

VERMONT LABOR RELATIONS BOARD

Grievance of Diane Fairchild and)
the Vermont State Colleges)
Faculty Federation, Local #3180)
AFT, VFT, AFL-CIO)

DOCKET NO. 80-57

FINDINGS OF FACT, OPINION, AND ORDER

Statement of the Case

On July 29, 1980, the Vermont State Colleges Faculty Federation, Local #3180, AFT, VFT, AFL-CIO (hereinafter "Federation"), filed a petition with the Vermont Labor Relations Board on behalf of Diane Fairchild (hereinafter "Grievant"), an Assistant Professor in Physical Education at Johnson State College (hereinafter "Johnson"). The petition alleged that the Vermont State Colleges (hereinafter "Colleges") violated Articles III(14), IV and XXIV of the collective bargaining agreement between the parties (hereinafter "Agreement") and the Colleges' tenure criteria in the denial of tenure to Ms. Fairchild on March 26, 1980.

A hearing was held in the Board hearing room in Montpelier on March 12, 1981. Board members Kimberly B. Cheney, William G. Kemsley, Sr., and James S. Gilson were present. The Federation was represented by Stephen T. Butterfield. Attorney Nicholas J. Giovanni, Jr., represented the Colleges. Requested findings of fact and memoranda were filed by the Colleges and the Federation on March 28 and 27, 1981, respectively.

FINDINGS OF FACT

1. Grievant was hired as an Instructor of Physical Education at Johnson in Fall, 1974. During her years at Johnson, Grievant taught courses in the Physical Education Department and coached women's basketball and field hockey. The coaching was part of her regular full-time workload, and she received a reduction in the number of her classroom courses because of the coaching.

2. On February 23, 1976, Grievant's second year at Johnson, the Colleges issued their Administrative Policy and Criteria on Promotion and Tenure (Joint Exhibit #6). This new policy governed all promotion and tenure decisions at Johnson for all relevant times herein.

3. Pursuant to Article XXIV, Agreement, faculty are evaluated for tenure during their sixth year of full-time teaching service with the Colleges.

4. Following completion of her second year, Grievant received a pre-tenure evaluation from her Division Chairman, Dr. Fred Stahloer (Colleges' Exhibit A). The evaluation praised her performance as a faculty member, but recognized her lack of a terminal degree, noting "the failure to obtain it jeopardizes her tenure". The new policy and criteria required as a credential for the award of tenure a "terminal degree in major teaching field or significant professional, artistic, or scholarly accomplishment". Grievant held a Master's Degree in her field, but was not pursuing a doctorate.

5. Grievant was recommended for promotion from Instructor to Assistant Professor on December 17, 1976, by Dr. Stahuber (College's Exhibit B). In this recommendation were cited her excellent student evaluations, her very good relationship with her students, membership on several college committees, development of new courses, service as advisor and counselor for more than 20 majors and students, performance as Women's Varsity Basketball and Field Hockey Coach, and Coordinator of Women's Athletics. Also noted were her receipt of the Joseph P. Kennedy, Jr. Foundation Award in recognition of outstanding activity in support of the Special Olympics Program (1974), and her work as a consultant and clinician for the Hamilton County Public Schools since 1974.

Stahuber again warned Grievant that future promotion and/or tenure was jeopardized if she did not obtain a terminal degree.

6. The Faculty Committee on Promotion, Retention, and Tenure (hereinafter "Faculty PRT Committee") recommended Grievant for promotion on January 30, 1977, based on her performance as a teacher and coordinator of women's athletics, her development of new courses, and her service on committees. The Committee advised Grievant to "begin active involvement in a terminal degree program" (Colleges' Exhibit C).

7. On March 15, 1977, Dr. Stahuber acknowledged that a discussion with Johnson President Edward Elmendorf convinced him that he made a mistake in implementing the promotion policy as it pertained to Grievant. Stahuber reversed his earlier recommendation of Grievant for promotion to Assistant Professor because she neither had a terminal degree nor was working toward it (Colleges' Exhibit D).

8. The Colleges' Administrative Policy and Criteria on Promotion and Tenure requires the following credentials for promotion to Assistant Professor: "active pursuit of terminal degree in major teaching field or recognized professional, artistic, or scholarly accomplishment".

9. On April 1, 1977, President Elmendorf denied promotion to Grievant because she had not pursued a terminal degree in her major teaching field nor demonstrated significant professional, scholarly, or artistic accomplishment (Colleges' Exhibit E).

10. On May 2, 1977, Dr. Stahuber enthusiastically supported Grievant for reappointment, citing again her excellent record of teaching, college service, community service, and participation in professional workshops (Colleges' Exhibit F).

11. On May 10, 1977, in a pre-tenure evaluation, Dr. Stahuber warned that unless Grievant "receives her terminal degree, I cannot recommend her for tenure" (Colleges Exhibit G).

12. During her fourth year at Johnson (1977-78), Grievant was again reviewed for promotion to Assistant Professor. She received favorable recommendations from her divisional committee (Colleges' Exhibit H) and from the Faculty PRT Committee (Colleges' Exhibit I). Both committees underlined in their recommendations that further promotion and/or tenure would be difficult without Grievant becoming involved in a terminal degree program.

13. Citing the continuing failure by Grievant to pursue a terminal degree, Dr. Stahuber again recommended against promotion (Colleges' Exhibit J). President Elmendorf concurred in this recommendation because Grievant had not met the required credentials necessary for promotion (Colleges' Exhibit K).

14. During her fifth year (1978-79), Grievant did begin working toward a terminal degree. Although she did not formally enter a doctoral program, she began to accumulate for the first time some graduate credits toward that end (Grievant's Exhibits L, M, N, O). This time, particularly because she had started to pursue her terminal degree, she received favorable recommendations at all levels (Colleges' Exhibits M, N, O) and was awarded promotion to Assistant Professor by President Elmendorf on April 1, 1979 (Colleges' Exhibit P).

15. In the letter granting promotion, President Elmendorf reminded Grievant that it would be necessary for her to have the required credentials in order for him to recommend her for tenure.

16. In order for a faculty member to be granted tenure, the Colleges' Administrative Policy and Criteria on Tenure provides that the following performance rating requirements must be met: A. Teaching - Superior, B. Professional Growth - Superior, C. College and Community Service - Average. Moreover, faculty must have a terminal degree in their major teaching field or significant professional, artistic, or scholarly accomplishment.

17. On August 30, 1979, Dean of Academic Affairs Gary Confessore recommended that Grievant be reappointed for the 1980-81 school year (Colleges' Exhibit Q). He further recommended that Grievant "be placed on notice, once again, that the outlook for a positive tenure recommendation remains quite negative".

18. On August 31, 1979, President Elmendorf informed Grievant that she had been reappointed for 1980-81, but that "this reappointment is not to be understood as implying a favorable judgment on your qualifications for tenure" (Colleges' Exhibit R).

19. As required by Agreement, Grievant was reviewed for tenure during her sixth year, academic year 1979-80.

20. The evaluation process calls for input from Divisional and Faculty PRT Committees, Department chairpersons, peers, students, and off-campus authorities. All input from these areas strongly recommended Grievant for tenure (Grievant's Exhibit 4-10).

21. Among the accomplishments of Grievant cited by these sources were:

- a. Excellence in teaching;
- b. Outstanding success as a field hockey coach and basketball coach. Her teams consistently had winning seasons. In 1979, her field hockey team placed 7th in the Division III National Association of Intercollegiate Athletics for Women Field Hockey Tournament;
- c. Development of the Women's Physical Education and Athletic Programs at Johnson as Coordinator of Women's Athletics;
- d. Conducting of popular basketball and field hockey workshops;
- e. National-rated basketball and volleyball official;
- f. Service on college committees;
- g. Treasurer of Johnson Recreation Commission and Supervisor of their Summer Recreation Program;

- h. Physical Education consultant to Lamoille schools;
 - i. Received the Joseph P. Kennedy, Jr. Foundation Award in recognition of outstanding activity in support of the Special Olympics Program.
22. In the opinion of the Faculty PRT Committee, Grievant's "coaching of field hockey qualified as 'significant professional or artistic...accomplishment which is required of candidates for tenure when the terminal degree has not been attained" (Grievant's Exhibit #6).

23. Gary Confessore, Dean of Academic Affairs, disagreed with the Faculty PRT Committee and recommended that Grievant not be granted tenure on the basis of her unsatisfactory professional growth (Grievant's Exhibit #3). He stated:

Ms. Fairchild's record of professional and scholarly accomplishment is unsatisfactory when compared to the tenure standards. The consistently high performance level of the teams she has coached is an indication of high achievement and professional competence. However, she has almost no record of scholarly accomplishment. She does not hold a terminal degree, nor has she been admitted to a program leading to a terminal degree.

24. Before a tenure case is reviewed by the President, all lower level evaluations and recommendations must be entered into the personnel file by February 1. That was done in this case. Article XXIV, Agreement, requires the President to notify the faculty member of the tenure decision by April 1.

25. President Elmendorf testified that between February 1 and April 1, 1980, he reviewed four faculty members for tenure: Grievant, Roger Rath, Wayne Roberts, and Daniel Tobey. The latter three all had terminal degrees in their major teaching field, and all received tenure.

26. With regard to Grievant's case, the President analyzed her entire personnel file which documented her six-year career at Johnson (Colleges' Exhibits A-S and Grievant's Exhibits #3-11, 14-15, were all part of her file). He reviewed her student evaluations over the previous three years. He reviewed the specific tenure recommendation letters from faculty committees and the Dean, and assessed her total record against the Colleges' tenure criteria. He spent an estimated 8-12 hours reviewing the case.

27. On March 26, 1980, President Elmendorf notified Grievant that she was not granted tenure and that her appointment for 1980-81 would be a one-year terminal appointment (Grievant's Exhibit #1). As reason for the denial, the President stated:

Your teaching, college, and community service were judged favorable but your record of professional growth failed to meet the performance rating requirement needed for the award of tenure. More specifically, the required credential for the award of tenure is a terminal degree in your major teaching field, or significant professional, artistic, or scholarly accomplishment. You do not possess a terminal degree in the major teaching field, nor have you demonstrated significant professional, artistic, or scholarly accomplishment.

28. Grievant has completed two courses toward a doctorate degree, but has never enrolled in a terminal degree program. Grievant cited reasons for not pursuing a terminal degree to be: 1) it was very difficult for her to take courses because of her coaching duties; and 2) the Colleges' tenure criteria allow the alternative of significant professional accomplishment; and she considered her teaching and coaching to be significant accomplishments.

29. Article XIV, Agreement, provides: "After every five years or more of continuous full-time teaching service to the Vermont State Colleges, permission to take one unpaid leave of absence from the faculty of a College of up to two consecutive semesters must be granted."

Despite this provision, Grievant never requested any leave time to work on a terminal degree or other professional growth.

30. Grievant's tremendous coaching accomplishments are undisputed. Her field hockey and basketball teams had a combined 75-21-11 record. She led her 1979 Field Hockey team to the Nationals where they competed against, and defeated, Big 10 schools on their way to a 7th place finish. The field hockey team has defeated some of the top universities in the Northeast. Her coaching accomplishments are remarkable, given the small size and meager resources of Johnson.

31. President Elmendorf testified that he did not consider successful coaching to be a significant professional accomplishment in terms of the Colleges' tenure criteria. He further stated that there was never an instance where he considered evidence of superior teaching ability as worthy by itself to substitute for the terminal degree in tenure cases.

32. Grievant has no record of publications. She has no books to her credit, and has published no articles in the journals in her field of physical education.

33. In 1979, a year before Grievant was denied tenure, the Colleges had granted tenure to Peter Kramer, also a faculty member in the Physical Education Department at Johnson (Grievant's Exhibit #12). Like Grievant, Kramer did not hold a terminal degree; however, his record was judged as demonstrating significant enough professional accomplishment to substitute for the terminal degree.

34. The faculty committees, Kramer's division head, the Acting Vice President for Academic Affairs, and President Elmendorf all strongly endorsed Kramer for tenure (Colleges' Exhibits T, U, V; Grievant's Exhibits #12). The accomplishments of Kramer cited include:

- a. Outstanding teaching;
- b. Making the Injury Care Room at the gym an effective operation; spending between 6-15 hours per week without remuneration to serve the Johnson community;
- c. Successful coaching. As coach of the cross country team, Kramer lead the team to three New England N.A.I.A. Division championships;
- d. Service on various College committees;
- e. Service as athletic trainer and physical therapist on campus;
- f. Holds a Certificate in Physical Therapy beyond his Master's Degree in Adapted Physical Education and Corrective Therapy;
- g. Wrote an article on leg and ankle injuries which was published in the Journal Physician and Sports Medicine;
- h. Various presentations and attendance at courses and conferences in his field;
- i. Established and directs Physical Therapy Department at Copley Hospital. His affiliation with Copley made possible independent studies, internships, and full-time jobs for Johnson students at the hospital;
- j. Extensive community service - organized and trained Morrisville Rescue Squad, therapist at local schools, ran high school cross country clinic.

35. President Elmendorf, in his letter notifying Kramer that he was granted tenure (Grievant's Exhibit #12), made reference to these accomplishments as forming the basis for the decision. He further stated:

I was especially pleased that the Board of Trustees recognized your professional public service contributions as significant professional accomplishment sufficient to substitute for the terminal degree requirement. Your outstanding record of contribution to Johnson State College and the surrounding community has been recognized by the institution and the Board of Trustees of the State College System.

36. The Divisional PRT Committee, in their letter recommending Kramer for tenure, stated that Kramer's Certificate in Physical Therapy was "essentially a terminal degree in that area" (Grievant's Exhibit #13, Pg. 1). In his recommendation, the Vice President for Academic Affairs disagreed with the Divisional PRT Committee and stated: "Mr. Kramer does not hold a terminal degree. However, he is a registered Physical Therapist of considerable professional stature". The tenure criteria do not list a Certificate in Physical Therapy as a terminal degree, and President Elmendorf did not consider it such when he reviewed Kramer for tenure.

OPINION

There are three issues before us in this case:

- 1) Were the reasons given to Grievant by President Elmendorf for denial of tenure erroneous;
- 2) Did the reasons given constitute an arbitrary application of the criteria for tenure; and
- 3) Did the reasons given constitute a discriminatory application of the criteria for tenure?

The pertinent contractual language (Article XXIV, Agreement) provides:

If a faculty member is denied tenure, he shall be given a written statement of the reasons for denial and such reasons shall be subject to Articles XIX and XX, Grievance and Arbitration. However, in no tenure arbitration shall the State Labor Relations Board substitute its judgment for that

of the academic community regarding the merits of a tenure case; but in any arbitration of a grievance under this article based in whole or in part upon the reasons for denial, if the Labor Relations Board determines that the reasons are erroneous or that they constitute an arbitrary or discriminatory application of the criteria developed under Article XXII(3), it shall remove the case for final determination to a system-wide ad hoc committee...

Erroneous Reasons Given for Denial of Tenure

In his letter denying tenure to Grievant, President Elmendorf wrote:

Your teaching, college and community service were judged favorable, but your record of professional growth failed to meet the performance rating requirement needed for the award of tenure. More specifically, the required credential for the award of tenure is a terminal degree in your major teaching field, or significant professional, artistic, or scholarly accomplishment. You do not possess a terminal degree in the major teaching field, nor have you demonstrated significant professional, artistic, or scholarly accomplishment.

The Federation claims that Grievant has, in fact, demonstrated significant professional accomplishment. This conclusion is urged, not because the facts considered by the President were untrue or inaccurate, but because the undisputed accomplishments of Grievant merit tenure. From this premise the Federation argues that the President's reason for denial of tenure was "erroneous".

We do not think the "erroneous" standard of the contract applies here. The standard for weighing the application of the criteria to an individual case is "arbitrary or discriminatory" (Article XXIV, Agreement). We interpret the "erroneous" standard of Article XXIV to apply to those cases where the stated reasons are plainly contrary to established fact or based on incorrect information.

There is no evidence before us that the President's decision was based on any incorrect information. The file of Grievant reviewed by the President did not consist of any "erroneous" material that may have misled the President. Therefore, we do not consider the "erroneous" standard applicable to this grievance.

Arbitrary Application of the Tenure Criteria

The Federation's principal contention is that President Elmendorf arbitrarily denied Grievant tenure. It contends that the tenure criteria contain objective standards, and that if any individual meets them, tenure results. Under this approach, comparisons between individuals are unnecessary. All that is required for this Board to determine is if objective criteria have been met; if so, any denial of tenure is arbitrary.

The United States Supreme Court has defined "arbitrary" as:

Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance" United States v. Gannick, 329 US 230 91 L.Ed 209, 67 S.Ct. 252.

Under this standard we agree that denial of tenure to one who met the criteria would be capricious. The Federation contends the President's determination that Grievant did not demonstrate "significant professional accomplishment", was just that sort of arbitrary departure from the tenure criteria. Therefore, we must determine whether Grievant did meet the criteria.

The tenure criteria are not drawn with mathematical nicety. They define "professional, artistic, or scholarly accomplishment" as: "These accomplishments may be in scholarship, professional public service, business, industry, the fine and performing arts and crafts, which contribute to the goals of higher education".

The Federation cites that provision of the criteria providing that "teaching is recognized as the most important activity to be considered in the evaluation process". It then argues that superior teaching, of which superior coaching is one manifestation, is a significant professional accomplishment substituting for a terminal degree.

Grievant's coaching and teaching, it is argued, constitute professional public service, and contribute to the goals of higher education in her field. Since the President supplied no reason for denying tenure other than to reject coaching and teaching as inadequate per se, his action must be taken as an arbitrary departure from the tenure criteria.

We disagree with the Federation. President Elmendorf did, in our judgment, conform to the tenure criteria. He stated, and there is no contradictory evidence, that there has never been an instance where superior teaching performance has been judged as worthy by itself to substitute for the terminal degree.

Clearly, the tenure criteria require a candidate to demonstrate more than superior teaching. The definition of "professional, artistic, or scholarly accomplishments" includes factors other than teaching.

Further, the President is not mandated by the criteria to consider successful coaching as significant professional accomplishment. Grievant's coaching cannot be divorced from her teaching responsibilities. She received a reduction in the number of classroom courses because of her coaching duties. Moreover, it is not arbitrary for the President to consider coaching success as qualitatively inferior to accomplishments in other fields, such as art, literature, and other more academic disciplines.

These disciplines have a more scholarly tradition than coaching. President Elmendorf did weigh Grievant's coaching record as one of a number of factors to consider in the tenure decision. Conceivably, he could have decided that successful coaching was evidence of significant professional accomplishment, but the fact that he did not is not indicative of arbitrary action. It does indicate that coaching success alone does not suffice as an alternative to the terminal degree.

The tenure criteria are relatively new to the College. If tenure were awarded, in prior cases, to individuals who lacked a terminal degree but were rated superior teachers and had superior coaching records, it would be arbitrary to deny Grievant tenure. But this case, we presume the first of its kind, has drawn a line. Superior teaching and coaching is not, in the President's view, a substitute for a terminal degree. We cannot say that decision is capricious or unprincipled. Hence, we do not find Grievant was treated arbitrarily.

Discriminatory Application of the Tenure Criteria

The Federation next contends President Elmendorf applied the tenure criteria in a discriminatory manner. This claim requires us to consider Grievant's case as compared to other tenured individuals rather than as compared to the criteria alone.

In Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 385 A2d 1099 (1978), the Supreme Court found discriminatory application of a rule or regulation to mean "unequal treatment of individuals in the same circumstances under the applicable rule". We must then, examine how the tenure criteria were applied to faculty members similarly situated to Grievant.

President Elmendorf awarded tenure in 1979 to Peter Kramer, a member of Grievant's department, who likewise did not possess a terminal degree and who was evaluated under the same criteria. In granting Kramer tenure, President Elmendorf determined that even though he did not have a terminal degree, his record demonstrated "significant professional, artistic, or scholarly accomplishment" sufficient to substitute for the terminal degree credential.

The Federation alleges the tenure criteria were applied discriminatorily to Grievant relative to Kramer in two ways. First, the Federation contends that discrimination against Grievant in evaluation for tenure began in 1976, and continued thereafter when letters were inserted into her file warning her that without a terminal degree or significant professional accomplishment, she could not expect favorable recommendations for promotion and tenure. The Federation argues that an impartial application of these criteria required that Kramer also be warned of the need to possess a terminal degree or demonstrate significant accomplishments. However, no such warning was ever placed in Kramer's file.

The Federation is thus asking us to find the Colleges applied promotion and tenure criteria in a discriminatory manner towards Grievant throughout her employment at Johnson. We will not make a judgment on that issue. If Grievant felt the criteria were being applied to her in a discriminatory manner, she should have grieved the various warnings she received as she received them. Both applicable collective bargaining agreements during Grievant's tenure at Johnson provided that complaints must be registered within 30 calendar days following the time at which the complainant could have been reasonably aware of the existence of the

situation created by the Colleges which is the basis for the complaint. By not grieving the prior warnings she received in a timely manner, Grievant waived her contractual right to grieve them.

The remaining issue before us is whether the tenure criteria were applied to Grievant in a discriminatory manner because she was denied tenure and Kramer wasn't.

In deciding whether the President's decision was discriminatory, we must look at those accomplishments of Kramer which the President accepted as a substitute to the terminal degree. Those accomplishments, since we are not invited to compare any other individual's records, have become the baseline criteria required to substitute for the terminal degree. We want to be clear that we are not comparing Kramer himself to Grievant in some sort of summing up of individual merits and demerits. Rather, we are looking at what each did that can be objectively measured, not at what each person is.

Kramer, the President concluded, demonstrated scholarly accomplishment which contributed to the goals of higher education by publishing an article in Physician and Sports Medicine, a well regarded professional journal in his field. Kramer's article, "Restoration of Dorsiflexion Following Distal Leg and Ankle Injuries" was related to his coursework at Johnson. As his Division Director noted in his tenure review, "his professional responsibilities include coaching and courses related to paramedical training and care". Grievant, on the contrary, had no record of scholarly publication.

President Ehnendorf specifically cited Kramer's "professional public service contributions" as constituting significant professional accomplishments. Kramer provided many professional public services at Johnson: teaching excellence, successful coaching, campus athletic trainer and physical therapist, and overseeing the effective injury care room operation. Grievant, too, provided many professional public services at Johnson: teaching excellence, successful coaching, development of Women's Physical Education and Athletic Programs as Coordinator of Women's Athletics. While there appear to be qualitative differences between the two, it would be difficult to distinguish between their respective records on that point.

The professional public services of Kramer and Grievant outside of their responsibilities at Johnson are, however, quite distinct. Both have performed various community services, conducted workshops, and attended conferences. However, Kramer has clearly made significant advancements in his field, whereas Grievant has not.

Kramer has obtained a Certificate of Physical Therapy beyond his Master's Degree in Adapted Physical Education and Corrective Therapy. He has applied this knowledge in various ways; including making presentations at professional courses and conferences. Most significant were his contributions at Copley Hospital where he established and directs the Physical Therapy Department. His affiliation with Copley has certainly contributed to the goals of higher education as it has made possible independent studies, internships, and full-time jobs for Johnson students at the hospital. Unlike a winning athletic team whose prestige adds evanescent glory to the school, development of new techniques in physical

therapy hold out the hope of extending knowledge. Grievant clearly has extraordinary talent in motivating; perhaps mediocre athletes to great team achievement. Had she been able to publish a scholarly and scientific paper describing the techniques of motivating individuals to great achievement, perhaps she would have contributed to the advancement of knowledge. As the record stands, however, her work does not.

Grievant's further accomplishments do not rise to a level that can be considered comparable to Kramer's record of professional growth and achievement. She has completed only two academic courses beyond her Master's Degree. She has made no presentations at professional courses or conferences. Further, she has no outside professional accomplishments which benefit her coursework and provide educational work opportunities comparable to Kramer's work at Copley Hospital.

We conclude that Grievant has not demonstrated evidence of significant professional and scholarly accomplishments comparable to Kramer. Thus, we do not find that the Colleges have applied the tenure criteria to Grievant in a discriminatory manner.

For reasons stated previously, we find the Colleges have not violated the contract or the criteria in its denial of tenure to Grievant.

VERMONT LABOR RELATIONS BOARD

Kirley B. Cheney
Kirley B. Cheney, Chairman

William C. Kemsley, Sr.
William C. Kemsley, Sr.

*Supat
Affirmed Order
April 1982*

CONCURRING OPINION

The majority of the Board offers compelling arguments in dealing with the first two issues posed by this case, as well as the reasons why Grievant was not discriminated against throughout her employment. However, the manner in which the majority deals with the final discriminatory application issue, while reaching a valid decision, attempts to expand the meaning of discrimination beyond a reasonable scope.

My premise is that discrimination between two or more alternatives or people is not illegal. It may be difficult or unpleasant, but it is not illegal. The ability to discriminate well is, in fact, one of the key elements of good leadership. What is illegal is discrimination due exclusively to age, sex, or race, for example. In addition to various state and Federal laws, and numerous court opinions, the Agreement between the parties in this case addresses this issue of discrimination in Article IV, Anti-Discrimination:

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

Since the language discriminates between "faculty members" and "applicants for employment in positions in the faculty", it seems safe to apply the meaning of this paragraph to the earlier-mentioned Article XXIV, in order to understand what this Agreement means by "...discriminatory application of the criteria..."

Since the Agreement limits the meaning of discrimination to those reasons identified in Article IV, to prove discrimination requires establishing that the Colleges used one or more of those reasons as the actual reason for denying tenure. To apply any other reasoning, such as the need to compare and contrast the basis for tenure decisions made for different people, offers several difficulties. The first and foremost is that the word "discrimination" was never intended to mean that choices could not be made between people, even two who appear to be identical.

Each fiscal year presents changing student demand for certain courses. Over time, the courses offered in schools may need to change to reflect society's changing needs. To argue that because the Colleges tenured one individual with a certain set of qualifications, that it therefore must tenure all individuals with similar qualifications or be guilty of illegal discrimination, overstates the meaning of illegal discrimination and prohibits the Colleges from adjusting staffing plans to meet changing outside influences. It also may cause the Colleges to deny tenure to all otherwise qualified candidates, if to choose any one of them could ultimately be construed as having illegally discriminated against the remainder. To deny tenure to everyone could be the only way to account for changing needs.

Consider Nezumi in light of these circumstances that must be faced by those who make tenure decisions. The Court refers to "unequal treatment of individuals in the same circumstances under the applicable rule" (emphasis added). There is no further language in this case which limits the phrase "same circumstances" to mean only the situation of some other individual, without reference to other circumstances, such as, funding decisions, student demand, or society's needs.

What must be done in applying tenure criteria? The Agreement between the parties is clear. Article XXII(1) says: "Evaluation of the faculty shall be used for the purpose of improving instruction and to aid in determining whether a faculty member shall be promoted, reappointed, non-reappointed or tenured" (emphasis added). Then in (3): "each College shall develop and publish criteria for such evaluations..." In Article XXIV, the parties agree "...in no tenure arbitration shall the State Labor Relations Board substitute its judgment for that of the academic community regarding the merits of a tenure case...", but rather the Board must determine whether there exists a "...discriminatory application of the criteria developed under Article XXII(3)..."

In this context, the debate centers on Peter Kramer, with scant evidence to suggest that his tenure decision was made in the "same circumstances" as Grievant's. There is no evidence that Grievant relied on Kramer's record in planning her progress toward tenure. The evidence shows that Grievant was continually measured against the published standard. To compare and contrast academic accomplishments before this Board which is instructed not to judge "...the merits of a tenure case..." is to subvert the published criteria. There are simply no criteria called "Kramer".

The impact of such a comparative technique is to establish an achievement baseline in lieu of the published criteria. Yet such a baseline can only be known after the tenure decision, when a denial is grieved to this Board, and then only after this Board compares and contrasts the accomplishments of the individuals, deemed by the parties to be in the "same circumstances", and then only after "same circumstances" are proven to have existed.

There is created by this baseline concept an illusion of certainty for the faculty and Colleges alike. The alternative is for the Board to hold hearings to determine who the baseline case will be in the English Department, who in the Mathematics Department, who in Physics. Only then can anyone be certain in advance what the published criteria mean. Yet, to do this means to ignore the bargained wish of the parties for the Board to leave the merits of the tenure arbitration to the academic community. It also makes the bargained goal "...of improving instruction..." inoperative, since once a baseline competence is reached, tenure is assured. It also renders useless Article XXII(4) which says: "the only written material the President may consider in making final determinations shall be the material placed in the personnel file..." How can this be done, if a comparison must also be made to every other tenure decision in the past in order to determine whether some unpublished achievement baseline has been equalled?

Article VI, Agreement, enumerates Management Rights:

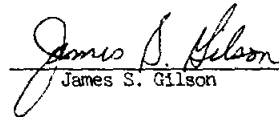
- (B) The right to direct employees; to determine qualifications and criteria in...tenure... situations to be applied in conformance with... this Agreement...
- (D) The right to take such action within the limits of this Agreement, as necessary to maintain the efficiency of the Colleges' operations;
- (E) The right to determine the means, methods, budgeting and financial procedures, and personnel by which the Colleges' operations are to be conducted.

All of these negotiated rights apply in a tenure decision, as do the previously referenced articles. To argue that an achievement baseline method is now the correct method of granting or denying tenure overlooks these parts of the bargained Agreement, as well as ignoring the "same

circumstances" test required by Nelson. Now the Board has created an unknowable standard, and taken tenure decisions unto itself.

The Faculty Federation may not always agree with the Colleges' decisions regarding the denial of tenure, or even the granting of tenure, but the alternative which has now been created serves to remove the decisions from the terms bargained by the parties.

VERMONT LABOR RELATIONS BOARD


James S. Gilson

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, the grievance of Diane Fairchild and the Vermont State Colleges Faculty Federation, Local #3180, AFT, VFT, AFL-CIO is ordered DISMISSED and is dismissed.

Dated this 2nd day of May, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

James S. Gilson
James S. Gilson

*Supreme Court
Affirmed
April, 1982*