

VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES)	
FACULTY FEDERATION, VFT, AFT,)	
LOCAL #3180, AFL-CIO)	DOCKET NO. 80-60
)	and
v.)	DOCKET NO. 80-73
)	
VERMONT STATE COLLEGES)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On July 29, 1980, and September 8, 1980, the Vermont State Colleges Faculty Federation (the "Federation") filed separate charges of unfair labor practices, alleging that the Vermont State Colleges (the "Colleges") had refused to bargain tenure limits contained in a long-range staffing plan (Docket No. 80-60) and criteria for appointment, reappointment, promotion and tenure (Docket No. 89-73) in violation of 3 V.S.A. §961(5). The Colleges filed an answer to the charges contained in Docket No. 80-60 on August 12, 1980. No answer was filed on the charges set forth in Docket No. 80-73.

After investigating both of the charges and taking the verified allegations as true, the Board consolidated the two cases and issued an unfair labor practice complaint on September 15, 1980.

A hearing was held on October 23, 1980, at the Board hearing room in Montpelier, before Board members Kimberly B. Cheney, William G. Kensley, Sr., and Robert H. Brown. Beverly Ryan, Executive Director of the Vermont Federation of Teachers (VFT), represented the Federation. Attorney Nicholas DiGiovanni, Jr. represented the Colleges.

Requests for findings of fact and memoranda were filed by the Federation and the Colleges on November 13 and 17, 1980, respectively.

FINDINGS OF FACT

1. The Federation is the exclusive bargaining representative of all the full-time faculty and ranked librarians employed by the Colleges.

2. The last three collective bargaining agreements between the Federation and the Colleges represent the entire bargaining history between the parties and were admitted into evidence (Employer's Exhibits #1-#3) at the hearing on this matter and are incorporated herein as findings of fact.

3. Employer's Exhibit #3 is the current agreement between the parties, having been extended to February 15, 1981, while negotiations for a successor agreement continue.

4. Negotiations between the parties began on May 27, 1980, and continued throughout the summer, with the parties declaring impasse on September 4, 1980.

5. The parties currently are engaged in factfinding pursuant to 3 V.S.A. §925.

6. On August 8, 1980, the Colleges Board of Trustees promulgated a new policy (Employer's Exhibit #19) setting forth criteria for appointment, reappointment, promotion and tenure, and establishing a ten-year staffing plan which includes limits on the number of faculty promoted and granted tenure.

7. That policy (Employer's Exhibit #19) was the result of a long process initiated in January, 1979, involving principally the Board of Trustees Personnel Committee, the Chancellor of the Colleges, Richard Bjork, the Colleges Director of Planning, Harry Lejda, and all the presidents and academic deans throughout the VSC system.

8. Chancellor Bjork assumed the position of Chancellor in May, 1978. At that time, he was informed by the Board of Trustees of the imminent problems facing the Colleges as perceived by the Trustees, one of which was an excessively accelerated promotion and tenure process then in place, making it difficult to develop flexible and responsive curricula at the Colleges. The Board of Trustees thus set out, through the Chancellor initially, to establish a personnel management system which included a long-range staffing plan.

9. Comprehensive promotion and tenure criteria were first promulgated by the Board of Trustees in January, 1976 (Employer's Exhibit #4). These criteria were not first subject to bargaining with the Federation but were developed and implemented unilaterally by the Colleges.

10. No grievances or unfair labor practice charges resulted from the promulgation of the 1976 promotion and tenure criteria.

11. The most controversial feature of the August, 1980 policy (Employer's Exhibit #19), the subject of these charges, was a limitation on the number of tenured faculty within the VSC system. With some variations and exceptions, a 60/40 ratio of tenured to untenured faculty was set as the goal, this ratio representing the national norm. (See Employer's Exhibit #18).

12. The Colleges' rationale behind a tenure limits policy (the 60/40 ratio) as explained by Chancellor Bjork is to provide for educational programs throughout the VSC system which can be adjusted to meet changing student needs in curriculum offerings. The certain guaranteed security afforded a tenured faculty member within an academic discipline may restrict the Colleges' ability to provide that flexibility.

13. VSC Faculty, either individually through open campus meetings called by Chancellor Bjork or collectively through the Federation or campus faculty assemblies, were aware of the Colleges' development of new promotion and tenure criteria and limits since the inception of that process in 1979.

14. As the 1979-80 academic year began, the Board of Trustees Personnel Committee was told by the Chancellor on October 11, 1979, (Employer's Exhibit #9, Page 3) that a staffing plan and new promotion and tenure criteria were being developed and would come before the Personnel Committee for action in the Spring of 1980. John Gillen, President of the Faculty Federation, was sent a copy of that document.

15. At the October 18, 1979, meeting of the Personnel Committee, Federation representative Richard McDonald was present when the Chancellor discussed the developing policies with the Trustees. Roberta Hackel, a faculty member at Castleton, was also present and issued a written statement commenting on the proposals. Dr. Janet Murphy, a faculty member of Lyndon State College, was told by the Chancellor at that time that faculty were to be included in the process of developing the new criteria and the staffing plan.

16. The subjects of new promotion and tenure criteria and staffing policies appeared on the agenda in other meetings of the Personnel Committee and the minutes reflect active discussion (Employer's Exhibits #11-#14) of the issues at those meetings. Mr. Gillen was sent copies of all such agenda and minutes and attended at least one meeting (Employer's Exhibit #12, Page 8, November 26, 1979) where the Chancellor discussed the concept of tenure limits in detail.

17. Extensive faculty input was sought and received, particularly during the winter of 1979-80. Employer's Exhibit #15, for example, is a compilation of the written comments submitted by individual faculty members and faculty governance bodies throughout the VSC system regarding the new criteria and planned limitations of tenured faculty.

18. The process of developing the new policy continued into the Spring of 1980 and past the onset of contract negotiations between the Colleges and the Federation. Throughout the 1979-80 academic year, and until August 8, 1980, the effective date of the implementation of the policy in its final form, the Federation was provided with numerous working drafts of that policy.

19. By letter dated July 16, 1980, from the Federation president John Gillen to Board of Trustees Chairman Marshall Witten (Petitioner's Exhibit #1), the Federation expressed its position that the Colleges' "tenure quota" policy should not be implemented without prior negotiations with the Federation. No bargaining demands regarding promotion and tenure criteria and limits were proposed by the Federation before July 16, 1980, and no detailed criteria were counter-proposed by the Federation until the end of August, after the policy had already been approved by the full Board of Trustees and made effective by the Colleges.

20. On July 23, 1980, the parties initialled a management rights article (Employer's Exhibit #21) for inclusion in the next contract. That clause was substantially similar to the management rights articles included in previous agreements (Employer's Exhibits #1-#3).

21. At the bargaining table, the Colleges took the position that promotion and tenure criteria and limits were part of an overall staffing plan and were not bargainable subjects under the State Employee Labor

Relations Act. The Colleges also took the position that the right to set such policies was a retention of their rights to promulgate such criteria and policy pursuant to the management rights clauses negotiated in prior agreements. The Colleges did refuse to bring to the bargaining table a specific set of promotion and tenure criteria or the details of a staffing proposal limiting the number of tenured faculty.

OPINION¹

Here we are required to decide whether the Colleges may unilaterally adopt and implement the same tenure and promotion criteria developed for the 1979-1980 contract in the successor contract. The criteria include a policy limiting the number of faculty granted tenure. The Federation argues that the Colleges' attempt to implement the 1980 policy for the successor contract constitutes a refusal to bargain in good faith and thus an unfair labor practice in violation of 3 V.S.A. §961(5). The Colleges admit the fact that they did refuse to bring to the bargaining table, at which the successor contract was being considered, any specific proposal regarding the new policy. We need not examine the current bargaining history on this issue. There is none, other than the respective blanket demands and denials of the Federation and the Colleges relative to the subject.

We reject at the outset the Colleges' argument that even assuming these issues are bargainable under 3 V.S.A. §904, the record indicates that the Colleges met its bargaining obligation. The Colleges claim, but we cannot accept, that its presentation of the policy to, and consultation with, faculty governance bodies, the Federation, and individual faculty members prior to implementing the policy in August, 1980, met its obligations. While the record is replete with numerous occasions of such consultation and presentation, it is also clear that throughout that process the Colleges maintained unequivocally the position that the promulgation of such policies was entirely within their management rights to operate the Colleges.

¹The original Opinion and Order in this case was issued December 18, 1980. Upon the Employer's Motion to reconsider, we withdrew our original Opinion and Order, and substituted this amended Opinion and Order.

The Colleges' interaction with various faculty representatives is commendable, but it does not change the fact that the criteria and tenure limits were promulgated and implemented outside of the collective bargaining process. While we believe the Colleges had the right to implement these criteria under the Agreement as it then existed, this does not mean the criteria have a perpetual life. Promotion and tenure policies, we believe, are negotiable whenever a new contract is negotiated.

The test in determining whether the Colleges committed an unfair labor practice, in refusing to bargain tenure criteria for the successor contract, is whether these matters pertain to the relationship between the employer and its employees, and if so, whether promotion and tenure criteria and limits are matters prescribed or controlled by statute and thus excepted from the obligation to bargain. Vermont State Colleges Faculty Federation v. Vermont State Colleges, ___ Vt. ___ (Slip Op. June 11, 1980 at 5).

On that test, we make two conclusions. First, we find that promotion and tenure criteria and limits certainly do relate to the relationship between the Colleges and the employees affected here. We concur with the Federation that criteria for conditioning continued employment, and at least the impact of any limitations on the number of qualified faculty tenured, are basic to that relationship. Second, those subjects are not prescribed or controlled by statute. We cannot accept the Colleges' argument that these subjects are expressly committed exclusively to the discretion of the Colleges under either the management rights provision of the Act, 3 V.S.A. §905, or under the provision of VSC Board of Trustees' powers set forth in 16 V.S.A. §2174. As we have noted, we believe Article VI of the 1979-1980 Agreement gave the Colleges the unilateral

right to establish these criteria, but the parties are free to negotiate a different provision if they wish. Our Supreme Court's ruling in Vermont State Colleges Faculty Federation v. Vermont State Colleges, supra, we believe, compels the conclusion that tenure is a bargainable subject. Like "faculty governance", dealt with in that opinion, the authority of the Colleges to make tenure policies granted by 16 V.S.A. §2174

...is not consistent with the idea of bargaining about whether and by what process the faculty will be given an opportunity to advise the Board of its views on these issues.

Vermont State Colleges Faculty Federation v. Vermont State Colleges, supra at 5-6

Accordingly, we conclude that promotion and tenure policies are also within the broad realm of bargainable subjects under the State Employee Labor Relations Act.

ORDER

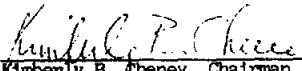
NOW, THEREFORE, based on these findings of fact and for the foregoing reasons, it is hereby ORDERED, pursuant to 3 V.S.A. §965(d) that:

1. the Respondent, the Vermont State Colleges, CEASE and DESIST from refusing to bargain collectively in good faith with the Complainant, the Vermont State Colleges Faculty Federation, policies regarding promotion and tenure criteria and limits to be included in any agreement succeeding the 1979-1980 Agreement between the parties; and that
2. the Vermont State Colleges take the following affirmative action: bargain collectively in good faith with the Vermont State Colleges Faculty Federation regarding promotion and tenure

for the agreement succeeding the 1979-1980 Agreement.

Dated this 22 day of January, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.

*Affirmed by Supreme Court
Nov. 1981*