

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF RICHARD McDONALD AND)
THE VERMONT STATE COLLEGES FACULTY)
FEDERATION, AFT LOCAL #3180, AFL-CIO)

DOCKET NO. 80-66

AMENDED OPINION AND ORDER

In our original Opinion and Order in this matter, dated January 29, 1981, we found the Colleges had committed significant due process violations in the denial of tenure to Grievant, and remanded the grievance to the systemwide ad-hoc committee pursuant to Article XXIV of Agreement.

Subsequently, the Board filed a petition to enforce the Order in Washington Superior Court, and the Colleges filed a memorandum in opposition to its enforcement. The memorandum raised issues that led us to withdraw our original Opinion and Order and reconsider it. We have reconsidered the remedy we applied and have determined it was not appropriate.

Upon reconsideration, we find the original Opinion and Order was based on the erroneous assumption that substantial due process violations automatically resulted in remand to the ad-hoc committee as provided for in Article XXIV.

Article XXIV provides, in pertinent part:

The provisions of Article XIX and XX, Grievance and Arbitration, provide the remedy available for any faculty member allegedly denied due process in the College's failure to grant tenure ... 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 reason for denial, if the labor relations board determines that the reasons are erroneous or that they constitute an arbitrary or discriminatory application of the (tenure) criteria ... it shall remand the case for final determination to a systemwide ad-hoc committee ...

The parties, by this language, bargained for automatic remand only when it is determined the reasons given for denial of tenure are erroneous or constitute an arbitrary or discriminatory application of the tenure criteria. We have not found either circumstance exists here.

Based on our earlier findings, we conclude the standards required by Article XXIV for automatic remand to the ad-hoc committee have not been met. This does not mean we are precluded from remanding this grievance to the ad-hoc committee for final determination. Under the Supreme Court decision in Vermont State Colleges Faculty Federation and Michael Peck v. Vermont State Colleges, ___ Vt. ___, February 4, 1981, this Board has broad powers in fashioning a remedy when significant due process violations occur and the parties have not provided a specific remedy for the violations. In the case before us, due process violations were significant. In essence, Grievant never had the opportunity to submit his case to the decision maker. No more fundamental deprivation of an important procedural right exists. The parties have not bargained for a specific remedy in such cases. Accordingly, we are guided by Peck, supra in fashioning the appropriate remedy here.

As we see it, the primary consideration in fashioning a remedy is to make Grievant whole - to restore him to the position he would have been in but for the due process error. Remand to the ad-hoc committee would not do this. That group was established to act as a neutral arbitrator after a finding by this Board that exercise of normal management prerogatives could not be expected to operate fairly because of prior discrimination or arbitrary action against Grievant. Here the wrongdoing of management is entirely procedural.

The next consideration is whether the procedural error could be expected to so affect President Meier's mind that another decision maker must be selected. In our earlier opinion we intimated our belief that this was so.

We have reviewed President Meier's testimony at the hearing. The following exchange took place between Stephen Butterfield, Grievant's representative, and President Meier:

Butterfield: Is it your testimony that no amount of evidence that Grievant could have submitted on his own behalf after March 5 would have caused you to change your decision in any way?

Meier: No, it is that nothing I have seen, in fact, has done so.

Are we necessarily to infer from this that no new evidence would change his mind? We think not. His testimony indicates he is willing to reconsider his decision made on March 5 if new evidence submitted to him is persuasive, but, to date, nothing he has seen has so persuaded him.

On reflection, then, we are not convinced that simply because the President made a decision without having all of Grievant's case before him, that he is necessarily so prejudiced that new, appropriate facts could not change his mind. There was no evidence before us of personal bias or bad faith motivation, or other suspect actions or interactions on the President's part. A whisper of such motivation would change our view. Absent such evidence, we do not find the President in such a position that we must necessarily remove him from the process.

Moreover, a remedy placing Grievant's tenure decision with a neutral, be it the ad hoc committee or some other person or forum, does not seem appropriate. An arbitrator, or other neutral, weighing the merits of a tenure decision has but one person to consider rather than the task

of applying the tenure criteria across the board to many people over time in a non-discriminatory, and non-arbitrary way. Within this framework, awarding of tenure is a management prerogative. To place such decision with a neutral, based solely on the tardy submission of the Dean's evaluation into Grievant's personnel file appears to us to give Grievant an advantage not given to others who have been denied tenure on the merits. A negative recommendation made 45 days late may become the equivalent of a terminal degree.

At the stage Grievant's case was derailed by due process errors, the tenure decision was still a management choice within certain guidelines. Consequently, we believe the appropriate remedy here is allowing Grievant to submit any additional information which he believes is relevant to his tenure review, with President Meier subsequently reviewing this material and determining whether Grievant shall be granted tenure. If, on remand, arbitrary or discriminatory standards are applied to Grievant, or erroneous facts are presented, that case can be reviewed here. We expect him to be treated with fairness and justice, and will carefully review any subsequent grievance, if one be filed, to make certain our expectations are met.

Due to the delay involved here, through no fault of Grievant, and because we do not want to downgrade procedural errors and encourage the Colleges to believe their obligations will be limited to simply redoing the review process, we believe it is appropriate that Grievant continue as a faculty member pending President Meier's decision; and that, upon issuance of such decision, he be accorded the notification rights granted sixth-year faculty members up for tenure as provided in Article XXIV of Agreement.

ORDER

For the foregoing reasons, it is hereby ORDERED:

- 1) this Order amends our Order of January 29, 1981;
and
- 2) Richard McDonald has 45 days from the date of this Order to supplement his personnel file with any additional evidence he feels is relevant to his tenure review; and
- 3) President Thomas Meier has 15 days from the date McDonald completes the process of having such material added to his personnel file to render a decision on granting tenure to McDonald; and
- 4) McDonald, at his discretion, is to be immediately placed in the faculty status he was in at the time the original tenure review process was conducted; that he remain so pending final determination by President Meier; and that the President's tenure notification shall provide that the next academic year is Grievant's last one-year appointment or that he is tenured.

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

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

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

*Matter settled by
disputation
12/31/81*