

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: STEWART MCHENRY)	
AND THE VERMONT STATE COLLEGES)	
FACULTY FEDERATION, AFT, LOCAL)	DOCKET NO. 81-14
3180, AFL-CIO)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On March 2, 1981, the Vermont State Colleges Faculty Federation (hereinafter "Federation") filed a petition with the Vermont Labor Relations Board on behalf of Stewart McHenry (hereinafter "Grievant"), who was not reappointed to his position as a full-time faculty member at Johnson State College (hereinafter "Johnson") for the 1981-82 academic year. The petition alleged Johnson violated Articles III.14, V, XXI, XXII, XXIII, and XXVI of the Collective Bargaining Agreement (Joint Exhibit #1, hereinafter "Agreement") effective between the Federation and the Vermont State Colleges (hereinafter "Colleges") through failing to develop and publish criteria for reappointment, applying criteria for evaluation in a discriminatory manner, and adding negative documents to Grievant's personnel file which were generated outside the normal evaluation procedure.

A hearing was held May 28, 1981, in the Board hearing room in Montpelier. Chairman Kimberly B. Cheney and Member William G. Kemsley, Sr. were present for the Board. James S. Gilson did not participate in the proceeding. The Colleges were represented by Paul K. Sutherland. Stephen T. Butterfield represented the Federation. Findings of Fact and Memorandum were filed by the Federation and the Colleges on June 11 and 12, 1981, respectively.

Findings of Fact

1. Grievant has a Doctorate in Social Geography. He was hired as a full-time faculty member by Johnson in Spring, 1980, to teach Environmental Planning. Grievant taught in the Department of Environmental Studies which was within the Division of Environmental and Scientific Sciences. Prior to being hired at Johnson, Grievant taught at Connecticut State College, the University of Vermont, and Middlebury College.

2. Grievant was given 25 percent release time in Spring, 1980, for the purpose of researching and preparing curricular development/modification in the area of Environmental Planning (Colleges' Exhibit A).

3. Grievant spent approximately four hours per week during the Spring Semester on this task. Grievant submitted the final report on this project in Fall, 1980. His colleagues expressed disappointment at his work in this regard and rejected his proposals for course modification (Colleges' Exhibit A, Grievant's Exhibit #6).

4. Grievant served on two "working groups" on curricular development within his division in Spring, 1980. Grievant believed these groups to be faculty committees and informed Johnson President Edward Elmendorf that he had served on one departmental committee and one divisional committee in Spring, 1980 (Grievant's Exhibit #5). Johnson does not recognize the "working groups" which Grievant served on as faculty committees.

5. During Spring Semester, 1980, Grievant was scheduled to present a paper at a conference in Kentucky. He asked his Department Chairman, Robert Hinkle, about the availability of travel funds for faculty. Hinkle informed Grievant he was entitled to a faculty travel allotment of \$62.50 to help support his travel.

6. Grievant then, without checking with Hinkle or Jerry Davis, his Division Chairman, went to Academic Dean Gary Confessore and asked him for field trip funds for the field trip he was going to take to Kentucky. Confessore authorized a \$150 travel advance for Grievant from the Department field trip budget.

7. Field trip funds are supposed to be authorized for student use only. Grievant was unaware of this when he requested the money from Dean Confessore.

8. Upon hearing of this arrangement, Hinkle confronted Grievant and told him what he had done was illegal and asked that he return the \$150 check. Grievant informed Hinkle that the money had already been spent.

9. Grievant had prepaid the fee for the conference in Kentucky in order to ensure that he be scheduled in as a participant.

10. Grievant and Hinkle reached an agreement whereby Grievant agreed to repay the \$150 on or before May 10, 1980. On May 9, 1980, Grievant repaid the \$150 (Grievant's Exhibit #8).

11. Grievant was evaluated for reappointment in Fall, 1980.

12. The procedure for evaluating a faculty member at Johnson consists of four steps: recommendations by a Divisional PRT (Promotion, Retention, and Tenure) Committee, the Faculty Assembly PRT Committee, the Academic Dean, and then a final decision by the President.

13. On October 30, 1980, Peter Marchand, a faculty member in Grievant's department and member of the Divisional PRT Committee, wrote a memorandum to Academic Dean William Cook. (Cook had replaced Confessore as Academic Dean September, 1980). Therein Marchand accused Grievant of

misrepresenting his committee work in Spring, 1980. He further stated Grievant, in April, 1980, "deliberately misrepresented his purpose while appealing to me for the transfer of unspent field monies for his use," and cited Grievant's "misappropriation of divisional funds" in the Spring. Marchand accused Grievant of deceit (Grievant's Exhibit #1).

14. The October 30, 1980, memorandum was placed in Grievant's personnel file by Dean Cook at the request of Marchand, and after the Dean had satisfied himself that the allegations made therein could be substantiated with documentation. Dean Cook never personally examined the documentation.

15. On November 4, 1980, Robert Hinkle, faculty member and past chairman of Grievant's Department, wrote a memorandum to Dean Cook (Grievant's Exhibit #6). Therein, Hinkle expressed concern about Grievant's reappointment, and stated the following "problems" with Grievant's performance:

- a. his apparent misappropriation of Departmental funds involving his Spring, 1980, "field trip" to Kentucky;
- b. inability to produce a required report on Environmental Planning programs at other colleges for which he was given 1/4 release time; and
- c. inability to develop courses which deal with Environmental Planning.

16. The November 4, 1980, memorandum was placed in Grievant's file by Dean Cook at the request of Hinkle and after the Dean had satisfied himself that the allegations made therein could be substantiated with documentation. The Dean never personally examined the documentation.

17. The October 30 and November 4 memoranda were not generated by the respective PRT Committees as part of the evaluation process.

18. On the basis of inquiry, Dean Cook felt it was valid to place the October 30 and November 4 memoranda in Grievant's personnel file.

The Dean did not feel it was his responsibility to determine the accuracy of the allegations made in the memoranda; his responsibility consisted of ensuring documentation of the charges.

19. The prior Academic Dean, Gary Confessore, had excluded memoranda from Hinkle and Marchand containing similar charges to the October 30 and November 4 memoranda in Spring, 1980, because the allegations made were not verified.

20. Dean Cook forwarded copies of the October 30 and November 4 memoranda to Grievant upon placement of them in his personnel file.

21. It was normal practice at Johnson for negative material generated outside the evaluation process to be entered into a faculty member's personnel file. Some administrators, like Dean Confessore, required verification of the negative assessments before the material was entered into the personnel file; others, like Dean Cook, did not.

22. The Environmental and Scientific Studies Divisional PRT Committee and the Faculty Assembly PRT Committee were the two faculty committees that evaluated Grievant for reappointment. Both recommended Grievant be reappointed although they expressed concern over the dissension between Grievant and other faculty in his teaching area (Grievant's Exhibits #9, 10).

23. The Colleges adopted a revised Administrative Policy and Criteria for Initial Appointment, Promotion, and Tenure of Full-time Faculty effective August 8, 1980 (Colleges Exhibit C). It superseded previous policies and criteria adopted by the Colleges in January, 1976 (Colleges' Exhibit B).

24. The August 8, 1980, policy was developed by the Colleges' central administration in consultation with presidents, academic deans, and faculty of the respective colleges within the state colleges system, including Johnson.

25. The 1980 policy was immediately binding on Johnson August 8, 1980. The policy was distributed widely among the faculty and administration at Johnson at the time of its adoption.

26. The August 8, 1980, Policy contains policy and criteria for evaluation of faculty up for reappointment as well as for initial appointment, promotion, and tenure.

27. Section V of the August 8, 1980, Policy specifies factors which will be considered for the reappointment of faculty during the six-year probationary period of employment. The factors are teaching effectiveness; scholarly and professional growth; service to the College and community; and academic credentials. To warrant reappointment, faculty performance should be substantially above average in all fields (Employer's Exhibit C).

28. The Johnson Administration evaluated Grievant for reappointment using the August 8, 1980, Policy.

29. On November 19, 1980, Dean Cook recommended Grievant not be reappointed for the 1981-82 academic year (Grievant's Exhibit #11).

30. Grievant's file contains no written evaluation by the Dean.

31. In his evaluation of Grievant, President Elmendorf reviewed all materials contained in Grievant's personnel file including student evaluations for the Spring and Fall Semesters, 1980; the October 30 and November 4 memoranda; and faculty committees' recommendations.

32. The Fall Semester student evaluations reviewed by President Elmendorf had not been reviewed by the faculty committees and Dean Cook in their evaluations because they were not completed and inserted into Grievant's personnel file until the first week of December, 1980.

33. President Elmendorf views teaching as the most important factor in the evaluation process, and sees student evaluations as the most significant factor in determining teaching effectiveness.

34. The form used by students to evaluate their instructors provides no specific question asking students to give their instructor an overall rating - i.e. outstanding, above-average, average, below-average, poor (Grievant's Exhibit #15). That determination is left to the professional judgment of the administrator reviewing the evaluation.

35. Based upon his review of the student evaluations in Grievant's file, President Elmendorf judged the teaching effectiveness of Grievant to be below average-mediocre in Spring, 1980, and poor in Fall, 1980. Some of the Fall, 1980, evaluations of Grievant were the worst he ever saw.

36. President Elmendorf considered the other factors for reappointment decisions besides teaching effectiveness specified in the August 8, 1980, Policy and found nothing in Grievant's performance to compensate for the poor teaching evaluations.

37. President Elmendorf did not conduct an investigation to determine whether the allegations made in the October 30 and November 4 memoranda were true.

38. The President decided not to reappoint Grievant for the 1981-82 academic year based mainly on the negative student evaluations.

39. The President notified Grievant of his non-reappointment December 11, 1980 (Grievant's Exhibit #2).

40. If the October 30 and November 4 memoranda had not been in Grievant's personnel file, President Elmendorf's decision not to reappoint Grievant would not have differed.

41. Grievant initially filed two separate grievances in this matter: one grieving the insertion of the October 30 and November 4 memoranda into his personnel file; and the other grieving his non-reappointment. The grievances were combined at Step II of the grievance procedure.

OPINION

There are three basic issues before us in this case:

- 1) Were the October 30, 1980, and November 4, 1980, memoranda submitted by Professors Marchand and Hinkle unsubstantiated and/or improperly included in Grievant's personnel file?
 - 2) Did Johnson State College fail to develop and publish criteria for reappointment? And,
 - 3) Did the Johnson Administration follow the proper procedure in the non-reappointment of Grievant; if not, what is the proper remedy?
1. Inclusion of Memoranda in Personnel File

The Federation makes three contentions with regard to the October 30 memoranda:

- 1) It is improper for the Dean to add negative letters to a personnel file which are not generated by the normal process of evaluation. Peer evaluation documents are generated through the divisional and faculty PRT committees, and the Dean allowed this process to be subverted by including the memoranda in Grievant's personnel file.
- 2) The Dean had the obligation to substantiate the charges made in the memoranda before including them in Grievant's personnel file. Through inclusion of false, libelous, or unsubstantiated negative material in the file, the Dean shares responsibility for any resulting violation of Grievant's rights or damage to his career.

3) Dean Cook was obliged to remove the unsubstantiated negative memoranda from the personnel file after Grievant had responded to the charges.

The first two contentions by the Federation relate to the inclusion of the October 30 and November 4 memoranda in Grievant's personnel file. The Federation contends the Dean acted improperly by inserting them in the file. In order to determine what is properly included in a personnel file, we look to Article XXI, Section 1, Agreement, which states:

Each College shall maintain a personnel file for each faculty member at the College... The contents of such file shall be determined by each college and such file may contain but shall not be limited to copies of personnel transactions, official correspondence with the faculty member, peer evaluations, student evaluations, and evaluation reports prepared by the college. (Emphasis added)

The contract language clearly gives the college discretion to decide what material should go into the personnel file. Article XXII, Agreement, provides the process whereby faculty will be evaluated by other faculty, but certainly does not limit what material can be inserted into a faculty member's personnel file outside this evaluation process. The faculty committees conduct evaluations based on the material contained in the faculty member's personnel file, but does not determine what shall be in the file. That clearly is left to the discretion of the college. Thus, we do not agree with the Federation that peer evaluation documents must be generated through the faculty PRT committees. The Dean did not subvert the process by including documents submitted by faculty outside the committee process.

Further, we cannot fault the Dean for not verifying the allegations made against Grievant in the memoranda before inserting them into Grievant's personnel file. No rights of Grievant were abrogated by such action. The Dean did ensure that the allegations made could be substantiated by documentation. Grievant was notified by the Dean that such material was being placed in his file, thus giving him opportunity to respond and have his response included in his personnel file. Grievant's rights in this regard are clearly stated in Article XXI, Section 1, Agreement:

A faculty member shall have the right to have relevant material added to his personnel file...The faculty member shall have the right to respond to any document in his personnel file and have such response included in such file and attached to the appropriate document.

In fact, Grievant did respond to at least the October 30 memorandum, and such response was included in his personnel file (Grievant's Exhibit #12). That Grievant never submitted to the file any detailed response to the allegations made against him is clearly his failure as he was given ample opportunity to do so. The Dean's actions were consistent with the Agreement.

The third contention of the Federation relates to the removal of the memoranda from Grievant's file. The Federation claims the memoranda should have been removed from the file once Grievant responded to them. Article XXI, Section 1, Agreement, states:

The faculty member shall have the right to grieve the insertion in his personnel file of any administrative report which he or she alleges to be untrue or inaccurate.

The grievance procedure provides this avenue of appeal for Grievant and he did resort to the grievance procedure in requesting that the memoranda be removed. However, the act of filing the grievance did not

require the Dean to remove the memoranda from the file. Such action would be inconsistent with Article XIX, Section 5, Agreement, which provides:

The filing or pendency of a grievance under the provisions of this Article shall not prevent the Vermont State Colleges or its representatives from taking the action complained of, subject, however, to the final decision on the grievance, unless such action would be irreversible if the decision were in favor of the grievant.

The action of placing memoranda in the file is not irreversible for if Grievant's position prevails through the grievance procedure, the memoranda are simply removed from the file.

The Federation further claims Dean Cook was guilty of discriminatory application of a rule or regulation by inserting the memoranda in Grievant's personnel file and then not removing them after they were challenged by Grievant. Finding no evidence that Dean Cook has acted differently in similar situations, we find no merit to the Federation's claim.

Thus, we must conclude Dean Cook violated no contractual provision through inclusion and maintenance of the memoranda in Grievant's personnel file.

We turn now to the substance of the allegations made against Grievant. With regard to the "apparent misappropriation of funds", the facts are not in dispute. Grievant received funds - the advance field trip money - that he was not entitled to. The issue in dispute is his motivation. Based on the evidence before us, we find no conscious evil motive on Grievant's part. Grievant is charged with intentional deceit in this matter; truly a serious and damaging charge. In order to find such deceit, we require clear and convincing proof. We find no such proof. Grievant should have been aware he was required to go through a proper procedure

to get funds; and his actions were inconsistent with College policy. However, it is not apparent he intended to deliberately misappropriate funds he was not entitled to. His fault appears to be more in ignoring proper procedure to receive what he thought he was entitled to.

Grievant is also charged with deceit through misrepresentation of his committee work. It appears that the committee structure at Johnson is pretty much ad-hoc and somewhat nebulous as to what constitutes a committee. Thus, it is not unreasonable for Grievant to assume his "working group" was a committee. However, a first-year faculty member has the implicit duty to talk with his department head on what constitutes a committee; something Grievant never did. Grievant acted without apparent regard for established college structure. This action casts doubt on his responsibility in carrying out his duties; particularly given his prior academic experience. In any event, there is no clear and convincing proof that Grievant intentionally misrepresented his committee work. Still, his actions were not without fault.

The other allegations against Grievant in the October 30 and November 4 memoranda relate to his inability to produce work required of him; specifically his failure to prepare a professional proposal relating to curriculum development/modification in the area of Environmental Planning for which he was given release time. It is evident that his work in this matter was below par and his colleagues appear justified in questioning his performance.

However, the October 30 and November 4 memoranda do contain some allegations that are unfounded. Grievant is charged with intentional deceit; allegations not supported by the evidence. For that reason, it is

unfair to maintain these memoranda in the file. They are "inaccurate" in part and should be removed from his personnel file to protect his character.

2. Development of Reappointment Criteria

The Federation claims Johnson did not satisfy its contractual obligation to develop and publish evaluation criteria for reappointment. The Federation holds that both the 1976 and 1980 policies were developed by the Vermont State Colleges; not Johnson. Further, they argue both the 1976 and 1980 policies are labelled promotion and tenure criteria, not reappointment criteria.

Grievant was evaluated under the August 8, 1980, Administrative Policy and Criteria for Initial Appointment, Promotion and Tenure of Full-time Faculty. No evidence was produced by the Federation to dispute this or allege that he should have been evaluated under the 1976 criteria. Thus, we see no basis for examining the development or content of the 1976 criteria.

Article XXII, Agreement, provides, in pertinent part:

1. Evaluation of 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. Effective teaching should be the most important element, but other factors, such as availability to students, professional development, additional contributions to the College, and contributions to professional organizations, should also be considered.
- 3 ...Each College shall develop and publish criteria for such evaluations in accordance with the guidelines above.

The August 8, 1980, Policy was developed by the Colleges' central administration in consultation with presidents, deans, and faculty of the respective colleges within the state college system, including Johnson.

The coverage of the policy is system-wide, and it was clear during its development that such would be the case. Cf. Vermont State Colleges Faculty Federation, VFT, AFT, Local #3180, AFL-CIO v. Vermont State Colleges, 4 VLRB 49, 58 (1981). The policy was widely distributed at the time of its adoption on August 8, 1980. We believe the system-wide approach employed here fulfills the contractual requirement that each college develop and publish criteria for faculty evaluations.

Nonetheless, the Federation claims that the August 8, 1980, Policy consists of promotion and tenure criteria, and not reappointment criteria. We disagree. Section V of the policy specifies factors which will be considered for the reappointment of faculty during the six-year probationary period of employment.

The Federation contends that the factors specified - teaching effectiveness, scholarly and professional growth, service to the College and community, and academic credentials - are no more than a recapitulation of the guidelines of Article XXII, Agreement, and not genuine criteria because there is no indication how these factors are to be measured.

To accept the Federation position would be to view the reappointment decision occurring in a vacuum. The reappointment process within the Colleges' system is part of the tenure process. The Vermont State Colleges, unlike many other colleges, does not have a tenure track and non-tenure track. All full-time faculty members hired by the Colleges are placed on the tenure track, and annual reappointment is the road to tenure. Thus, reappointment decisions cannot be divorced from the tenure process. This is made evident by examination of the August 8, 1980,

Policy. The factors to be considered in the reappointment process are the same factors used to assess qualifications for tenure. The way these factors are to be measured is well-developed within Section V (Colleges' Exhibit C, Pg. 10-11); thus, there is no merit to the Federation's claim that the factors do not constitute genuine criteria. That the factors considered in reappointment and tenure evaluations are the same is only logical and fair so there are no "surprises" when a candidate is up for tenure review.

In sum, the August 8, 1980, Policy provides the faculty members up for reappointment with clear indication of what criteria s/he will be evaluated by. Grievant's claim of not knowing what criteria he would be measured by cannot be supported.

3. Procedure Followed in Non-Reappointment of Grievant

The Federation contends Johnson violated the Agreement because there are no written evaluations of Grievant by the President or the Dean in Grievant's personnel file. Article XXII, Section 3, Agreement, provides:

The Dean or other appropriate administrative officer shall forward his written evaluations and recommendations to the faculty member's personnel file... and they shall be kept in the file.

We cannot find the President in violation on this count because he is not required to submit written evaluations to the personnel file.

Grievance of Richard McDonald, 4 VLRB 62, 79 at Pg. 73-74.

We do find, however, that Dean Cook violated the above-cited contract provision. The Dean, upon completion of his review of Grievant for reappointment, did forward his recommendation to President Elmendorf (and Grievant's personnel file) that Grievant not be reappointed.

However, in violation of the Agreement, he did not forward any "written evaluations" to the personnel file. Grievant's due process rights were violated. He was entitled to have Johnson show that the action taken in not reappointing him was demonstrably carried out in compliance with the terms of the Agreement, and not in violation of it. Peck v. Vermont State Colleges, ___ Vt. ___, Docket #305-78, February 4, 1981.

We must now determine if the procedural shortcomings had a significant effect on the President's ultimate decision not to reappoint Grievant. Nzomo v. Vermont State Colleges, 138 Vt. 73, 411 A2d 1366 (1980). We find it did not. President Elmendorf decided not to reappoint Grievant based mainly on the negative student evaluations. Most persuasive in the decision were the evaluations from the Fall 1980 semester. These evaluations were not even in Grievant's personnel file at the time Dean Cook conducted his review of Grievant. It seems review of these evaluations by the Dean would be preferable; however, Article XXII, Agreement, does not allow for such review. Given this, the Dean's written evaluation of Grievant was inconsequential to the President's decision.

We are concerned, as the Federation apparently is, that the student evaluation forms used at Johnson make it difficult to measure teaching effectiveness. However, the forms are a result of negotiation between Johnson and the Federation pursuant to Article XXII, Section 5, Agreement; thus, as a bargained-for item, the Federation must live with the result. In any event, student evaluations of Grievant's teaching, their genuineness not being disputed by the Federation, leave no doubt of his sub-par performance.

Article XXIII, Agreement, is evidence of the clear intent of the parties to allow the President full discretion in reappointment decisions

of first and second-year faculty as he is not even required to give written reasons for his decision. Grievance of Esther Swett, 4 VLRB 98, 106 (1981). Given such discretion and President Elmendorf's stated basis for his decision being mainly negative student evaluations, we do not find the Dean's failure to provide a written evaluation of Grievant material to the President's decision to exercise his discretion not to reappoint Grievant. Also, we do not find the presence of the October 30 and November 4 memoranda in Grievant's file had an effect on the President's ultimate decision. He reviewed them, along with the other contents in the personnel file; however, he noted that Grievant had objected to the memoranda and did not accept the allegations as true. In any event, the President, although he considered other required factors, made his decision on the basis of teaching effectiveness, a criterion given special importance by the Agreement.

The failure of the Dean to submit a written evaluation of Grievant was not without negative consequences to Grievant. As our Supreme Court made clear in Peck, supra, faculty may use evaluations in seeking employment elsewhere. 3 VSA §982(g) authorizes this Board "to enforce compliance with all provisions of the collective bargaining agreement". We think it would be appropriate here to enforce compliance with the Agreement by requiring Dean Cook to submit a written evaluation of Grievant to his personnel file if Grievant desires such submission.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

1) the October 30, 1980, memoranda submitted by Peter Marchand, and the November 4, 1980, memoranda submitted by Robert Hinkle, contained in Dr. Stewart McHenry's personnel file, be immediately removed;

2) Dean William Cook expeditiously submit a written evaluation of McHenry to McHenry's personnel file in accordance with Article XXII, Agreement, if McHenry requests such submission within 10 days of the date of this Order; and

3) the decision not to reappoint McHenry be allowed to stand.

Dated this 13th day of July, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

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

*Appeal to Sup Ct
Dismissed pursuant
to Sup 10/27/81
Sept 81*