsement as an Educational Speech Pathologist in Vermont (Federation Exhibit 1).

6. 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 on multiple occasions. Rosenberg has not been assigned any courses to teach since the fall 2005 semester (Colleges Exhibit 40).

7. 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 40).

8. 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 40).

9. 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 40).

10. 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.

11. 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.

12. Rosenberg filed a grievance concerning her lack of teaching assignments for the fall 2006 semester. In a decision dated July 19, 2007, the Labor Relations Board sustained the grievance to the extent it concluded that the Employer violated Article XVIII, Section F, of the Contract by not assigning Rosenberg to teach one section of the two-credit *Introduction to Academic Community* course during the Fall 2006 semester. The Board denied the grievance in all other respects. 29 VLRB 169.

13. Rosenberg filed a grievance concerning her lack of teaching assignments for the spring 2007 semester. In a December 31, 2007, decision, 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 317.

14. Rosenberg filed three grievances concerning her lack of teaching assignments for the summer 2007 and fall 2007 semesters. In a decision issued July 9, 2008, the Labor Relations Board determined that the Vermont State Colleges did not violate the provisions of the Contracts by not assigning Rosenberg any courses. The Board concluded that the Colleges did not violate the procedures for assigning courses to part-time faculty, and did not discriminate against Rosenberg due to her grievance activities. The Board also concluded that the Colleges did not violate the collective bargaining agreement by granting her less faculty development funds than she had requested. 30 VLRB 63.

15. Donna Dalton has served as the Dean of Academic and Student Affairs at Lyndon since November 2004. Dean Dalton has responsibility for final decisions on course assignments for full-time faculty, part-time faculty and administrators.

16. Among the duties of a department chairperson at Lyndon is the preparation of course offerings, schedules and assignments each semester. The chairperson recommends assignments and offerings to Dean Dalton.

17. Each semester, part-time faculty members submit a completed teaching availability form in which they indicate the courses they are interested in teaching and when they are available to teach.

Spring 2008 Semester

18. On or about August 14, 2007, Rosenberg submitted a completed Teaching Availability form for the spring 2008 semester. One course that she listed on her form was EDU 3350, *Reading and the Language Arts*. Theresa Young, a part-time faculty member with less seniority than Rosenberg, was assigned to teach the course under a different title, *Teaching Language Arts and Writing*. The course is designed to introduce the student to the writing skills, strategies and instructional practices necessary to be an effective teacher in elementary schools (Federation Exhibits 2 and 3, Colleges Exhibits 3 and 4).

19. Rosenberg had never taught this course at Lyndon. She had taught similar courses when she was a part-time faculty member at Johnson State College from 1988 to 1990. Rosenberg had not taken courses or otherwise stayed abreast of developments in techniques, theories and strategies on teaching children to write.

20. Young has a Masters of Education Degree in Special Education from the University of Vermont, with a concentration in Consulting Teaching/Learning Specialist. She had 15 years of teaching experience, and had implemented a standards-based writing curriculum using the writing process in the teaching. She had participated in “Grades 3 and Beyond Literacy Facilitator’s Training” (Colleges Exhibit 27).

21. Young previously had taught the *Teaching Language Arts and Writing* course through the Northeast Kingdom School Development Center. The Center is a collaboration between Lyndon State College and the supervisory unions of the Northeast Kingdom with the purpose of providing professional development for the teachers of the supervisory unions. Linda Metzge, Education Department Chair at Lyndon and Co-Director of the Center, had reviewed Young’s syllabus. Metzge also had observed Young teaching the course, and concluded that she performed well as a teacher.

22. Metzke reviewed Rosenberg's teaching availability form and her *curriculum vitae*. Metzke determined that Young had superior qualifications to Rosenberg to teach the *Teaching Language Arts and Writing* course due to her qualifications and experience and because her preparation for teaching the course was much more current than Rosenberg. Metzke recommended to Dean Dalton that Young be assigned to teach the *Teaching Language Arts and Writing* course.

Summer 2008 Session

23. Rosenberg submitted a completed teaching availability form for the summer 2008 session. None of the courses for which she claimed entitlement to teach, and which were taught by part-time faculty, were offered that summer (Federation Exhibits 4 and 5, Colleges Exhibits 9 and 10).

24. One course for which Rosenberg had expressed an interest was ENG 0030, *Basic Reading and Writing*. This course was to begin on June 16 and it was scheduled to be taught by William Biddle. However, it was canceled on June 16 due to insufficient enrollment. There is no evidence whether Biddle received a cancellation fee.

25. ENG 0030 is one of three basic reading and writing courses offered by Lyndon. ENG 1051, *Introduction to Writing*, is a course offered during the fall semester. It centers on basic writing skills, paragraph development and structure, and grammar. It is a prerequisite for ENG 1052. ENG 1052, *Exposition and Analysis*, is a writing course which provides an opportunity for study and practice in the principles of rhetoric, evidence, analysis, exposition and argument as the basis of college-level writing. Lyndon students are required to successfully complete ENG 1051 and ENG 1052 to graduate. ENG 0030 is a basic reading and writing course offered to first year students who need remedial help before they are ready to take ENG 1051.

26. Andrea Luna, a full-time faculty member at Lyndon and the Coordinator of College Composition, was responsible for recommending to Dean Dalton instructors for ENG 0030, ENG 1051 and ENG 1052. Luna recommended that William Biddle, rather than Rosenberg, be assigned to teach ENG 0030 during the summer 2008 session. Dean Dalton assigned Biddle to teach the course.

27. Biddle has a Bachelors degree in English and French from Amherst College and a Masters degree in English Literature from Boston University. He had taught English as a Second Language at St. Johnsbury Academy for the past 16 years. He was Dean of the Faculty and taught English as a Second Language at the White Mountain School from 1989 to 1992. He was Associate Director of Programs of English as a Second Language at Harvard University for ten years. He also has served as an independent consultant on English as a Second Language program assessment. He is a writer of detective fiction, poetry and journalism (Colleges Exhibit 32).

28. Biddle had previously taught ENG 0030, ENG 1051 and ENG 1052 at Lyndon. He had taught ENG 0030 between five and seven times. Rosenberg does not have a degree in English or a related subject. She has never taught ENG 0030, ENG 1051 or ENG 1052.

Fall 2008 Session

29. Lyndon Registrar Deb Hale sent a memorandum to department chairpersons on December 3, 2007, that outlined information, guidelines and timelines for scheduling courses for the summer and fall of 2008. The timeline for the fall 2008 schedule called for a first draft of proposed courses to be submitted by the department chairpersons to Hale by February 1. The “final revisions” from the chairpersons were due to be submitted to Hale by March 3, 2008. The “final schedules” were to be available for printing by March 17, 2008 (Federation Exhibit 12).

30. The College did not initially send Rosenberg an availability form for the fall 2008 semester. The Federation filed a grievance with Lyndon President Carol Moore on February 18, 2008, concerning Rosenberg not receiving a form (Federation Exhibit 6, Colleges Exhibit 11).

31. On March 11, 2008, President Moore sent Federation Grievance Chair Russell Mills a response to the grievance which provided:

With regard to the Step 1 Grievance of June Rosenberg . . . I do not believe there was any violation of the contract; however, we will forward her an availability form for the fall 2008 semester and extend the date her response would be due until two weeks from the date of this memorandum. Ms. Rosenberg will then be considered along with others for part-time teaching assignments for the fall 2008 semester. . .
(Federation Exhibit 9, Colleges Exhibit 12)

32. Dean Dalton's assistant immediately sent Rosenberg a teaching availability form. Rosenberg returned the completed form on March 18, 2008 (Federation Exhibit 10, Colleges Exhibit 17).

33. The timing of Rosenberg returning the availability form meant that she was not considered for courses prior to the planned printing of course schedules by March 17, 2008. The College did print a schedule on March 17, 2008 (Federation Exhibit 11).

34. It is typical for there to be changes to the course schedule between the March printed schedule and the beginning of classes for the fall semester. There were several changes made to the schedule printed in March 2008 by the beginning of the fall 2008 semester. For example, based on the March schedule, there were two sections of ENG 0030 scheduled to be offered, both to be taught by Sheila Post. In the end, Kelly Post taught a section in addition to the two sections taught by Sheila Post. Another example is that the March schedule indicated that ENG 1051 was going to be taught by Daniel Swainbank (2 sections), Erin Narey (3 sections), Karen Haskins (3 sections), and

William Biddle (3 sections). During the semester, Mitchell did not teach a section, and Thabit and Swainbank taught three sections rather than two. Also, Denise Brown, Jack Pulaski, Miriam Benson and Elizabeth Williams – who were not listed on the March schedule – all taught one or two sections (Federation Exhibit 11, Colleges Exhibit 18).

35. The evidence does not indicate a particular situation at Lyndon where a course has been taken away from a part-time faculty member and reassigned to another part-time faculty member. There have been situations where a part-time faculty member withdrew from an assignment and it was given to another part-time faculty member.

36. Shortly after Rosenberg returned the teaching availability form, Dean Dalton held a regular meeting with department chairs. At the conclusion of the meeting, she called aside the chairpersons of departments that had courses in which Rosenberg had indicated an interest. This included Linda Metzge, Education Department Chair, and Rhonda Korol, Psychology Department Chair. Dean Dalton gave these chairpersons a copy of the availability form submitted by Rosenberg and instructed them to consider Rosenberg for all of the courses being offered in their departments. Dean Dalton told them that if they deemed Rosenberg the most qualified for any courses, in accordance with the criteria in the Contract, they should recommend her for such courses. Dean Dalton also sent Andrea Luna the availability form with the same instructions.

37. All the chairpersons of departments in which Rosenberg had expressed an interest in teaching considered her for the courses she listed on the teaching availability form even though they had tentatively recommended instructors for the courses. They reviewed her resume and the courses which she expressed an interest in teaching for the fall 2008 semester. They did not recommend Rosenberg for any of the courses (Federation Exhibits 7 and 8).

38. Rosenberg expressed an interest in teaching PSY 1010, *Introduction to Psychology*, during the fall 2008 semester. Rosenberg had taught PSY 1010 on five occasions, most recently in 2005 (Colleges Exhibit 40).

39. The course ultimately was assigned to Jon Fitch. Fitch had been a full-time faculty member in the Psychology Department at Lyndon for more than 20 years before retirement. He continued teaching at Lyndon as a part-time faculty member. He had less seniority than Rosenberg as a part-time faculty member. Fitch has a Ph.D in Psychology. He had taught PSY 1010 at least a dozen times, most recently in 2005. He indicated an interest in teaching the course on his completed teaching availability form.

40. Psychology Department Chair Rhonda Korol viewed Fitch as superior to Rosenberg to teach the course based on superior academic qualifications, the multiple times he had taught the course, his professional background and his knowledge of the department. Korol recommended that Fitch be assigned the course. Dean Dalton concurred with this recommendation.

41. Rosenberg expressed an interest in teaching the following three English Department courses during the fall 2008 semester which were taught in whole or in part by part-time faculty members: 1) ENG 0030, *Basic Reading and Writing*; 2) ENG 1051, *Introduction to Writing*; and 3) ENG 1052, *Exposition and Analysis*. Andrea Luna recommended part-time faculty other than Rosenberg to teach these courses. Dean Dalton concurred in her recommendations. The part-time faculty selected had less seniority than Rosenberg.

42. Part-time faculty members Sheila Post and Kelly Colby were assigned to teach ENG 0030 for the fall 2008 semester. Post holds a Ph.D in American Literature, Rhetorical & Critical Theory from the University of Chicago. She taught writing at the University of Massachusetts for many years and at Green Mountain College in 2003. She

taught basic writing and college writing courses at Rutgers University in 1992 and 1993. She was a writer's coach at the Writer's Retreat in Stanstead, Quebec. She is a published author with a book and several articles to her credit. She previously had taught ENG 0030 at Lyndon (Colleges Exhibit 30).

43. Kelly Colby received a Bachelors degree in English Literature and Cultural Studies from Lyndon in 2006, graduating *summa cum laude*. He is a licensed high school English teacher. Colby was one of Luna's students. Colby was a Literacy Lab teacher at St. Johnsbury School from December 2007 to June 2008, and worked with the Alternative Education Teacher Connections Program at St. Johnsbury School from September 2006 to December 2007. As a Literacy Lab teacher, Colby worked with a professional development team to design and implement a Vermont standards-based curriculum for students identified as needing additional language arts support, specifically in the area of reading comprehension. Colby had not previously taught ENG 0030 (Colleges Exhibit 33).

44. Rosenberg does not have any degrees in English or related disciplines. She had not previously taught ENG 0030. Rosenberg taught a course in reading disabilities at Johnson State College in the late 1980's. She taught assessment of prior learning courses at Community College of Vermont which included students writing portfolios on their prior experiences. She has written newsletters in connection with her service as a school board member. She has written grant applications, and has taught a course in grant writing. Rosenberg has instructed students on writing in correcting their papers. She completed a 160 page dissertation in furtherance of obtaining a doctoral degree.

45. Luna viewed Post as a superior candidate to Rosenberg to teach ENG 0030 due to her advanced degree pertinent to teaching writing and her extensive experience teaching writing courses, including previously teaching ENG 0030. Luna

viewed Colby's degree in English literature, his academic honors, his teaching experience and his work in the field of writing as making him a superior candidate to Rosenberg for teaching ENG 0030.

46. Part-time faculty members William Biddle, Daniel Swainbank, Karen Haskins, Erin Narey and Miriam Benson were assigned to teach ENG 1051, *Introduction to Writing*, for the fall 2008 semester. They had less seniority as part-time faculty members than Rosenberg. Rosenberg had never taught ENG 1051. Luna viewed Biddle, Swainbank, Haskins, Narey and Benson as having superior qualifications to Rosenberg to teach the course. Biddle's qualifications have been discussed above in reference to ENG 1030. He had previously taught ENG 1051 at Lyndon.

47. Swainbank held a Masters degree in Teaching (English) and had taken additional graduate work in journalism. He had taught English at Lebanon High School for 28 years. Swainbank had recently taught ENG 1051 at Lyndon on two occasions (Colleges Exhibit 31).

48. Haskins held a Bachelors degree in French and Writing, and a Masters degree in English plus 12 graduate credits in Reading/Education. She was an Instructor of English and Remedial Studies at St. Bonaventure University for several years. She was a free-lance writer and tutor in English and other subjects. Haskins had taught ENG 1051 at Lyndon many times (Colleges Exhibit 34).

49. Narey received a Masters of Fine Arts in Writing degree in 2005 from Vermont College. She had been a lecturer at Vermont College in 2005, was a published author of stories, had received writing awards, and founded an online writing workshop. She taught two sections of ENG 1051 in the fall of 2007 and sections of the course in the spring of 2008 (Colleges Exhibit 35).

50. Benson held a Bachelors degree from Brown University and had a Masters degree in Curriculum and Instruction based on courses taken at Johnson State College and the University of Vermont. She had attended numerous literacy workshops. She had conducted workshops for faculty at Derby Elementary School focusing on reading comprehension, assessment, vocabulary instruction and reading fluency. Benson was an elementary school teacher for nearly 20 years, and was the Reading Coordinator at Derby Elementary School for eight years. Benson had taught ENG 1051 twice previously (Colleges Exhibit 38).

51. Part-time faculty members Alia Thabit, Elizabeth Williams, Denise Brown and Jack Pulaski were assigned to teach ENG 1052, *Exposition and Analysis*, for the fall 2008 semester. They had less seniority as part-time faculty members than Rosenberg. Rosenberg had not taught ENG 1052 previously. Luna viewed Thabit, Williams, Brown and Pulaski as having superior qualifications to Rosenberg to teach the course.

52. Thabit had a Bachelors degree in English/Writing from Lyndon State College where she graduated in the top five percent of her class. She was a published writer, and had received awards for writing over her career. She had taught at Community College of Vermont in 1995, and was a Writing Lab tutor at Lyndon from 1991 to 1993. Thabit had regularly taught ENG 1052 for over a decade (Colleges Exhibit 37).

53. Williams held a Bachelors degree in English and a Masters degree in English from Oakland University. She had served as an adjunct instructor at White Mountain Community College beginning in January 2008. She was a Coordinator of Academic Services at Community College of Vermont from 2001 to 2007. She also was an adjunct professor there for ten years from 1997 to 2007, teaching many reading and writing courses. She was a special lecturer in Rhetoric at Oakland University for several years in the 1990's. Williams had not previously taught ENG 1052 at Lyndon. She taught

courses at the Community College of Vermont over many years which were similar to ENG 1052 (Colleges Exhibit 26).

54. Brown had a Bachelors degree in English, and a Masters degree in English Literature, from the University of Delaware. She has an additional 15 credits toward her doctorate. She taught freshman composition courses at Delaware for three years. She is a free-lance writer with many publications. Brown had taught ENG 1052 many times at Lyndon (Colleges Exhibit 36).

55. Pulaski held a Masters degree (with Creative Thesis) from Goddard College. He has taught at Goddard since 1969, and taught for one year at Hampshire College. Among the subjects he has taught over his career include prose fiction, writing papers, and Russian literature. He is a published author of stories. Pulaski has taught ENG 1052 for many years (Colleges Exhibit 25).

56. Rosenberg expressed an interest in teaching the Education course, EDU 3540, *Language and Expressive Arts*. This course was assigned to Theresa Young. It is the same course, with a different title, as EDU 3540, *Reading and Literacy Development*. Rosenberg had never previously taught this course. Young had previously taught it at Lyndon.

57. Rosenberg expressed an interest in teaching INT 1020, *Introduction to Academic Community*, during the fall 2008 semester. INT 1020 is a required two credit course for all freshman students. It introduces the students to the nature of the college and academic community. As usual, many sections of the course were offered this semester. All sections of the course were taught by either full-time faculty members or administrators (Colleges Exhibit 18).

58. The assignments for INT 1020 are controlled by Dean Dalton without recommendations from department chairpersons. She began this practice of taking

complete responsibility for assignments to this course shortly after arriving at Lyndon approximately four years ago. She did so to ensure that faculty from every department were regularly teaching the course where practical. There had been problems in the past with faculty not volunteering to teach the course. Dean Dalton decided that only full-time faculty and other full-time staff would be assigned to teach the course. She considered it important for students to have full-time employees introduce them to the college community.

59. Tim Sturm, a full-time faculty member and Federation officer, was chair of INT (“Interdisciplinary Studies”) from late January to May 2008. Lyndon has departments and “other academic units” (“OAUs”). INT is one of the OAUs. At some point during the spring 2008 semester, there were discussions at Lyndon concerning whether INT should be brought into a status comparable to a department on issues such as finding instructors for course, but the evidence does not indicate that these discussions or subsequent developments resulted in INT now being considered comparable to a department.

60. Sturm did not ask Dean Dalton to consider Rosenberg for a section of INT 1020. Sturm was aware that Dean Dalton had been assigning faculty and staff to INT 1020 on her own for a period of years. Neither Sturm nor the Federation ever filed a grievance over an alleged failure by Dean Dalton to solicit Sturm’s recommendations on who should be assigned INT 1020.

OPINION

Alleged Violations of Articles III and XVIII of the Contract

We first address Grievants' contentions made in each of the grievances that the Employer acted contrary to the procedures for assigning courses to part-time faculty in violation of Articles III and XVIII of the Contract through not assigning any courses to Rosenberg for the spring 2008 semester, the summer 2008 session, and the fall 2008 semester.

Spring 2008 Semester

In Docket No. 08-35, Grievants claim violations of the Contract with respect to one course which Rosenberg specifically indicated a preference for teaching on the teaching availability form for the spring 2008 semester: 1) EDU 3350, *Teaching Language Arts and Writing*. Grievants claim entitlement of Rosenberg to teach this course on the basis that the course was improperly assigned to less senior part-time faculty member Theresa Young.

In situations where the Employer is selecting among available part-time faculty members to teach a course, Article XVIII, Section F, of the Contract provides that seniority will prevail in available assignments where the following factors are deemed to be equal: a) credentials and qualifications (including sub-specialties and areas of particular expertise) of both current unit members and other available faculty members from within and outside the College; b) the teaching experience of both current and other available faculty members from within and outside the College; c) evaluations and work performance of unit faculty members, and d) the stated availability of unit faculty members. Article III and Article XVIII, Section F, provide that such decisions shall not be made arbitrarily and capriciously.

In applying the standards set forth in Article XVIII, Section F, of the Contract to the assignment of Young to teach the *Teaching Language Arts and Writing* course, we conclude that the assignment of Young rather than Rosenberg did not violate the Contract. The Employer determined that Young had superior qualifications to Rosenberg to teach the *Teaching Language Arts and Writing* course due to her qualifications and experience and because her preparation for teaching the course was much more current than that of Rosenberg. The Employer further determined that these factors took precedence over Rosenberg's greater seniority. It was not arbitrary and capricious for the Employer to reach these conclusions and assign the course to Young rather than Rosenberg.

Summer 2008 Session

In Docket No. 08-36, Grievants claim violations of Articles III and XVIII of the Contract with respect to English course ENG 0030, *Basic Reading and Writing*, which Grievants claim was improperly assigned to part-time faculty member William Biddle rather than Rosenberg for the summer 2008 session. Rosenberg does not have an English degree and has never taught an English course at Lyndon. Biddle on the other hand holds a Masters degree in English Literature and has taught many English courses at Lyndon, including teaching ENG 0030 previously on several occasions. Given these circumstances, it was not arbitrary and capricious for the Employer to determine that Biddle was a superior candidate to Rosenberg and assign him to teach the course.

Fall 2008 Semester

In Docket No. 08-37, Grievants claim violations of Articles III and XVIII of the Contract with respect to not reassigning six courses to Rosenberg for the fall 2008 semester. Grievants contend as a general matter that the Employer treated Rosenberg unfairly and differently from other part-time faculty members this semester by not

sending her a teaching availability form in a timely manner, and then tentatively assigning courses to other faculty members before Rosenberg had a chance to indicate that she was interested in teaching these courses.

The Employer responds that the late sending of the teaching availability form was remedied by the Employer after the Federation filed a grievance over the matter. The Employer sent Rosenberg an availability form, giving her time to return it, and informing her that she “will be considered along with others for part-time teaching assignments for the fall 2008 semester.” The Employer contends that, once Rosenberg’s completed teaching availability form was received, the Employer reviewed her availability for assignments just as would have been done had her form been received prior to the tentative assignment of courses. The Employer asserts that the tentative assignments of courses to other faculty members was not an impediment to assigning courses to Rosenberg because: 1) it is typical for course schedules and assignments to change between the tentative schedule in March and the start of fall semester classes, and 2) Dean Dalton instructed department chairpersons to fully consider Rosenberg for assignment to the courses which she had indicated an interest in teaching.

We are not persuaded by Grievants’ argument that the late consideration of Rosenberg’s teaching availability form resulted in her not being fairly considered for teaching assignments. It is typical for there to be changes to the course schedule between the March printed schedule and the beginning of classes for the fall semester. Further, Dean Dalton instructed department chairs that they should recommend Rosenberg for courses if they deemed Rosenberg the most qualified for any courses in accordance with the Contract. The evidence indicates that all the chairpersons of the department in which Rosenberg had expressed an interest in teaching considered her for the courses even though they had tentatively recommended other instructors for the courses. Given these

circumstances, we conclude that the tentative assignments of courses to other faculty members was not an impediment to assigning courses to Rosenberg.

We turn to considering each of the six courses Grievants claim that Rosenberg should have been assigned to teach rather than less senior part-time faculty members. Grievants contend that the Employer violated Articles III and XVIII of the Contract by assigning Jon Fitch rather than Rosenberg to teach PSY 1010, *Introduction to Psychology*.

Grievants contend that, in deciding this issue, we should consider an understanding reached by the parties that is not explicit in Article XVIII, Section F, concerning assignments to introductory courses such as PSY 1010. As set forth in the Findings of Fact, Article XVIII, Section F, contains different provisions than existed in the previous contract. The Federation presented testimony during the hearing in an attempt to demonstrate that, in addition to the wording changes contained in the revised Section F, the parties had an understanding that the modified contract language would not be used to displace senior part-time faculty teaching introductory courses.

We conclude that Grievants failed to prove that any such understanding existed which modified the language of the Contract. 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). The Board will not read terms into a contract unless they arise by necessary implication. Stacey, 138 Vt. at 71. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake

them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

The language negotiated by the parties makes no distinction between the types of courses in setting forth the provisions concerning making course assignments. The parties agreed in clear and unambiguous language that the Colleges would consider specific factors in making assignments and that the Colleges shall not make assignments “arbitrarily and capriciously”. We will not read into these terms that there was any understanding that introductory courses would be treated differently than other courses under this negotiated language. If we were to so rule, we would be improperly remaking the parties’ contract.

In applying the language of the Contract to the assignment of Fitch rather than Rosenberg to teach PSY 1010, we conclude that the Colleges did not violate the Contract. Rosenberg had taught this course previously on five occasions at Lyndon, but she did not possess a degree in Psychology. Fitch has a Ph.D in Psychology and had been a full-time faculty member at Lyndon for more than 20 years before his retirement. He had taught PSY 1010 at least a dozen times. Given the respective backgrounds of Rosenberg and Fitch, it was not arbitrary and capricious for the Employer to assign the course to Fitch, despite Fitch having less part-time seniority than Rosenberg, based on superior academic qualifications, the multiple times he had taught the course, his professional background and his knowledge of the department.

Grievants claim that Rosenberg should have been assigned to teach ENG 0030, *Basic Reading and Writing*, rather than less senior part-time faculty members Sheila Post and Kelly Colby. Given the degrees and experience of Post and Colby pertinent to teaching a remedial writing course such as ENG 0030 compared to the lack of such

degrees and experience possessed by Rosenberg, we conclude that it was not arbitrary or capricious for the Employer to assign them rather than Rosenberg to teach the course.

Grievants assert that Colby does not meet the minimum degree requirement for part-time faculty because Appendix A of the Contract provides that the required minimum degree is a master's degree or "equivalent experience", and Colby only has a bachelor's degree. Grievants assert that it is difficult to see how Colby could have accumulated experience equivalent to a master's degree in the two years subsequent to graduating from Lyndon State College.

Since Grievants did not present evidence developing this issue at the hearing, we do not consider this a valid basis to overturn the Employer's assignment to Colby. We would be improperly speculating on the experience actually possessed by Colby as well as the applicability of Appendix A of the Contract to this issue. In any event, Grievants have not demonstrated that Rosenberg would have been assigned to teach ENG 0030 given the lack of pertinent degrees and experience possessed by Rosenberg to teach a remedial reading and writing course.

Grievants claim that Rosenberg should have been assigned to teach ENG 1051, *Introduction to Writing*, rather than various part-time faculty members with less seniority than her. All the selected part-time faculty members had advanced degrees in fields related to teaching an introductory writing course, compared to Rosenberg who possessed no such degree. All of them previously had taught ENG 1051 at Lyndon, whereas Rosenberg had not taught this course or any other writing course at Lyndon. Given their respective backgrounds, it was not arbitrary and capricious for the Employer to determine that the assigned part-time faculty members were superior candidates to Rosenberg to teach the course.

Grievants also claim that Rosenberg should have been assigned to teach ENG 1052, *Exposition and Analysis*, during the fall 2008 semester rather than several part-time faculty members with less seniority than her. Again, all the selected part-time faculty members had degrees in fields related to teaching an introductory writing course. All of them previously had taught ENG 1052 at Lyndon or a similar course elsewhere. Given their backgrounds more conducive to teaching ENG 1052 than Rosenberg, it was not arbitrary and capricious for the Employer to determine that the assigned part-time faculty members were superior candidates to Rosenberg to teach the course.

Grievants further claim that Rosenberg was entitled to be assigned the Education course, EDU 3540, *Language and Expressive Arts*. This course was assigned to Theresa Young. It is the same course, with a different title, as EDU 3540, *Reading and Literacy Development*. Rosenberg had never previously taught this course. Young had previously taught it at Lyndon.

The Labor Relations Board decided in a 2008 decision that the Colleges did not violate the Contract in determining that Young had more appropriate academic qualifications than Rosenberg to teach EDU 3540, *Reading and Literacy Development*, and that the Employer was within its rights to assign the course to Young rather than Rosenberg. Grievance of Rosenberg and VSFE, 30 VLRB 63, 75-76, 80-81. There is no evidence before us which causes us to reach a different result in this case. Thus, it was not arbitrary and capricious for the Employer to determine that Young was a superior candidate to Rosenberg to teach the course.

The final course which Grievants claim that Rosenberg should have been assigned to teach during the fall 2008 semester is INT 1020, *Introduction to Academic Community*. Unlike other claims made by Grievants in this case, there is no claim that part-time faculty members with less seniority were improperly assigned the course rather than

Rosenberg. All sections of INT 1020 were taught during the fall 2008 semester by full-time faculty, staff and administrators who are given preference over part-time faculty to teach courses by the Contract.

Instead, Grievants claim that the process to staff the INT 1020 sections was not in line with the Contract because Tim Sturm, co-chair of the INT program, was never sent copies of any availability forms nor was he allowed to recommend whom should be given teaching assignments. Grievants contend that Sturm was contractually entitled to be involved in the process, and it is possible that he would have recommended Rosenberg for one or more sections of INT 1020. Grievants contend that, to prevent this from happening, Dean Dalton arbitrarily and capriciously chose to assign the INT 1020 sections herself to ensure that Rosenberg did not receive any teaching assignments.

Grievants can prevail on this claim only if they can establish that Sturm was contractually entitled to be involved in the process for selecting INT 1020 instructors. Grievants rely on Article 25, Section B.5 and B.16, of the collective bargaining agreement between the Colleges and Federation covering full-time faculty members. These provisions of the full-time faculty contract provide that the responsibilities of a “department chairperson” include “preparing and recommending course offerings, schedules and assignments to the Academic Dean or designee” and “providing recommendations to the Dean as to the retention, scheduling and assignment of work to part-time faculty” (Joint Exhibit 2).

Grievants also rely on Article XVIII, Section B.8, of the Contract covering part-time faculty. This provides that the teaching availability forms completed by part-time faculty members “will be sent to and considered by the department chairperson or other appropriate administrator in establishing department schedules”.

Under these provisions, Sturm was contractually entitled to be involved in the process for selecting INT 1020 instructors only if INT is a department and Sturm is a department chairperson. Neither is the case. INT is not a department, but instead is an “OAU”, or “other academic unit”. At some point during the spring 2008 semester, there were discussions at Lyndon concerning whether INT should be brought into a status comparable to a department on issues such as finding instructors for course, but the evidence does not indicate that these discussions or subsequent developments resulted in INT being considered comparable to a department. Accordingly, Sturm was not a department chairperson as chair of the INT unit.

Dean Dalton was contractually entitled to proceed as she did in this case by selecting INT 1020 instructors without soliciting Sturm’s recommendation. Thus, the Employer did not act arbitrarily and capriciously in the process of not selecting Rosenberg as an INT 1020 instructor.

Alleged Violations of Article VII of the Contract

In addition to Grievants’ contention made in each of these grievances that the Employer acted contrary to the procedures for assigning courses to part-time faculty in violation of Articles III and XVIII of the Contract, Grievants also allege that the Employer violated Article VII of the Contract by failing to assign Rosenberg any courses during the spring 2008 semester, summer 2008 session and the fall 2008 semester as a result of discrimination against her due to her grievance activities. In cases where employees claim employers took action against them for engaging in protected activities, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977): once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her.

Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.

Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983).

Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).

Rosenberg engaged in the protected conduct of grievance activities. Grievants must then demonstrate that this protected conduct was a motivating factor in the Employer's failure to assign her courses. The factors the Board reviews in determining whether protected conduct constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity. Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

Rosenberg has filed six previous grievances with the Board in which she claimed that she was discriminated against based on grievance activities in the assignment of courses. In the first grievance, the Board panel in a split decision held that Rosenberg had been discriminated against because of her previous grievance activities with respect to course assignments for the spring 2002 semester. 25 VLRB 253 (2002). However, this decision was reversed by the Vermont Supreme Court. 176 Vt. 641 (2004). In five subsequent grievances, the Board concluded that the Employer did not discriminate against Rosenberg due to her grievance activities in making course assignments. 29 VLRB 12 (2007); 29 VLRB 317 (2007), 30 VLRB 63 (2008). The cases concerned

assignments for the spring 2006 semester, spring 2007 semester, summer 2007 session and fall 2007 semester.

Given this history, Grievants would have to introduce new evidence that decision-making for the spring 2008 semester, summer 2008 session and fall 2008 semester was motivated by Rosenberg's grievance activities. Although the non-assignment of courses occurred following the filing of several grievances by Rosenberg, Grievants have not presented new evidence demonstrating that Rosenberg's grievance activities constituted a motivating factor in the failure to assign her courses.

The Employer knew of Rosenberg's protected grievance activities. However, Grievants have not demonstrated that this knowledge resulted in the protected conduct motivating the Employer's assignments decisions. Knowledge alone is not sufficient to demonstrate that protected conduct motivated an adverse action. Grievants have not demonstrated that any of the other factors discussed above providing evidence of animus for protected conduct existed here. Thus, we dismiss Grievants' claim of discrimination based on her grievance activities.

Grievants also alleged in each of their grievances that the Employer violated Article VII of the Contract by discriminating against Rosenberg based on her age in not assigning her any courses. However, Grievants presented no evidence on this issue. We have no basis to conclude that Grievants have made out even a *prima facie* case of discrimination, and thus we deny this claim by Grievants.

In closing, we note that it is difficult for part-time faculty members to prevail in grievances over course assignments based on the contract provisions negotiated by the Federation and the Employer. The Contract provides part-time faculty with only limited rights in the assignment of courses. Full-time faculty, professional staff, supervisors and managers all are given precedence over part-time faculty in the assignment of courses

regardless of seniority considerations and qualifications. Further, in cases where full-time faculty, professional staff, supervisors and managers are not assigned courses, the Contract makes it difficult for senior part-time faculty members such as Rosenberg to claim entitlement to a course. Superior academic qualifications and/or experience in teaching a course by other faculty members both inside and outside the College may take precedence over the greater seniority of a part-time faculty member. As the Board stated in the most recent decision of the Board on grievances filed by Rosenberg and the Federation:

Although the contracts have allowed the Employer to provide many course assignments to Rosenberg over the years, as she in fact did receive until the spring 2006 semester, the contracts have not required such assignments to be made as long as the Employer followed proper procedures, applied contractual standards, and did not discriminate against Rosenberg due to prohibited reasons. The grievance cases involving Rosenberg have illustrated just how limited the rights of part-time faculty members have been under the part-time contracts. 30 VLRB at 89-90.

ORDER

Based on the foregoing finding findings of fact and for the foregoing reasons, it is ordered that the Grievances of June Rosenberg and the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180, AFL-CIO, in Docket Nos. 08-35, 08-36, and 08-37 are dismissed.

Dated this 14th day of May, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward Zuccaro, Chairperson

/s/ Richard W. Park

Richard W. Park

/s/ James C. Kiehle

James C. Kiehle

