

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	DOCKET NOS. 12-34 & 12-40
JOHN ALEONG)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Attorney Pietro Lynn filed a grievance, Docket No. 12-34, on August 30, 2012, on behalf of Professor John Aleong (“Grievant”), a full-time faculty member employed by the University of Vermont (“Employer”). The grievance alleged that a May 10, 2012, letter of discipline the Employer imposed on Grievant for alleged unsatisfactory performance, making him ineligible for assignments yielding supplemental or additional compensation: 1) was not supported by just cause in violation of Article 13.1 of the collective bargaining agreement between the Employer and United Academics, effective December 5, 2011 – June 30, 2014 (“Contract”); 2) does not indicate it is a letter of reprimand in violation of Article 13.2 of the Contract; and 3) was untimely administered in violation of Article 13.7 of the Contract. The grievance further alleged that any performance that was less than satisfactory was the direct result of the Employer’s failure to meet its obligations under Article 10.2, 10.4 and 10.5 of the Contract to provide Grievant with adequate professional resources.

Attorney Lynn filed a second grievance, Docket No. 12-40, on September 26, 2012, on behalf of Grievant. The grievance alleged that the disciplinary action of the termination of Grievant’s .2 FTE appointment in the Department of Mathematics and Statistics for alleged unsatisfactory performance: 1) was not supported by just cause in violation of Article 13.1 of the Contract; 2) was untimely administered in violation of

Article 13.7 of the Contract; and 3) constituted a failure to follow mandated termination procedures under Article 13.8 and/or 13.10 of the Contract. The grievance further alleged that any performance that was less than satisfactory was the direct result of the Employer's failure to meet its obligations under Article 10.2, 10.4 and 10.5 of the Contract to provide Grievant with adequate professional resources. The grievance also alleged that, if a Memorandum of Understanding entered into in October 2005 by the Employer and United Academics controlled the termination, required termination procedures were not followed.

The Labor Relations Board consolidated these grievances for hearing. Hearings were held before Board Members Linda McIntire, Acting Chairperson; James Kiehle and Alan Willard in the Board hearing room in Montpelier on January 24, 2013, and February 7, 2013. Lynn represented Grievant. Attorneys Jeffrey Nolan and Sophie Zdatny represented the Employer. The Employer and Grievant filed post-hearing briefs on February 22 and 26, 2013, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

. . .

ARTICLE 2 - DEFINITIONS

2.1

Board: The term "Board" as used in this Agreement refers to the Board of Trustees of the University of Vermont and State Agricultural College acting on its own or through the University administration.

2.2

University: The term "University" as used in this Agreement refers to the Board and/or the administration of the University of Vermont and State Agricultural College . . .

ARTICLE 4 – BOARD RIGHTS AND RESPONSIBILITIES

4.1

Unless otherwise modified by this Agreement, all the customary rights, powers, functions and responsibilities of the University shall be retained by the University and, in its discretion, may be exercised by the Board acting directly or through its authorized agents, including University Officers of Administration. Such rights and responsibilities shall include those rights and powers that have been reserved to the Board through legislative acts and state and federal regulations and include all matters relating to: . . . b) appointment, reappointment, promotion and tenure .

..

4.2

The exercise of any rights in a particular manner shall not preclude the University from exercising such right or function in any other manner that does not violate this Agreement. The University's failure to exercise any right or function reserved to it shall not be deemed a waiver of its right to exercise same.

4.3

In addition, the parties acknowledge that written departmental policies (and college or school written policies in those colleges and schools with no departments) relating to appointment, promotion, tenure and evaluation are incorporated by reference into this Agreement, provided such policies are submitted to and approved by the Deans and Provost following ratification of this Agreement and provided further that such policies are consistent with college and University policies and do not establish lesser obligations or standards than stated elsewhere in this Article. . . .

4.4

Provisions of the University and University Officer's Manual, or its successor, that deal with bargainable topics under the State Employees Labor Relations Act do not apply to members of the bargaining unit unless specifically incorporated by reference into this Agreement.

...

ARTICLE 10

10.1

Any rights or privileges under this Article must be consistent with University, college/school/division and department policies and procedures on use of resources, including but not limited to those involving use of facilities, equipment and services.

10.2

Faculty members will be provided with reasonable access to available administrative and technical support, duplicating services, office supplies and equipment for the preparation of teaching materials, examinations and related materials for the purpose of carrying out their professional responsibilities. Faculty members shall also have access to telephones, voice mail, photocopying, computer and e-mail resources, and software for the purpose of carrying out their professional responsibilities.

...

10.4

Office Space. Faculty members will be provided office space and, where space allocated to department use allows, faculty members will be provided with private offices. . .

10.5

Classroom assignment. The scheduling of classes and the assignment of instructional space to them is the responsibility and prerogative of the University. The University will assign instructional space consistent with institutional and pedagogical needs including class size, room capacity and configuration, location and instructional technology.

Faculty may request health-related accommodations pertaining to the assignment of instructional space that may or may not fall under the Americans with Disabilities Act (ADA). . .

...

ARTICLE 12 – GRIEVANCE AND ARBITRATION PROCEDURE

12.1

The parties acknowledge that it is desirable for problems to be resolved where possible through free and informal communication. . .

If an issue cannot be resolved through informal discussion, the procedures presented below shall be instituted. . .

12.2

For the purposes of this Article, a “grievance” shall be defined as an allegation, filed by a faculty member, a group of faculty members, or the Union, that there has been violation, misinterpretation or misapplication of a specific provision of this Agreement. This Article shall provide the exclusive means and procedures by which any of the parties identified in this section may grieve an alleged violation, misinterpretation or misapplication of the Agreement.

...

12.8

Formal Procedure: Whether or not a grievant (a faculty member, a group of faculty members or the Union) attempts to resolve a concern through informal discussion, a formal grievance must be filed at the appropriate step within thirty (30) days following the time at which the faculty member and/or the Union were or reasonably should have been aware of the existence of the situation that is the basis for the grievance.

STEP ONE: In accordance with the requirements of formal filing listed in Section 2 of this Article, the grievance must be presented in writing to the Department Chair. . .

...

12.9

Failure of the grievant and/or the Union to comply with the time limitations of this procedure at any of the Steps, including the initial filing of the grievance, shall constitute a forfeiture of the right to pursue the grievance and shall preclude any further processing of the grievance. . .

ARTICLE 13 – DISCIPLINE AND SANCTIONS

13.1

No faculty member shall be subject to discipline without just cause. It is understood that, in any case involving discipline under this Article, the University bears the burden of proving that there was just cause for such action. This Article contains the only process through which a faculty member can be disciplined.

...

13.2

Definitions and limits

- a.** As used in this Agreement, “discipline” shall be limited to:
 - i.** Written letters of reprimand. Any such letter must state specifically that it is a “letter of reprimand” in order to be considered a disciplinary action under this sub-section. . .
 - ii.** Ineligibility for sabbaticals.
 - iii.** Ineligibility for professional development funds.
 - iv.** Suspensions without pay of varying length.
 - v.** Ineligibility for assignments yielding supplemental or additional compensation (e.g. teaching Evening Division and Summer Session courses).
 - vi.** Termination.

As used in this Agreement, “termination” shall refer to the discharge of a faculty member prior to the expiration of his or her appointment with the University or the discharge of a tenured faculty member. The grounds on which termination can be considered are dereliction of duties, professional incompetence, gross misconduct or academic dishonesty.

...

e. "Discipline" shall not include oral counseling or oral reprimands, nor shall it include annual performance evaluations or other performance reviews. Such matters are not grievable under this Agreement.

...

13.7

Once the University has been informed of any alleged acts that form the basis for discipline, except those that would constitute a crime, it shall have ninety (90) days after knowledge of the acts to complete any necessary investigation and commence disciplinary proceedings. . . Disciplinary procedures may be initiated by the University through the Chair, Dean and/or Provost.

13.8

In any case under this Article other than Retrenchment situations where the University is contemplating termination of a non-tenured faculty member, the suspension without pay for no more than thirty (30) days of any faculty member, the ineligibility for sabbaticals, professional development funds, or the ineligibility for teaching Evening Division and Summer Session courses, the following procedures will be used:

- a. The Dean (of decanal equivalent) will first provide written notification to the faculty member that termination or suspension without pay or some other disciplinary action other than a written letter of reprimand is being contemplated. The Union shall be informed of all such cases. Such statement shall include a summary of the basis for the contemplated action and, when such basis includes allegations of violations of policy or procedure, a reference to any such policy or procedure. Such written notification shall be delivered by hand, by certified mail or by overnight delivery.
- b. The faculty member shall be provided with an opportunity to formally respond to the Dean in writing. Except in extenuating circumstances, such a response must be made within ten (10) days of the Dean's notification letter.
- c. The faculty member shall be provided with an opportunity to meet with the Dean to discuss the contemplated action. He or she shall be entitled to have a Union representative or attorney present at such meeting . . .
- d. Within seven (7) days following such meeting, the Dean shall notify the faculty member by letter of the final action taken. . .
- e. Upon receipt of the letter indicating what final action was taken, the faculty member may exercise his or her rights under the grievance procedure. Any challenge by a faculty member to the disciplinary action must be processed under the grievance and arbitration provisions of this Agreement.

...

ARTICLE 14 – APPOINTMENTS AND EVALUATION OF FACULTY

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14.1

Appointment Status. Faculty may be appointed to a tenure-track, tenured or non-tenure track position. . .

14.2

Split or Multiple Appointments. For faculty with split, or multiple appointments, there must be a primary department (or College, School, Library or Extension) that is responsible for the professional development and evaluation of a faculty member; for maintaining complete records; for initiating recommendations concerning change in appointment status; and for any eventual tenure commitment. . .

14.5

Appointments and Evaluation: Tenure-Track and Tenured Faculty

...

b. Considerations Regarding Tenure

i. Tenure represents the commitment of the University to the continued appointment of a faculty member until retirement or resignation, termination for just cause, termination due to the inability to perform the essential requirements of the faculty member's appointment, with reasonable accommodations for a physical or mental disability, or termination due to financial exigency or elimination of an institutional program.

e. Evaluation Criteria: Tenure-track and Tenured Faculty

... i. Teaching and Advising

Effectiveness in teaching is an essential criterion for reappointment, promotion and tenure. . .

The parties recognize that no single set of measures and methods can be prescribed to evaluate the quality of teaching or advising. Some of the measures and methods, however, may include but are not limited to:

- (a) Assessments by members of the candidate's department and Department Chair or equivalent, particularly if based on examination of course materials . . . observations of the candidate's teaching through class visitations, attendance at lectures given by the candidate
...
- (b) Evaluations of teaching or advising by students, appropriately documented and interpreted, for example through the use of student course evaluations, advising questionnaires, post-graduate surveys, etc.

...

(University Exhibit 1, Grievant Exhibit A)

2. The Provost, Dean Lawrence Forcier and Department of Plant and Soil Science Chair Lorraine Berkett sent Grievant a letter dated March 7, 1994, which provided in pertinent part:

We are pleased to offer you an .8 FTE position as Professor with tenure in the Department of Plant and Soil Science at the University of Vermont. . . In addition, a supplemental salary not to exceed 20% of your total compensation . . . will be provided by the College of Engineering and Mathematics for teaching one course each semester. This 20% will be provided by that College as long as your teaching is deemed satisfactory by normal University standards. . . (University Exhibit 7, p.530; Grievant Exhibit HH)

3. On July 21, 1994, Grievant affixed his signature to the March 7, 1994, letter below a line which stated: “I accept the offer as stated above.” (University Exhibit 7, p. 530; Grievant Exhibits HH).

4. The Department of Mathematics and Statistics issued Faculty Evaluation Guidelines effective March 4, 2004. The Guidelines provided in pertinent part:

...

Teaching

Excellent: . . .

Highly Satisfactory: . . .

Satisfactory: The faculty member

- Shows some evidence of success . . . but generally the quality is less than that of a “highly satisfactory or excellent” teacher.
- Receives positive as well as satisfactory student evaluations.
- Generates feedback that is generally positive but to a lesser degree than for a “highly satisfactory” teacher.
- Makes themselves available to students on a basis commensurate with the faculty member’s teaching and advising assignments, and maintains office hours reasonably convenient to students

Unsatisfactory: The faculty member’s teaching and advising is characterized by some of the following:

- Consistently receives mediocre or poor student teaching evaluations.
- Generates feedback from peers and students about teaching performance that is often negative.

- Either does not have appropriate office hours or does not reliably attend scheduled office hours
 - Does little to seek to maintain or improve present courses.
 - ...
 - Is unresponsive to student needs.
 - Does not respond to normal student questions or requests in a timely and appropriate fashion.
 - ...
- (University Exhibit 2, Grievant Exhibit F)

5. In March 2005, James Burgmeier, Chair of the Department of Mathematics and Statistics, informed Grievant that his 20% appointment provided by CEMS to teach one course per semester was being discontinued. Burgmeier considered Grievant to have the following problems: 1) poor student evaluations, 2) cancelling classes, 3) tardiness in submitting grades, 4) lack of availability outside class, 5) lack of response to e-mail and phone contacts from students, and 6) lack of response to contacts from the statistics program director and Burgmeier. United Academics filed a grievance on behalf of Grievant, contending that this action violated the terms of Grievant's appointment letter because there was no documentation of Grievant's ineffective teaching, no formal process to evaluate his teaching, and no classroom observations by his peers (University Exhibit 5, p.920; University Exhibit 7, p.531; Grievant Exhibit FF).

6. The Employer and United Academics entered into a Memorandum of Understanding in settlement of the grievance in October 2005 which provided in pertinent part:

1. The University agrees to continue to offer Professor Aleong a 20% teaching appointment in the Department of Mathematics and Statistics (one course each semester) until a review has determined that his teaching is not satisfactory by normal University standards . . .
2. A review of Professor Aleong's teaching for the Department of Mathematics and Statistics will be completed by the end of May 2006, and will include student and peer evaluations of the Spring 2006 Statistics course taught by Professor

Aleong. The review should incorporate the methodology usually employed to assess teaching quality in the department but must include both student and peer evaluations. In this case the review would be done only at the departmental and dean's levels and will, along with other teaching materials previously generated, lead to a determination as to whether the teaching is deemed satisfactory by normal University standards.

3. United Academics agrees to withdraw the current grievance on behalf of John Aleong . . .

4. This settlement is without prejudice or precedent for any future actions taken by the University.
(University Exhibit 7, p.532; Grievant Exhibit EE)

7. Pursuant to the Memorandum of Understanding, a review of Grievant's teaching which included both student and peer evaluations was completed by the end of the spring 2006 semester. The student evaluations were satisfactory overall and the peer evaluations were positive. Burgmeier recommended that Grievant's .20 FTE teaching responsibilities in CEMS be continued "with peer and student evaluations of all statistics courses taught" by Grievant. The Dean of CEMS at this time, Domenico Grasso, concurred with the recommendation that Grievant's "teaching responsibilities . . . be continued subject to continuing peer and student review." (University Exhibit 11, p.724-725; Grievant Exhibits AA, BB, CC, DD).

8. CEMS discontinued the peer reviews of Grievant's teaching at some point after the spring 2006 semester.

9. Jeffrey Buzas is the Director of Statistics. Buzas is not included in the bargaining unit of full-time faculty members represented by United Academics. Buzas assigns classes to faculty members, reviews their performance, and makes recommendations concerning reappointment, promotion and tenure of faculty members. He does not have the authority to discipline faculty members.

10. Buzas reports directly to Bernard Cole, the Interim Dean of the College of Engineering and Mathematical Sciences (“CEMS”), with respect to the administration of the statistics program. The statistics program resides within the Department of Mathematics and Statistics in CEMS. James Burgmeier is the Chair of the Department of Mathematics and Statistics. Cole supervises Burgmeier.

11. Deborah Neher, Chair of the Department of Plant and Soil Science in the College of Agricultural and Life Sciences (“CALs”), is Grievant’s direct supervisor. Thomas Vogelmann is Dean of CALs. Neher prepares Grievant’s annual evaluations, with input from Buzas on Grievant’s performance in teaching statistics courses. Neher also sets Grievant’s annual workload (University Exhibits 9, 10).

12. Grievant held a .8 FTE tenured position in the Department of Plant and Soil Sciences in CALs, as well as a non-tenured .2 FTE assignment in CEMS, from July 1994 through May 31, 2012. Since the end of the 2011-2012 academic year, Grievant has continued to hold his .8 FTE tenured position in CALs (University Exhibit 7).

13. Grievant taught four sections of STAT 141, Basic Statistical Methods, in the fall of 2011. He has been teaching STAT 141 for many years. One of these sections was taught as part of Grievant’s .2 FTE in CEMS, while the remaining three sections were part of Grievant’s workload for his .8 FTE tenured appointment in the Department of Plant and Soil Sciences in CALs (University Exhibit 9).

14. Grievant also voluntarily chose to teach a Math class in the UVM Continuing Education program in the fall of 2011. This was not part of his academic workload (University Exhibits 3, 4).

15. Grievant's teaching load in the fall of 2011 was consistent with his teaching load in prior years. This teaching load was consistent with other professors in CALS who had similar research assignments to Grievant (University Exhibits 3, 4, 9; Grievant Exhibit G).

16. UVM students have been completing evaluations of teachers online for about five years. Students mostly complete the evaluations outside of class. It is not unusual for less than fifty percent of students in a class to complete an evaluation. Larry Kost, a Senior Lecturer in Mathematics, is responsible for uploading the student evaluations to his computer. A program on his computer reads the information on the student evaluations and generates a report. Kost then sends the completed reports to the involved faculty member, and program director or department chair.

17. On January 13, 2012, Kost forwarded to Buzas approximately thirty sets of student evaluations from all the statistics classes taught in the fall 2011 semester. Included in the file transfer were the four sets of student evaluations for Grievant's STAT 141 class (University Exhibit 5, p.810-832).

18. The student evaluations contain a number of key questions, including "gives clear explanations", "is responsive to students' level of understanding", "is available to help students if needed", "overall rating of instructor", and "quality of your overall learning experience in the course". The grading scale on these questions is: 1 – Poor, 2 – Unsatisfactory, 3 – Satisfactory, 4 – Good, and 5 – Excellent (University Exhibit 5, p.810-832).

19. Buzas typically prefers to see average scores for faculty members of approximately “4”. If Buzas observes average scores of “3.5” or below, he becomes concerned.

20. Buzas first reviewed the student evaluations of Grievant’s classes on January 18 or a few days earlier. Approximately 47 percent of students enrolled in his fall 2011 classes completed evaluations. Buzas was surprised and very concerned when he reviewed these evaluations. He viewed the evaluations as the lowest scores he had ever seen for a faculty member.

21. The average scores on student evaluations on the key questions for the four fall 2011 STAT 141 sections taught by Grievant were as follows:

Question	STAT 141 E	STAT 141 C	STAT 141 B	STAT 141 G
Gives clear explanations	1.50	1.64	1.77	1.67
Is responsive to students’ level of understanding	2.06	2.29	2.17	2.29
Is available to help students if needed	2.63	2.46	2.83	3.00
Overall rating of instructor	1.81	1.75	1.80	2.24
Quality of your overall learning experience in this course	1.88	1.52	1.89	1.85

(University Exhibit 5, p. 810 – 832)

22. The narrative comments made by students on the evaluations reflected concerns in the same areas captured on these numerical ratings. Many students commented that Grievant was kind and knowledgeable but that he was a poor teacher. There were many comments that Grievant was disorganized, unclear and non-responsive to student questions. A significant number of students commented that Grievant was the worst teacher they had at UVM, that he was a horrible teacher, that he was a terrible

teacher, or that he should be fired or replaced. There were some positive comments about Grievant but the majority of comments about him were negative (University Exhibit 5, p. 810-832).

23. Buzas forwarded the student evaluations on Grievant's fall 2011 classes to Dean Cole on January 18, 2012. This was the first time Buzas forwarded a set of student evaluations on a faculty member to a dean to review. Dean Cole forwarded the evaluations to Dean Vogelmann the same day he received them. Upon review of the evaluations, Deans Cole and Vogelmann considered them the worst they had seen in their academic careers. They both had reviewed a significant number of student evaluations in their careers. The student evaluations of Grievant's classes concerned them because of the adverse effect on students' academic experience, UVM's reputation and ranking, and UVM's ability to attract applicants and raise revenue from alumnae (University Exhibit 8, Grievant Exhibit X).

24. On January 20, 2012, Dean Cole sent an email message to Dean Vogelmann reporting that Grievant apparently had told the students in one of his spring Stats 141 classes that "it would be much easier if the class met only on Monday and Wednesday, and not on Friday, and if the class could start 10 minutes early, everything would be fine. . . he put it to a vote, and the class voted it down", but that the issue would be revisited the following week. Dean Cole indicated that he hoped to meet with one of the students to discuss what happened (University Exhibit 8, p.933).

25. On January 22, 2012, Douglas Dickey, Assistant Dean of CEMS, received a letter from a student in Grievant's spring Stats 141 class reporting that, in the first two class sessions of the semester, Grievant had asked the students if they would be willing to

switch the Friday 12:50 – 1:40 p.m. class to a different day and time. The student mentioned that Grievant had indicated he was going to discuss the issue further at the next class. Dickey spoke about this issue with Buzas. On January 23, 2012, Buzas sent Grievant a memorandum informing him to hold his assigned courses on the days and times as scheduled (University Exhibit 5, p. 802, 834).

26. Cole and Vogelmann sent Grievant a letter dated February 7, 2012, which provided in pertinent part:

This letter is to inform you that we are conducting an investigation of your recent teaching performance (fall semester 2011 and spring semester 2012). As part of this process, we will conduct an investigatory interview with you as described in Article 13 of the Collective Bargaining Agreement. This investigation might lead to discipline . . .

A summary of the basis for this action is as follows: Student feedback regarding your teaching of STAT 141 (sections B, C, E and G) in the fall 2011 semester suggests that your teaching performance was unacceptably poor, raising concern that prior issues regarding your teaching performance have recurred. In addition, it has been alleged that you inappropriately sought to alter the meeting time of STAT 141 (section H) in the spring 2012 semester.

...
(University Exhibit 5, p.836; Grievant Exhibit U, p.497).

27. Cole and Vogelmann interviewed Grievant on March 2, 2012, as part of the investigation. Cole asked Grievant during the interview whether he did something differently during his fall 2011 classes. Grievant responded that he did not make any changes to his teaching approach in the fall. Cole described the recent letter from a student alleging that Grievant had tried to change the regular class meeting time of one of his spring 2012 STAT 141 classes. Grievant denied trying to change the regular meeting time of the class. He indicated that he and his wife have a number of health issues, and he cannot predict when he will need to miss class in order to deal with them. Grievant

indicated that he explored with the class the possibility of moving some meeting times as needed in order to make up any missed classes.

28. Cole and Vogelmann asked two professors to review the student evaluations of Grievant's fall 2011 STAT 141 sections and provide an opinion. In a March 16, 2012, memorandum, Richard Single, Associate Professor of Mathematics, stated:

The positive comments focus on the fact that many students perceive Professor Aleong as very intelligent and knowledgeable about the field. Several students mentioned that they appreciate his efforts to encourage student participation in class. There are also a number of students that temper their positive remarks about Professor Aleong's knowledge and demeanor with negative remarks about his teaching in the same comment.

There is a clear message in the written evaluations about a lack of organization for the material presented. This is surprising to see since Professor Aleong has taught this same course several times during previous years. The extremely negative responses are the most troubling to see. There are several students from each of the classes that use the phrase "worst teacher/professor/class". A single individual comment of this nature would not be so disturbing, as it could be written off as being from a specific disgruntled student. The large number of comments of this nature from different classes along with the extremely low numerical ratings for organization, clarity of explanations, and overall experience are disturbing to see (University Exhibit 5, p.914-916; Grievant Exhibit R, p.914-916).

29. Professor of Mathematics Ruth Mickey, the second faculty member to review the evaluations, stated in a memorandum:

Several years ago, I visited one of John Aleong's Stat 111 classes and I was impressed with the quality of (his) teaching. He was well prepared for class. He had gone over an example that had engaged the students' interest. . . After going over the example in detail, he passed out a handout with another example. The students were asked to work through the example, applying the statistical methods that he had gone over that day. I thought that was a very effective way of reinforcing the key concepts that were covered and helped students identify which concepts were unclear to them. Professor Aleong was able to help the students that were struggling during the class period. The students seemed enthusiastic and were willing to participate in class discussion. Professor Aleong had clearly established a good rapport with the students and he was an effective teacher in that class.

My recollection of what happened in that class several years ago is very different from the impression I got from reviewing the course evaluations for his Stat 141 classes last semester. Why is there such a large difference? I think it is worthwhile to try to find out and then investigate what, if anything, can be done to improve the situation. Certainly everyone, including Professor Aleong, wants the students to have a positive learning experience at UVM.
(University Exhibit 5, p.917-918; Grievant Exhibit R, p.917-918)

30. Five students from Grievant's spring 2012 STAT 141 were selected at random and invited to meet with Douglas Dickey, Assistant Dean of CEMS. Two students accepted the invitation. One student met with Dickey on March 23, 2012. Dickey's notes from the meeting included the following statement attributed to the student: "He tried to change the class schedule. He was very pushy about making the class change to meet his needs. He was disappointed when students did not agree that there should not be class on Friday. He said that he was very busy and he did not want to teach on Fridays. He said he was writing a book. Students were polite at first, but he kept bringing it up and students got very upset." Dickey met with the second student on March 27, 2012. Dickey's notes from this meeting included the following statement attributed to the student: "He wanted to cancel all Friday classes – he was too busy to come to campus on Fridays. He needs to write his book and have meetings. He tried to get us to agree to move the Friday class to Tuesday, but students couldn't do it. He kept trying until the students made him stop." Dickey offered the students the opportunity to make revisions to these notes. They did not make revisions (University Exhibit 5, p.910-911; Grievant Exhibit T, p.910-911).

31. Classroom observations of faculty members by peers typically are conducted for promotion purposes. Grievant, as a full professor, has attained the highest academic rank. There is no higher position to which he could be considered for

promotion. Classroom observations by peers are rarely conducted for full professors such as Grievant.

32. Grievant agreed to allow peers to visit his class during the spring 2012 semester if sufficient notification was provided to him. Three professors conducted classroom observations of Grievant during the spring 2012 semester and made a written report on their visits. The purpose of these visits in Dean Cole's view was to ensure that students were receiving teaching at an acceptable level based on their investment in their education. These classroom observations and reports were not considered part of the investigation whether to discipline Grievant (Grievant Exhibits P, Q).

33. Grievant has not taught a summer course in any subject for the Continuing Education program since 2002. He also has not taught a Continuing Education course in statistics since 2002.

34. Deans Cole and Vogelmann issued their Investigatory Report on April 16, 2012. They did not send a copy of the report to Grievant. Instead, they sent him a letter on April 17, 2012, which provided in pertinent part as follows:

The student evaluations of your fall 2011 STAT 141 courses are exceedingly poor and completely inconsistent with reasonable expectations of a full professor. It is clear that the student experience in these classes was well below acceptable standards, and this fact is corroborated by direct interviews with students.

You attempted to explain the poor student experience by blaming others. . . In short, you blamed just about everything and everyone apart from yourself. However, much of the evidence uncovered in this investigation is either inconsistent with or directly contradicts your statements . . . it was your own conduct that was primarily responsible for the poor student experience.

Regarding the matter of attempting to inappropriately change the regular meeting time of your spring 2012 STAT 141 course, our investigation discovered substantial evidence indicating that you made untruthful statements at the investigatory interview. You very clearly denied any attempt to alter the regular class meeting time without approval. However, independent statements from three

of your current students directly contradict your denial. The students were all abundantly clear, emphatic and very convincing about it being Aleong's intent on the first day of class to change the regular meeting time so that the class did not meet on Fridays.

The specific findings of this investigation are as follows:

- You grossly under-delivered in your teaching of STAT 141 in the fall of 2011. This case represents a repeat of significant, documented prior issues with your teaching conduct. Over 200 students were adversely affected by your poor teaching conduct in the fall of 2011.
- We believe that you made a willful decision to provide an extremely poor learning experience to your STAT 141 students last fall. Those actions represent dereliction of duty on your part. If instead your poor performance was not deliberate on your part, then that fact calls into question your professional competence as a teacher.
- You inappropriately attempted to alter the regular meeting time of your spring 2012 STAT 141 class in order to avoid teaching on Fridays.
- There is compelling evidence that you were not entirely truthful during the investigatory interview.

As a result of this investigation and our findings, we are contemplating that you be subjected to the following disciplinary actions; that you be ineligible for assignments yielding supplemental or additional compensation. We also intend to issue a letter of reprimand.

(University Exhibit 5, Grievant Exhibit N; University Exhibit 6, p.511-512).

35. On April 27, 2012, Jeffrey Buzas, Director of Statistics/Biostatistics, and James Burgmeier, Chair of the Department of Mathematics and Statistics, sent Grievant a letter which provided:

We regret to inform you that your .20 FTE assignment in the Department of Mathematics and Statistics will end on May 31, 2012.

This action is predicated on the October 2005 MOU between the University of Vermont and United Academics and your appointment letter, signed by you on July 21, 1994, both which stipulate that your .20 FTE is contingent upon satisfactory teaching. Recent reviews of your teaching have documented poor to unsatisfactory performance in the classroom.

(University Exhibit 7, p.533; Grievant Exhibit M)

36. The decision to end Grievant's .2 FTE assignment was reached after discussions among Buzas, Burgmeier and Cole. The "recent reviews" of Grievant's

teaching mentioned in the letter referred to the fall 2011 student evaluations and the written reports of the two faculty members who reviewed the evaluations.

37. On May 10, 2012, Deans Cole and Vogelmann sent Grievant a letter which provided in pertinent part:

We are writing regarding our decision to discipline you for your failure to carry out adequately your teaching responsibilities during the 2011-2012 academic year.

As you know, we conducted an investigation of your teaching conduct after we were notified that student evaluations of your fall 2011 STAT 141 courses were exceedingly poor. We have also considered the additional information that you provided in your letter dated April 24, 2012 and our meeting on May 3, 2012; however, we continue to find that your conduct is overwhelmingly responsible for the poor student experience. Our specific findings are:

- You grossly under-delivered in your teaching of STAT 141 in the fall of 2011. This case represents a repeat of significant, documented prior issues with your teaching conduct. Over 200 students were adversely affected by your poor teaching conduct in the fall of 2011.
- You made a willful decision to provide an extremely poor learning experience to your STAT 141 students last fall. Those actions represent dereliction of duty on your part.
- You inappropriately attempted to alter the regular meeting time of your spring 2012 STAT 141 class in order to avoid teaching on Fridays.
- There is compelling evidence that you were not entirely truthful during the investigatory interview.

This conduct is unacceptable and completely inconsistent with reasonable expectations of a full professor. Thus, we are imposing the following discipline: you will be ineligible for assignments yielding supplemental or additional compensation until the end of the spring 2015 semester.

Any continuation or repeat of this conduct will be investigated and could result in further disciplinary action.

(University Exhibit 6, p.519; Grievant Exhibit U, p.519)

38. On May 18, 2012, a student sent an e-mail message to Burgmeier. It provided in pertinent part as follows:

. . . I recently had the opportunity to take a basic statistical methods course under the instruction of John Aleong. I was made aware at the end of the semester that some students in the class expressed dissatisfaction with some aspects of the class, and I am writing in support of my instructor. I was informed that you were the appropriate audience for such a letter. I understand that one of the primary complaints has been that he had asked to cancel/reschedule all Friday classes. My recollection of this request is somewhat different; I did not think that he was requesting to reschedule all Friday classes, and I do not now believe that such was his intention. I specifically recall his mentioning a conflict on “some” Fridays, and that he would appreciate it if we could “occasionally” reschedule such classes at a different time of the week. When it became obvious that the impediments to rescheduling would make it impossible for all members of the class to attend a rescheduled class, this subject was not brought up again . . .
(Grievant Exhibit K)

39. Grievant sent a letter dated May 23, 2012, to Burgmeier which provided in pertinent part:

In accordance with Article 12, Section 8 of the Agreement between the University of Vermont and United Academics, I am grieving the April 27 letter from you and Professor Buzas, which terminates by 20% appointment in the Department of Mathematics and Statistics on the basis that this action violates the terms of my appointment as well as the October 25 MOU.

My appointment letter specifies that my 20% appointment . . . will continue “as long as your teaching is deemed satisfactory by normal University standards.” Professor Burgmeier’s letter provides no documentation of ineffective teaching. There has been no formal process undertaken to evaluate my teaching. The recent class observations by my peers are not available. Only one observation was made available and it was very positive. This is similar to prior observations of my teaching which were all positive.

On April 27, 2012, I was terminated from my 20% FTE assignment . . . because of a single unsatisfactory student review. The University indicated that the decision to terminate me was consistent with a Memorandum of Understanding signed in September 2005. The MOU refers to a single review to be conducted by both students and peers. That review was satisfactory. The most recent student review did not include my peers. Accordingly, the discipline violates the MOU.

The termination of my 20% FTE position is also a violation of Article 13.1 and the procedures specified in Article 13.10. There was not just cause to support termination and the mandated procedures were not followed by the University. The discipline was also imposed on an untimely basis as specified under Article 13.7.

. . .

As a remedy, I ask that my appointment . . . be continued, in accordance with my appointment letter.

...

(University Exhibit 7, p.534; Grievant Exhibit J, p.534)

40. Burgmeier denied this grievance. In doing so, he concluded among other things that the discontinuance of the .2 FTE assignment was not a disciplinary action. Grievant appealed this decision by filing a Step II grievance with Dean Cole on June 22, 2012. Grievant included the same allegations he made in the grievance he filed with Burgmeier, and he also made allegations that he received inadequate resources in violation of Article 10.2, 10.4, and 10.5. Cole denied the grievance. Grievant appealed this decision by filing a Step III decision with the provost. Associate Provost Gayle Nunley, the provost's designee, denied the grievance. Cole and Nunley both concluded that the elimination of the .2 FTE assignment was not a disciplinary action. They also concluded that the Article 10.2., 10.4 and 10.5 allegations were raised in an untimely manner (University Exhibit 7, p.535-547; Grievant Exhibit J, p.535-547).

41. Grievant sent a letter dated June 1, 2012, to Cole and Vogelmann which provided in pertinent part:

In accordance with Article 12, Section 8 of the Agreement between the University of Vermont and United Academics, I am grieving the May 10, 2012 letter from you, which disciplines me for "failure to carry out adequately (my) teaching responsibilities during the 2011-2012 academic year."

I also grieve the decision to discipline me in connection with my 80% FTE responsibilities. In its letter dated May 10, 2012, the University imposed certain discipline. The discipline is in violation of Article 13.1 and Article 13.7. There was not just cause to support discipline and the mandated procedures were not followed by the University. The discipline was also imposed on an untimely basis as specified under Article 13.7. There are inadequate professional resources in violation of Articles 10.2 and 10.4. Further, the letter must be rescinded under Article 13.2 for failure to indicate it is a letter of reprimand.

As a remedy, I ask that my letter of discipline be rescinded and the removal of “ineligibility for assignments yielding supplemental or additional compensation” from my record.

...

(University Exhibit 6, p.521; Grievant Exhibit U, p.521)

42. Cole and Vogelmann denied this grievance. In doing so, they concluded among other things that Grievant’s allegations relating to inadequate professional resources in violation of Articles 10.2 and 10.4 of the Contract were untimely raised. Grievant appealed the denial of the grievance to the provost. Grievant again included allegations that he received inadequate resources under Article 10.2 and 10.4, and added an alleged violation of Article 10.5. Associate Provost Nunley denied the grievance. She concluded among other things that the Article 10.2., 10.4 and 10.5 allegations were raised in an untimely manner (University Exhibit 6, p.522-528; Grievant Exhibit U, p.522-528).

OPINION

Docket No. 12-34

Grievant alleges that the May 10, 2012, letter of discipline the Employer imposed on him, making him ineligible for assignments yielding supplemental or additional compensation: 1) was not supported by just cause in violation of Article 13.1 of the Contract; 2) does not indicate it is a letter of reprimand in violation of Article 13.2 of the Contract; and 3) was untimely administered in violation of Article 13.7 of the Contract. The grievance further alleged that any performance that was less than satisfactory was the direct result of the Employer’s failure to meet its obligations under Article 10.2, 10.4 and 10.5 of the Contract to provide Grievant with adequate professional resources.

Grievant's contention that Article 13.2 of the Contract was violated because the letter of discipline does not indicate it is a letter of reprimand can be summarily dismissed. Grievant is correct that the letter does not state that it is a letter of reprimand. However, the Employer is not contending that it was seeking to impose a letter of reprimand on Grievant. Thus, there is no violation of the Article 13.2 requirement that a letter of discipline must state specifically that it is a letter of reprimand to be considered as such.

We next consider Grievant's contention that the Employer violated Article 10.2, 10.4 and 10.5 of the Contract by failing to provide him with adequate professional resources. The Employer requests that the Board dismiss this contention by Grievant because he raised it in an untimely manner at earlier steps of the grievance procedure.

Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board previously has dismissed claims made in grievances for failing to follow the contractual filing timeframes at an earlier step of the grievance procedure.¹ Article 12.8 of the Contract provides that a "grievance must be filed at the appropriate step within thirty (30) days following the time at which the faculty member and/or the Union were or reasonably should have been aware of the existence of the situation that is the basis for the grievance." Article 12.9 of the Contract states that "(f)ailure of the grievant and/or the Union to comply with the time limitations of this procedure at any of the Steps, including the initial filing of the grievance, shall constitute a forfeiture of the right to pursue the grievance and shall preclude any further processing of the grievance".

¹ Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); Affirmed, 165 Vt. 624 (1996). Grievance of Dyer, 4 VLRB 306 (1981).

Grievant first raised his claims that the Employer violated Article 10.2 and 10.4 of the Contract by failing to provide him with adequate professional resources when he filed a grievance with Deans Cole and Vogelmann on June 1, 2012, contesting the disciplinary action imposed on him. He did not raise the Article 10.5 allegation until the next step of the grievance procedure. His allegations concerning the failure to provide him with adequate professional resources related to courses which he taught during the fall 2011 semester.

He was reasonably aware of the existence of the situation that was the basis for these allegations at some point during the fall 2011 semester. His failure to file a grievance over these matters until many months after the conclusion of the semester was well outside the 30 day time period for filing a grievance. Thus, he forfeited his right to pursue a grievance over these matters. The Contract precludes our considerations of these allegations.

Grievant further contends that the discipline imposed on him was untimely administered in violation of Article 13.7 of the Contract. Article 13.7 provides that “(o)nce the University has been informed of any alleged acts that form the basis for discipline, . . . it shall have ninety (90) days after knowledge of the acts to complete any necessary investigation and commence disciplinary proceedings”. Grievant contends that the “University (was) informed of any alleged acts that form the basis for discipline” when Jeffrey Buzas, Director of Statistics, reviewed the evaluations, which may have been more than 90 days before the Employer commenced disciplinary proceedings on April 17, 2012.

The Employer asserts to the contrary that review of the evaluations by Buzas did not start the clock running on the commencement of disciplinary proceedings. Instead, the Employer contends that the University was not informed of the alleged acts that formed the basis for discipline within the meaning of Article 13.7 until Buzas informed Dean Cole on January 18, 2012, of the poor student evaluations received by Grievant. Since disciplinary proceedings were commenced within the 90 day period established by the Contract after Dean Cole was so informed, the Employer contends that Article 13.7 was not violated.

In interpreting the provisions of a contract, a contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole.² The contract provisions must be viewed in their entirety and read together.³ Article 13.7 provides, in addition to the above-cited 90-day provision, that “(d)isciplinary procedures may be initiated by the University through the Chair, Dean and/or Provost”. In reading these provisions together, we conclude that the “University” is informed of any alleged acts that form the basis for discipline at the point a person whom may initiate disciplinary procedures is so informed.

Buzas is not a department chair and is without authority to initiate disciplinary procedures. It was not until Dean Cole was made aware of Grievant’s student evaluations that a person with authority to initiate disciplinary procedures was informed of alleged acts that may form the basis for discipline. Since the Employer commenced disciplinary

² In re Grievance of VSEA on Behalf of “Phase Down” Employees, 139 Vt. 63, 65 (1980).

³ In re Stacey, 138 Vt. 68, 72 (1980).

proceedings within the 90 day period established by the Contract after Dean Cole was so informed, the Employer did not violate the timeliness provisions of Article 13.7.

This leaves Grievant's remaining contention that the letter of discipline the Employer imposed on him, making him ineligible for assignments yielding supplemental or additional compensation, was not supported by just cause in violation of Article 13.1 of the Contract. To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline.⁴

In carrying out our function to hear and make final determination on whether just cause exists for discipline, the Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract.⁵ In large measure, this is an objective standard requiring review of the penalty imposed on the basis of facts actually found by the Board.⁶ The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence.⁷

Once the underlying facts have been so proved, the Board must determine whether just cause exists for the discipline imposed by the employer based on the proven facts. The Board determines whether the action taken by the employer was reasonable based on the proven charges.⁸

⁴ Grievance of MacDonald, 28 VLRB 128, 133 (2006). Grievances of MacDonald, 28 VLRB 55, 66 (2005). Grievance of Ackerson, 17 VLRB 105, 124 (1994). Grievance of Earley and Ibey, 6 VLRB 72, 82 (1983).

⁵ Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).

⁶ Id.

⁷ Id.

⁸ Grievance of Simpson, 12 VLRB 279, 295 (1989).

The Employer has made various charges against Grievant, as detailed in Finding of Fact No. 37. The Employer first charges that Grievant “grossly under-delivered in” his teaching of statistics courses in the fall of 2011, and that this represented a “repeat of significant” issues with his “teaching conduct”. The primary evidence which the Employer presented to support this charge consisted of student evaluations and a peer review of these evaluations. This evidence made it reasonable for the Employer to conclude that Grievant demonstrated poor to unsatisfactory overall teaching performance during the fall 2011 semester which certainly warranted intervention by the Employer to correct his performance. However, the Employer has not presented sufficient evidence to demonstrate by a preponderance of evidence its serious charge that Grievant engaged in conduct constituting a gross under-delivery of teaching. This charge would necessitate the Employer establishing by a preponderance of the evidence that Grievant engaged in conduct with the intent to provide gross-undelivery of teaching. The Employer has not demonstrated such intent on Grievant’s part.

Similarly, the Employer had not established by a preponderance of the evidence its related charge that Grievant made a “willful decision to provide an extremely poor learning experience” to his students in the fall of 2011. Again, it is reasonable to conclude that Grievant demonstrated poor to unsatisfactory teaching performance, but the Employer has not demonstrated by a preponderance of the evidence that Grievant’s deficiencies resulted from a willful decision on his part to provide a poor learning experience to his students. This is particularly so given that the evidence the Employer primarily relies on is limited to the single measure of student evaluations and a peer review of these evaluations.

The Employer next charges Grievant with inappropriately attempting to alter the regular meeting time of his spring 2012 STAT 141 class to avoid teaching on Fridays. The evidence before us is mixed and too weak for us to conclude that the Employer established this charge by a preponderance of the evidence. The Employer presented evidence of statements made by three students during the Employer's investigation of this issue indicating that Grievant asked students on more than one occasion whether they would be willing to switch the Friday class to a different day and time, and that he was persistent in pursuing the issue. These students did not appear as witnesses in the Board hearing.

Grievant disputed this version of events during the investigation and at the Board hearing, indicating that he and his wife had health issues and that he explored with his class the possibility of moving some meeting times as needed to make up any missed classes. Also, in evidence is a written statement from a student generally consistent with Grievant's version of events. This student did not appear as a witness at the Board hearing.

In presenting their case, the Employer apparently thought it was largely sufficient to rely on statements made during an investigation to establish this charge. In so proceeding, the Employer did not take into account that all Board hearings are *de novo*; that it is our duty to determine *de novo* and finally the facts of a particular dispute.⁹ This was particularly significant on this issue given the conflicting accounts of what occurred. There was no opportunity during the Board hearing for examination and cross-

⁹ Section 12.14, Board Rules of Practice. Grievance of Ackerson and Vermont State Colleges Staff Federation, 16 VLRB 262, 273 (1993). Colleran and Britt, 6 VLRB at 261, 265.

examination of persons with personal knowledge of events except for Grievant. In sum, the evidence as presented results in our conclusion that the Employer has not established this charge by a preponderance of the evidence.

The final charge made by the Employer against Grievant is that he was not entirely truthful during the investigatory interview because he denied any attempt to alter the regular class meeting time of his spring STAT 141 course contrary to statements from three students directly contradicting him. Given our conclusion discussed above that the Employer has not established by a preponderance of the evidence that Grievant inappropriately attempted to alter the regular meeting time of his spring 2012 STAT 141 class, we cannot conclude that he was dishonest during the investigatory interview when he denied attempting to alter the regular meeting time.

In sum, the Employer has not met its burden of establishing by a preponderance of the evidence any of the charges made against Grievant. Thus, just cause does not exist to support the disciplinary action imposed on Grievant of making him ineligible for assignments yielding supplemental or additional compensation.

We need to determine the remedy to grant Grievant as a result of this improper disciplinary action. The appropriate remedy for an improper disciplinary action is to make the employee “whole”; to make an employee whole is to place the employee in the position he or she would have been in if the improper discipline had not occurred.¹⁰ This means rescinding the disciplinary action and awarding back pay and benefits lost due to the disciplinary action.¹¹

¹⁰ Grievance of Sherbrook, 13 VLRB 359, 361 (1990).

¹¹ Id.

This requires that the Employer rescind the disciplinary action imposed on Grievant and give it no further force and effect. Also, the improper disciplinary action of making Grievant ineligible for assignments yielding supplemental or additional compensation has been in effect since May 2012. Grievant is entitled to receive any back pay and benefits he would have received if this improper disciplinary action had not occurred.

Grievant also seeks attorney fees and costs. To so order would be in excess of our authority under law, which is limited to remedying improper disciplinary actions.¹²

Docket No. 12-40

Grievant alleges that the disciplinary action of the termination of his .2 FTE appointment in the Department of Mathematics and Statistics for alleged unsatisfactory performance: 1) was not supported by just cause in violation of Article 13.1 of the Contract; 2) was untimely administered in violation of Article 13.7 of the Contract; and 3) constituted a failure to follow mandated termination procedures under Article 13.8 and/or 13.10 of the Contract. Grievant further alleged that any performance that was less than satisfactory was the direct result of the Employer's failure to meet its obligations under Article 10.2, 10.4 and 10.5 of the Contract to provide him with adequate professional resources. Grievant also alleged that, if a Memorandum of Understanding entered into in October 2005 by the Employer and United Academics controlled the termination, required termination procedures were not followed.

¹² Id. Grievance of Warren, 10 VLRB 65, 67 (1987).

We dismiss Grievant's contention that the Employer violated Article 10.2, 10.4 and 10.5 of the Contract by failing to provide him with adequate professional resources. Grievant first raised these claims when he filed a Step II grievance with Dean Cole on June 22, 2012, contesting the ending of his .2 FTE assignment in the Department of Mathematics and Statistics. His allegations concerning the failure to provide him with adequate professional resources related to courses which he taught during the fall 2011 semester.

He was reasonably aware of the existence of the situation that was the basis for these allegations at some point during the fall 2011 semester. His failure to file a grievance over these matters until many months after the conclusion of the semester was well outside the 30 day time period for filing a grievance pursuant to Article 12.8 of the Contract. Thus, he forfeited his right to pursue a grievance over these matters pursuant to Article 12.9 of the Contract. The Contract precludes our consideration of these allegations for the same reasons we set forth in our consideration of this issue in Docket No. 12-34.

The various contentions that Grievant makes concerning alleged violations of Article 13 of the Contract presume that the ending of Grievant's .2 FTE assignment in the Department of Mathematics and Statistics constituted a disciplinary action. Grievant contends that this action constituted the disciplinary action of "termination" pursuant to Article 13.2 of the Contract.

Article 13.2 defines "termination" as "the discharge of a faculty member prior to the expiration of his or her appointment with the University or the discharge of a tenured

faculty member”. Termination can be considered pursuant to Article 13.7 for “dereliction of duties, professional incompetence, gross misconduct or academic dishonesty.”

Grievant contends that he had a right to continued employment. He asserts that his appointment was to continue and would not expire so long as he performed satisfactorily. He maintains that the decision to terminate the .2 FTE appointment was a discharge prior to the end of the appointment since the appointment had no end date unless he was discharged. Moreover, Grievant contends that he was a tenured faculty member at the time, and that the termination of his .2 FTE position constituted the termination of a tenured faculty member.

The Employer disputes the assertion that the ending of Grievant’s .2 FTE assignment was a disciplinary action. The Employer contends that the assignment was not governed by the Contract. Instead, the Employer asserts that Grievant’s 1994 letter of appointment and the October 2005 Memorandum of Understanding govern this assignment separate from the Contract. The Employer asserts that Grievant’s dissatisfaction with the ending of his assignment is not a grievance over which the Board has adjudicatory authority because it does not involve the Contract or the discriminatory application of a rule or regulation.

This, we need to examine the nature of Grievant’s .2 FTE assignment in CEMS to determine whether the ending of it constituted a disciplinary action within the meaning of the Contract. This requires reviewing the 1994 letter of appointment and the October 2005 Memorandum of Understanding. The 1994 letter of appointment provided that “a supplemental salary not to exceed 20 percent of your total compensation will be provided by the College of Engineering and Mathematics for teaching one course each semester . .

. as long as your teaching is deemed satisfactory by normal University standards . . .” The October 2005 Memorandum of Understanding provides that the “University agrees to continue to offer (Grievant) a 20% teaching appointment in the Department of Mathematics and Statistics (one course each semester) until a review has determined that his teaching is not satisfactory by normal University standards . . .”

The fairest reading of these documents is that Grievant’s .2 FTE appointment was an assignment on a semester to semester basis which would continue contingent on his teaching being satisfactory by normal University standards. We disagree with Grievant that the decision to end the .2 FTE appointment was a discharge prior to the end of the appointment. Instead, the ending of his .2 FTE appointment is more appropriately characterized as the end of a semester to semester assignment at the conclusion of a semester based on a determination that his teaching was not satisfactory by normal teaching standards.

If we were to accept Grievant’s contention that this was a disciplinary termination prior to the expiration of his appointment pursuant to Article 13.2 of the Contract, we would be granting Grievant many more rights than set forth in the 1994 letter of appointment and the 2005 Memorandum of Understanding. This is because the “grounds on which (a disciplinary) termination can be considered” pursuant to Article 13.2 are “dereliction of duties, professional incompetence, gross misconduct or academic dishonesty”. These grounds are substantially more serious and difficult to establish than the basis for ending Grievant’s .2 FTE assignment set forth in the letter of appointment and Memorandum of Understanding; namely that there is a determination that Grievant’s teaching is not satisfactory by normal teaching standards.

We also reject Grievant's assertion that this was a disciplinary termination pursuant to Article 13.2 of the Contract because it constituted the discharge of a tenured faculty member. Grievant's letter of appointment made it clear that he is a tenured faculty member only for his primary .8 FTE appointment as Professor in the Department of Plant and Social Science, and that he was not tenured with respect to his .2 FTE secondary appointment in the College of Engineering and Mathematics. Thus, the ending of his .2 FTE assignment did not constitute the discharge of a tenured faculty member. He was not discharged from his tenured appointment.

In sum, Grievant has not established that the ending of his .2 FTE assignment in the Department of Mathematics and Statistics constituted the disciplinary action of "termination" pursuant to Article 13.2 of the Contract. This leaves for determination Grievant's remaining contention that, if the Memorandum of Understanding entered into in October 2005 by the Employer and United Academics controlled the termination, required termination procedures were not followed. Grievant contends that the Memorandum of Understanding is a side letter of agreement to the Contract and must be construed consistent with its terms and conditions. The Employer contends that the Board does not have adjudicatory authority over this issue because it does not involve an alleged violation of a collective bargaining agreement or the discriminatory application of a rule or regulation.

The Board has such adjudicatory jurisdiction as is conferred on it by statute.¹³ In deciding grievances, the Board is limited by the statutory definition of grievance¹⁴, which

¹³ In re Grievance of Brooks, 135 Vt. 563, 570 (1977).

¹⁴ Grievance of Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO and Michael Laflin, 16 VLRB 276, 280 (1993).

is in pertinent part the “expressed dissatisfaction . . . with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation.”¹⁵

The Board would have jurisdiction over Grievant’s contention if he was alleging that the Employer violated a provision of the Contract, rule or regulation in making the determination that Grievant’s teaching was not satisfactory. Grievant has made no such allegation other than his contention that disciplinary procedures set forth in Article 13 of the Contract were not followed. As discussed above, the termination of Grievant’s .2 FTE assignment was not a disciplinary action. Thus, Article 13 is not applicable to this matter. Grievant is left with the bare assertion that required termination procedures under the Memorandum of Understanding were not followed. This is not sufficient to create an actionable grievance absent an assertion that there was otherwise a violation of the Contract, rule or regulation. Grievant’s assertion that the Memorandum of Understanding was a side letter of agreement incorporated into the Contract is refuted by the explicit statement in the Memorandum of Understanding, entered into in settlement of a grievance, that “(t)his settlement is without prejudice or precedent for any future actions taken by the University”. Thus, we dismiss this grievance.

¹⁵ 3 V.S.A. § 902(14).

ORDER

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

Docket No. 12-34

1. The Grievance of John Aleong (“Grievant”) in Docket No. 12-34 is sustained.
2. The disciplinary action imposed on Grievant of making him ineligible for assignments yielding supplemental or additional compensation is rescinded. The Employer shall remove the disciplinary letter from Grievant’s personnel file and shall give it no further force or effect.
3. The Employer shall provide Grievant with any back pay and benefits he would have received if this improper disciplinary action had not occurred. The interest due Grievant on any back pay shall be computed on gross pay and shall be at the legal rate of 12 percent interest per annum; it shall run from the date Grievant would have received such pay but for the improper disciplinary action and end on the date he receives such pay.
4. The parties shall file with the Board by May 16, 2013, a proposed order indicating the specific amount of any back pay and other benefits due Grievant; and if they are unable to agree on such order, shall notify the Board in writing that date of specific facts agreed to be the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if necessary, shall be held on May 30, 2013, at 3 p.m., in the Labor Relations Board hearing room.

Docket No. 12-40

The Grievance of Professor John Aleong in Docket No. 12-40 is dismissed.

Dated this 30th day of April, 2013, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Linda P. McIntire

Linda P. McIntire, Acting Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard