

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	DOCKET NO. 07-35
JUNE ROSENBERG AND THE)	DOCKET NO. 07-38
VERMONT STATE COLLEGES)	DOCKET NO. 07-39
FACULTY FEDERATION, UPV/AFT)	DOCKET NO. 08-04
LOCAL 3180, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The above-captioned four grievances have been consolidated for hearing and decision. On November 13, 2007, the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180, AFL-CIO (“Federation”) filed a grievance, Docket No. 07-35, 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-August 31, 2006 (“2000-2006 Contract”), by not assigning any courses to Rosenberg for the Fall 2007 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 Federation filed a second grievance, Docket No. 07-38, on December 11, 2007, on behalf of itself and Rosenberg. The Federation alleged that the 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 (“2006-2010 Contract”), by not assigning any courses to Rosenberg for the

Summer 2007 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 Federation filed a third grievance, Docket No. 07-39, on December 11, 2007, on behalf of itself and Rosenberg. The Federation alleged that the Employer violated Articles III, VII and XVIII of the 2006-2010 Contract in not reassigning a course to Rosenberg for the Fall 2007 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 Federation filed a fourth grievance, Docket No. 08-04, on January 22, 2008, on behalf of itself and Rosenberg. The Federation alleged that the Employer violated Articles III, VII and XXIV of the 2006-2010 Contract by not granting her professional development funds that she had requested.

The Labor Relations Board conducted a hearing on the four grievances on April 24, 2008, in the Board hearing room in Montpelier before Board Members James Dunn, Acting Chairperson; John Zampieri and Leonard Berliner. Russell Mills, Federation Grievance Chairperson, represented Grievants. Attorney Nicholas DiGiovanni, Jr., represented the Employer. The Federation and the Employer filed post-hearing briefs on May 16, 2008.

FINDINGS OF FACT

1. The Federation represents a bargaining unit of part-time faculty at the four campuses of the Colleges.

2. The 2000-2006 Contract is applicable only to the grievance filed in Docket No. 07-35. It 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 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 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. The 2006-2010 Contract is applicable to the grievances filed in Docket Nos. 07-38, 07-39 and 08-04. Articles III and VII of the 2006-2010 Contract are identical to Articles III and VII of the 2000-2006 Contract. The 2006-2010 Contract otherwise provides in pertinent part:

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.

...

ARTICLE XXIV PROFESSIONAL DEVELOPMENT

A. The employer shall create a Part-Time Faculty Professional Development Fund at each college. Effective January 1, 2007, each college shall put aside, on a semester basis, an amount equal to \$120 per bargaining unit member.

B. These funds shall be used to reimburse:

1. Professional relevant travel; including attendance at professional meetings.
2. Course tuition; relevant to cover the cost of tuition for graduate level courses taken outside of the VSC system.
3. Other relevant professional development projects.

C. Part-time faculty may access these funds by making prior application in writing to the Dean on each campus. Approval for reimbursement shall be at the discretion of the Dean. The Dean will not withhold such approval arbitrarily, capriciously, or without a good and sufficient basis in fact.

Applications for professional development money must be submitted by October 1 with a decision by the College by October 15 for professional activity between November 1 and April 30. Applications must be submitted by April 1 with a decision by the College by April 15 for professional activity between May 1 and October 31. Faculty members may apply after October 1 and April 1 but will be considered only if funds still remain.

Persons having used funds in excess of \$100 within the previous 12 months will not be considered unless funds remain after the other applicants have been approved.

Application for funds and reimbursement of funds shall be consistent with travel policies on each campus.

D. In no instance shall reimbursements exceed the actual expenditures of the part-time faculty member as attested to by receipts for expenses.

E. Effective January 1, 2007, all funds not used in a given semester shall be carried over into the subsequent semester except that at no time may the total available funds exceed \$353 per part-time member currently teaching. Summer sessions shall not apply in determining the maximum fund limit.

...

(Joint Exhibit 2)

4. June Rosenberg is a part-time faculty member at Lyndon State College. She has taught at the college since 1993 and, with the exception of one semester when she taught in the Education Department, she has taught courses in the Psychology 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 22).

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. Rosenberg is pursuing a doctorate degree in Educational Leadership from Argosy University. 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. Rosenberg has not been assigned any courses to teach since the Fall 2005 semester (Colleges Exhibit 6).

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 16).

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 16).

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 16).

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. 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.

15. 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 (Joint Exhibit 1).

16. 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. On or around January 4, 2007, Rosenberg submitted a completed Teaching Availability form for the Summer 2007 session. Her completed form indicated that she was interested in teaching 57 different courses in Education, Psychology, English, Social Sciences, and interdisciplinary seminars. One of the courses listed by Rosenberg was “EDU 5725, Community/School Relations”. *Phonetics* and *Introduction to Audiology* are both listed as EDU 5725 courses. They were both offered during the Summer 2007 session. None of the other 57 courses listed by Rosenberg were offered during the summer session except for two courses which were taught by full-time faculty members. Rosenberg was not assigned to teach any courses during the summer session (Colleges Exhibits 15, 17; Federation Exhibits 18, 19).

17. During the processing of the grievance now before us as Docket No. 07-38, Federation Grievance Chairperson Russell Mills took the position there were three courses offered by the Northeast Kingdom School Development Center during the Summer 2007 session that Rosenberg could teach and to which she should have been assigned: EDU 5725, *Phonetics*; EDU 5725, *Introduction to Audiology*; and EDU 6410, *Public School Financing* (Colleges Exhibit 1 & 2).

18. There is a unit clarification petition pending before the Board, Docket No. 06-43, involving whether courses offered through the Northeast Kingdom School

Development Center constitute bargaining unit work for part-time faculty members. The Colleges contend in that case that none of the courses offered through the Center constitute bargaining unit work. The Lyndon State College administration did not consider Rosenberg for assignment to the Center courses.

19. The courses *Phonetics* and *Introduction to Audiology* offered through the Center in the Summer 2007 session are run in conjunction with East Carolina University. The courses are designed for Vermont teachers who are seeking to be certified as Speech and Language Pathologists. The teachers can obtain a Masters in Speech and Language Pathology from East Carolina University through a combination of courses offered through the Center and distance learning courses from East Carolina University. East Carolina University will accept credits from courses offered through the Center only if their syllabi are used for the courses and the course instructors have a Certificate of Clinical Competence.

20. The two instructors who taught *Phonetics* and *Introduction to Audiology* through the Center during the Summer 2007 session, Paul Lister and Sandra Farnum, had a Certificate of Clinical Competence when they were assigned to teach the courses. Rosenberg did not have such a certificate. Rosenberg has never taught the *Phonetics* or *Introduction to Audiology* courses (Colleges Exhibits 18, 19).

21. Rosenberg has never taught the course *Public School Financing*. Ray Proulx, a Vermont school superintendent and administrator, taught the course through the Center during the Summer 2007 session. He is considered an expert in Vermont on this subject. He had taught the course on previous occasions.

22. On or around January 4, 2007, Rosenberg submitted a completed Teaching Availability form for the Fall 2007 semester. Her completed form indicated that she was interested in teaching 59 different courses in Education, Psychology, English, Social Sciences, and interdisciplinary seminars. Rosenberg was not assigned to teach any courses for the Fall 2007 semester (Colleges Exhibits 20, 21).

23. 22 of the 59 courses Rosenberg indicated an interest in teaching were offered during the Fall 2007 semester – i.e., 13 in Education, 6 in Psychology, one in English, one in Social Sciences, and one interdisciplinary course (Colleges Exhibit 21, Federation Exhibit 21).

24. 11 of the 13 offered Education courses were taught only by full-time faculty. The remaining two courses were assigned to part-time faculty members Theresa Young and Jennifer Patenaude. Young was assigned to teach EDU 3540, *Reading and Literacy Development*. Patenaude taught EDU 4011, *Reading Disabilities*. Both Young and Patenaude had less seniority than Rosenberg.

25. *Reading and Literacy Development* is designed to introduce the student to the reading skills, strategies and instructional practices necessary to be an effective reading teacher in elementary schools. *Reading Disabilities* is designed for prospective classroom teachers and covers the full range of reading disabilities children may exhibit in the classroom. Rosenberg had never taught either of these courses at Lyndon. She had taught similar courses when she was a part-time faculty member at Johnson State College from 1988 to 1990 (Federation Exhibit 1).

26. Linda Metzke, Education Department Chair at Lyndon, reviewed Rosenberg's teaching availability form and her *curriculum vitae*. Metzke and other full-

time faculty of the Education Department reviewed Rosenberg's *curriculum vitae* and determined that she was not qualified to teach either the *Reading and Literacy Development* or *Reading Disabilities* courses. It was significant in reaching this conclusion that Rosenberg had never taught these courses at Lyndon. Metzge was aware that Rosenberg had taught similar courses at Johnson State College in the late 1980's, but determined that Rosenberg was not qualified to teach the courses nearly 20 years later because her knowledge in the field was not current. The techniques, theories and strategies on teaching children to read had changed considerably during the preceding two decades.

27. English Department members agreed unanimously to offer Young the assignment to teach the *Reading and Literacy Development* course. Young previously had taught this course three times, once with a co-teacher and twice on her own. Metzge had observed Young teaching the course, and concluded that she was an excellent teacher. Young had a Masters Degree in Education in Special Education, with a concentration in Consulting Teaching/Learning Specialist. She had 15 years of teaching experience, and had implemented effective techniques in research-based literacy instruction in her teaching. She had actively participated in literacy facilitator's training for two years through the Northeast Kingdom School Development Center. She also had been a Regional Director with the Vermont Council on Reading since 2006 (Colleges Exhibit 23).

28. In selecting Patenaude to teach the *Reading Disabilities* course, the Education Department reviewed Patenaude's *curriculum vitae* and considered her past experience in teaching the course. She holds a Masters Degree in Education, with an

emphasis on Special Education. She was a Special Educator for six years, a Special Education Evaluation Specialist for four years, and a Special Education Programming Consultant for the previous two years with the Orleans-Essex North Supervisory Union. Since 2005, she has been a Course Instructor on Assessment in Special Education and Learning Disabilities through the Vermont Higher Education Collaborative. Patenaude previously had taught the *Reading Disabilities* course through the Collaborative. Education Department Chair Metzge had witnessed her teaching the course, and knew she had taught other teachers how to teach students with reading disabilities (Colleges Exhibit 24).

29. All six Psychology courses offered during the Fall 2007 semester which Rosenberg expressed an interest in teaching were taught by full-time faculty members (Colleges Exhibit 21).

30. The one English course offered during the Fall 2007 semester which Rosenberg expressed an interest in teaching – ENG 1080, Expository Speaking – was taught by part-time faculty member Terry Portner. Portner is the second most senior part-time faculty member at Lyndon, having 328 credits of course instructional work through the Fall 2007 semester (Colleges Exhibit 22).

31. Portner has taught *Expository Speaking* 49 times at Lyndon over 24 years. Rosenberg has never taught the course.

32. Rosenberg expressed an interest in teaching INT 1020, *Introduction to Academic Community*, during the Fall 2007 semester. 23 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 21).

33. One of the administrators assigned to teach a section of *Introduction to Academic Community* was Leo Sevigny, the Associate Dean of Student Affairs. However, Sevigny resigned from the college prior to the beginning of the Fall 2007 semester. He was replaced in the Associate Dean of Student Affairs position on an interim basis by Jonathan Davis, who was Director of Student Life. Dean Dalton also assigned Davis to teach the section of INT 1020 that Sevigny had been assigned to teach. Davis previously had taught the course, and had expressed interest in teaching it again. Dean Dalton assigned Davis to teach the course within days of Sevigny's resignation.

34. Rosenberg expressed an interest in teaching SSC 1030, *Exploring the Social Sciences*, during the Fall 2007 semester. Full-time faculty members were assigned to teach four of the ten sections offered during the Fall 2007 semester. The remaining six sections of the course were taught by part-time faculty members Dennis Sweet, Jon Fitch and Donna Dolan. They all had less seniority as part-time faculty members than Rosenberg. The Labor Relations Board has decided in past cases that Rosenberg was not entitled to teach sections of the course over Sweet, Fitch and Dolan (Colleges Exhibit 21). 29 VLRB at 188-189; 29 VLRB at 333-334.

35. By letter dated October 9, 2007, Rosenberg applied to Dean Dalton for reimbursement for tuition and expenses for her graduate work at Argosy University pursuant to Article XXIV of the 2006-2010 Contract. She sought a total of \$9,324.92. This was the largest request for faculty development funds that Dean Dalton had ever received (Colleges Exhibit 25, Federation Exhibit 7).

36. By memorandum dated November 6, 2007, Dean Dalton notified Rosenberg that “I am pleased to grant the amount of \$1,000 to help defray your doctoral program expenses at Argosy University” (Colleges Exhibit 26; Federation Exhibits 8, 9).

37. This was the largest amount of professional development funds that Dean Dalton had ever awarded to a part-time faculty member. It was the second highest amount awarded to a part-time faculty member at Lyndon since 2001. In the Fall of 2002, the previous dean had awarded a part-time faculty member \$1,400 (Colleges Exhibit 29, Federation Exhibit 17).

38. Rosenberg had previously received professional development funds. In the Fall of 2004, she applied for \$642 for a VELA Seminar Series and tuition at the University of Vermont, and received the amount she requested. In 2005, she requested \$1,980 to cover tuition for a course at Argosy University. Dean Dalton awarded her \$500 (Federation Exhibits 12, 14, 17; Colleges Exhibit 29).

39. Dean Dalton has administered the professional development fund since the Spring of 2005. During the time that she has administered the fund, she has awarded funds to 24 part-time faculty members. In 14 of these cases, she has awarded less than the amount requested. In the ten cases where Dean Dalton granted the full amount, the highest amount awarded was \$654.60 (Colleges Exhibit 29, Federation Exhibit 17).

40. The professional development fund at Lyndon for part-time faculty had a balance of \$16,491.95 at the time of Rosenberg’s request for \$9,324.92 (Colleges Exhibit 29, Federation Exhibit 17).

41. In 2006, Dean Dalton awarded professional development funds to two part-time faculty members at Lyndon who were not in the part-time faculty bargaining

unit represented by the Federation. The Federation requested that the professional development fund be refunded the amount awarded to the two faculty members. Dean Dalton acknowledged that part-time faculty who are not members of the bargaining unit were not eligible for professional development funds, and agreed to refund the amount awarded to the two faculty members (Federation Exhibits 15, 16).

OPINION

Dockets Nos. 07-35, 07-38, 07-39

We first address 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 applicable contract through not assigning any courses to Rosenberg for the Fall 2007 semester and the Summer 2007 session.

In Docket No. 07-35, Grievants claim violations of the 2000-2006 Contract with respect to two courses which Rosenberg specifically indicated a preference for teaching on the teaching availability form: 1) EDU 3540, *Reading and Literacy Development*; and 2) EDU 4011, *Reading Disabilities*. Grievants claim entitlement of Rosenberg to these courses on the basis that the courses were improperly assigned to other part-time faculty members. 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 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.

In applying the standards set forth in Article XVIII, Section F, of the Contract, to the assignments of Theresa Young to teach the *Reading and Literacy Development* course and Jennifer Patenaude to teach the *Reading Disabilities* course, we conclude that the assignments of these part-time faculty members rather than Rosenberg did not violate the Contract. Both Young and Patenaude had more appropriate academic qualifications to teach the respective courses than Rosenberg, and both had recently taught the courses to which they were assigned. Rosenberg had taught similar courses at another academic institution but it had been nearly two decades previously. There was no evidence that her knowledge to teach the course remained current. It was reasonable for the Employer to conclude that the superior academic qualifications of Young and Patenaude and their recent experiences in teaching the respective courses took precedence over Rosenberg's greater seniority.

In Docket No. 07-38, Grievants claim violations of Articles III and XVIII of the 2006-2010 Contract with respect to three Education courses which Grievants claim were improperly assigned to part-time faculty members other than Rosenberg: 1) EDU 5725, *Phonetics*; 2) EDU 5725, *Introduction to Audiology*; and 3) EDU 6410, *Public School Financing*. The Federation and the Employer amended Article XVIII, Section F, of the 2000-20006 Contract in reaching agreement on the 2006-2010 Contract. In situations where the Employer is selecting among available part-time faculty members to teach a course, Article XVIII, Section F, of the 2006-2010 Contract provides that seniority will prevail in available assignments where the following factors are deemed to be equal: a) credentials and qualifications; b) teaching experience, c) evaluations and work performance, and d) stated availability.

The three courses at issue during the Summer 2007 session were offered by the Northeast Kingdom School Development Center (“NEKSDC”). There is a unit clarification petition pending before the Board, Docket No. 06-43, involving whether NEKSDC courses constitute bargaining unit work for part-time faculty members. The Employer contends in that case that none of the NEKSDC courses constitute such work. We conclude that it is unnecessary in this case to decide whether NEKSDC courses constitute bargaining unit work. Even assuming *arguendo* that NEKSDC courses constitute bargaining unit work, there are two independent grounds supporting the Employer’s assignment of the Summer 2007 NEKSDC courses.

First, the Employer was not required to consider Rosenberg for any of the NEKSDC courses because she did not list these courses on her teaching availability form. Article XVIII, Section B.1.b, states that the faculty 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 “stated availability”.

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. Grievance of Rosenberg and VSCFF, 29 VLRB 169, 191 (2007). If a faculty member has not indicated specific preferences, then he or she cannot reasonably lay claim to a course or courses. Id. While failure to list a course does not preclude the Employer from assigning a particular part-time faculty member to teach a course, there is no contractual requirement in such

instances obligating the Employer to contact or otherwise consider the faculty member for assignment of a course or courses.

Rosenberg did indicate an interest in teaching “EDU 5725, Community/School Relations”, on her availability form for Summer 2007 courses. However, no course in Community/School Relations was offered during the Summer. The NEKSDC did offer two courses under the course registration number “EDU 5725”, but they were *Phonetics* and *Introduction to Audiology*. The fact that these two courses carried the same course registration number as Community/School Relations does not mean they were courses for which she had expressed a specific interest. There was no opportunity to make a reasonable judgment whether Rosenberg was suitable for these courses for which she had not indicated a specific interest. The course for which she expressed a specific interest was “Community/School Relations”.

The third NEKSDC course offered during the Summer 2007 session which Grievants claims Rosenberg should have been offered is EDU 6410, *Public School Financing*. As note above, Grievant has no claim to this course under the Contract because she did not mention it on her availability form.

Second, Grievants have not established that Rosenberg was qualified to teach any of the three NEKSDC courses. Individuals are qualified to teach the *Phonetics* and *Introduction to Audiology* courses only if they have a Certificate of Clinical Competence. The instructors selected to teach these NEKSDC courses during the Summer of 2007 possessed such a certificate when they were assigned to teach the courses. Rosenberg did not have the certificate.

The *Public School Financing* course was taught by an expert on the subject who had taught the course on previous occasions. Rosenberg, by contrast, had never taught the course and Grievants did not present evidence demonstrating that Rosenberg had specific expertise to teach it.

In Docket No. 07-39, Grievants claim violations of Articles III and XVIII of the 2006-2010 Contract with respect to not reassigning a section of INT 1020, *Introduction to Academic Community*, to Rosenberg for the Fall 2007 semester. One of the administrators assigned to teach a section of the course, Leo Sevigny, resigned from the college prior to the beginning of the semester. The Employer assigned another administrator, Jonathan Davis, to teach the section of the course. Grievants contend that Davis was not entitled to be given the reassigned course section in preference to Rosenberg.

This contention by Grievants is not supported by the provisions of the Contract. Article XVIII, Section E, of the 2006-2010 Contract, provides that the “College reserves the right to give preference . . . to full-time or part-time professional staff members, supervisory or managerial employees prior to offering courses to part-time faculty”.

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. In re 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. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

The plain meaning of the pertinent contract language is that the College can choose to offer a course to professional staff members, supervisors or managers at any time prior to offering it to part-time faculty members. There is no distinction made under the Contract whether it is an originally assigned course or a reassigned course. If we were to conclude otherwise, we would be ignoring the plain meaning of the contract language and improperly reading terms into 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 Summer 2007 session and the Fall 2007 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 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 three 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 two subsequent grievances, concerning assignments for the Spring 2006 semester and Spring 2007 semester, the Board concluded that the Employer did not discriminate against Rosenberg due to her grievance activities. 29 VLRB 12 (2007); 29 VLRB 317 (2007).

Given this history, Grievants would have to introduce new evidence that decision-making for the Summer 2007 session and Fall 2007 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.

Our conclusion in this regard should not be construed as endorsement of the Employer's actions over time with respect to assignment of courses to Rosenberg. Rosenberg taught between 6 and 10 credits a semester from the Spring of 2001 through the Fall of 2005, the bulk of such credits earned from teaching Psychology Department courses. Then, course assignments abruptly halted, and she has not been assigned to teach a course since the Fall 2005 semester in the Psychology Department or any other department.

This did not stem from Rosenberg's poor performance as a teacher. We have not been presented evidence in any of the grievances supporting such a conclusion. A reason contributing to non-assignment of Psychology Department courses has been discussed by

the Board in a previous decision concerning lack of teaching assignments for Rosenberg for the Spring 2006 semester. The Board determined that “significant tension exists between Rosenberg and others in the Psychology Department”, and that it was “apparent that fault for the deleterious relationship does not lie solely with Rosenberg”. 29 VLRB at 31-32. The Board further stated:

There are tensions and personality conflicts evident between Rosenberg and others in the department, but the evidence simply does not support a conclusion that her grievance activities caused such problems. It is also apparent that Rosenberg bears some responsibility for the deleterious relations with department colleagues. Nonetheless, it would be more constructive for Rosenberg’s full-time colleagues to genuinely seek to resolve concerns they have with Rosenberg rather than overstate her deficiencies, distort her performance and unfairly cast blame on her. Id. at 33.

Since the Spring 2006 semester assignment discussed by the Board in this decision, Rosenberg has not been given an opportunity to improve her relations with Psychology Department colleagues since she has not been assigned any psychology courses. Since that time, the psychology courses which Rosenberg previously taught have been assigned to full-time faculty members of the Psychology Department or college administrators.

Also, the other course regularly taught by Rosenberg from the Fall 2003 through the Fall 2005 semesters, *Introduction to Academic Community*, has been assigned to full-time faculty or college administrators subsequent to the Fall 2005 semester with one exception. In that case, the Board determined that the Employer had not demonstrated that an individual assigned the course was an administrator, and the Board concluded that the course should have been assigned to Rosenberg. Grievance of Rosenberg and VSCFF, 29 VLRB 169 (2007).

It is understandable given such circumstances that Rosenberg is frustrated. It also is understandable if she is frustrated that the several grievances which she has filed with the Board have resulted in very little in the way of remedies for her. Given these developments, it is important to address the fundamental difficulties faced by part-time faculty members in prevailing in grievances over course assignments.

The task of the Board in these grievances has been to interpret the provisions of the collective bargaining contracts as they have been negotiated by the Federation and the Employer. The part-time faculty contracts that we have applied in the grievances have provided only limited rights to part-time faculty members 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 part-time faculty contracts make it difficult for senior part-time faculty members such as Rosenberg to claim entitlement to a course if they have not previously taught the course. Superior academic qualifications and/or experience in teaching a course by other faculty members often serve to take precedence over the greater seniority of a part-time faculty member.

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.

Docket No. 08-4

Grievants contend that the Employer violated the 2006-2010 Contract by not granting Rosenberg professional development funds during the Fall 2007 semester that she had requested. Grievants allege that the Employer violated Article XXIV of the Contract. Article XXIV provides that, in acting on professional development fund requests, “the Dean will not withhold approval arbitrarily, capriciously, or without a good and sufficient basis in fact.” Grievants assert that, in granting Rosenberg only \$1,000 of \$9,324 that she had applied for, Dean Dalton acted arbitrarily and capriciously and without a good and sufficient basis in fact. Grievants further assert that in granting reimbursement for such a small portion of Rosenberg’s request, the Dean was discriminating against Rosenberg on the basis of her grievance activities in violation of Article VII of the Contract.

Article XXIV provides little guidance as to what constitutes “professional development” and no specific criteria to guide the awarding or amount of grants. The Dean thus is left with a great deal of discretion in awarding grants. The Dean acts consistent with the Contract as long as the Dean does not act arbitrarily, capriciously, without a good and sufficient basis in fact, or in a discriminatory manner.

In applying these standards here, we conclude that Dean Dalton did not violate the Contract by awarding Rosenberg \$1,000 in professional development funds. This was the largest amount of professional development funds that Dean Dalton had ever awarded to a part-time faculty member. It was the second highest amount awarded to a part-time

faculty member at Lyndon since 2001. Also, it came on the heels of Rosenberg recently receiving two other grants of professional development funds.

The fact that Rosenberg received only a fraction of her requested funds does not indicate a violation of the Contract. Her request for \$9,324 was much higher than any other request made under the fund. Also, it was not unusual for Dean Dalton to award less than the amount requested. Under all the circumstances, the award constituted a proper exercise of discretion by the Dean. It was not arbitrary or capricious, and it was not without a good and sufficient basis in fact. Further, Grievants have not demonstrated that Rosenberg's grievance activities constituted a motivating factor in the grant decision.

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. 07-35, 07-38, 07-39 and 08-04 are dismissed.

Dated this 9th day of July, 2008, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

James J. Dunn, Acting Chairperson

John J. Zampieri

Leonard J. Berliner