

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF JAN LEWANDOSKI)	
AND THE VERMONT STATE COLLEGES)	
FACULTY FEDERATION, AFT LOCAL)	DOCKET NO. 81-17
#3180, AFT-CIO)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On March 31, 1981, the Vermont State Colleges Faculty Federation ("Federation") filed a petition on behalf of Professor Jan Lewandoski ("Grievant") in which it alleged the Vermont State Colleges ("Colleges") violated the collective bargaining agreement ("Agreement") and the tenure criteria in its denial of tenure to Grievant.

Hearings were held before the Board on June 4, July 2, and July 29, 1981. Grievant was represented by Stephen Butterfield, the Federation Grievance Chairperson. Attorney Paul Sutherland represented the Colleges. Present for the Board on June 4 were Kimberly B. Cheney, Chairman, and William G. Kemsley, Sr. Kemsley and James S. Gilson, Acting Chairman, were present on July 2. Present on July 29 were Cheney and Gilson.

Both parties agreed to go forward with the hearings in the absence of the full Board with the understanding that all three Board members would participate in the decision after reviewing the entire record and reading the transcript of the testimony they missed. All Board members have read the transcripts of testimony they missed and reviewed the entire record.

FINDINGS OF FACT

1. Grievant was hired by Johnson State College ("Johnson") in January, 1974, to teach political science. At the time he was hired there was no indication given to Grievant he would need a Ph.D. in order to be granted tenure. Grievant was told to emphasize teaching effectiveness, advising, and college and community service.

2. Faculty are reviewed for tenure during their sixth year of full-time teaching service at the College.

3. In Spring, 1974, Grievant had finished all his coursework toward a doctorate in political science at McGill University and was doing research for a doctoral dissertation on Henry David Thoreau.

4. On July 3, 1974, Susan S. Smith, Grievant's Divisional Chairperson, advised Grievant:

Please do continue to work on the Ph.D. also. The stimulation you get from colleagues at McGill will be transmitted to your students here. In the long run, for yourself, your attainment will be worth the effort.
(Colleges' Exhibit #1)

5. In 1975, as a result of Grievant's doctoral advisor's disinterest in Grievant doing his dissertation on Thoreau and because there was no indication given to Grievant he would need a doctoral degree in order to be granted tenure, Grievant shifted dissertation topics and began researching Dostoyevsky.

6. In January, 1976, the Colleges issued tenure criteria which required candidates for tenure to receive the following performance ratings in order to be granted tenure: Teaching - Superior; Professional growth - Superior; and College and Community Service - Average. Additionally, the criteria require a terminal degree in major teaching field or

significant professional, artistic, or scholarly accomplishment. Professional, artistic or scholarly accomplishments are defined as those accomplishments in scholarship, professional public service, business, industry, the fine and performing arts and crafts which contribute to the goals of higher education (Joint Exhibit #2, Pg. 8, 9).

7. The Faculty Promotion, Retention and Tenure (PRT) Committee in recommending Grievant for reappointment on May 16, 1976, for 1977-78, stated:

Regarding Jan Lewandoski as one of the most promising members of the faculty, the Committee urges him nevertheless to sustain progress towards completion of his doctoral dissertation and acquisition of the terminal degree in his field. His evident scholarly distinction can only become indelibly confirmed by achievement of the Ph.D. and the professional accomplishment represented by an acceptable doctoral thesis at McGill University.
(Colleges' Exhibit #4, Pg. 3)

8. Johnson President Edward Elmendorf made no similar comments in notifying Grievant he was reappointed for 1977-78 on August 31, 1976, (Colleges Exhibit #4, Pg. 1).

9. On July 29, 1977, Grievant's Divisional Chairperson Susan Smith, in her pre-tenure review and recommendation to President Elmendorf that Grievant be reappointed for 1978-79, stated it would be necessary for Grievant to complete his Ph.D. requirement by the end of the Fall Semester, 1978, if he was to receive a tenure appointment (Colleges' Exhibit #5). This letter was seen by Grievant at the time it was sent to President Elmendorf.

10. A few weeks after seeing this letter, Grievant re-applied and was re-admitted to McGill to resume work on his doctorate for Fall, 1978. Grievant felt he could not resume work at McGill earlier than

Fall, 1978, without disrupting the political science program at Johnson. In addition, Grievant's dissertation advisor, Charles Taylor, was at McGill only in the Fall.

11. Grievant applied for a leave of absence and a Faculty Development Fund grant for Fall, 1978, to enable him to be at McGill full-time. The Faculty Development Fund Committee and Academic Council recommended that Grievant be awarded the grant (Grievant's Exhibit #4, #5). On March 1, 1978, President Elmendorf notified Grievant:

It is my unpleasant task to inform you that award of Faculty Development Fund grants for 1978-79 are not going to be possible (unless Johnson State College receives a substantial increase in revenue). I am especially disappointed that it will not be possible to fund your proposed project at this time. (Grievant's Exhibit #4)

12. After receiving this letter, Grievant held out hope that the money was going to come through for the grant for that fall. However, by mid-summer, 1978, Grievant began to lose faith he was going to be awarded the grant. He did not consider taking the leave of absence that fall without the Faculty Development funds since he did not want to disappoint students who had already signed up for courses. On August 20, 1978, Grievant notified McGill he would not be attending there in Fall, 1978.

13. There is no evidence before us Grievant filed a grievance as a result of not being awarded a Faculty Development Fund grant for Fall, 1978.

14. Grievant made use of his early work on Thoreau by publishing an article, "Early Lithic Sites, a Note from Thoreau's Journal" in Early Sites Research Bulletin in May, 1978 (Grievant's Exhibit #27). The Bulletin is published by the Early Sites Research Society, a group specializing in early New England history.

15. On June 29, 1978, John Duffy, Grievant's Division Chairperson, in a letter to President Elmendorf concerning the reappointment of Grievant, recommended the President give Grievant notice of termination effective Spring of 1980, unless Grievant produced a completed first draft of his dissertation by May, 1979. He stated:

Jan has been at Johnson since 1974 without making substantial progress during those four years on a Ph.D. in Political Science...During recent years he has been both encouraged to complete his degree and cautioned that without the degree he will not receive tenure.
(Colleges' Exhibit #6)

16. President Elmendorf did not take the advice of Dr. Duffy. Instead, on August 31, 1978, he sent Grievant a reappointment letter indicating:

This reappointment is not to be understood as implying a favorable judgment on your qualifications for tenure at Johnson. As you know, a tenure appointment requires the prior possession of a terminal degree or firm evidence of significant growth in scholarly achievement. Although this subject has been treated in various communications between the officers of the college and yourself, your file contains no evidence that you will, in fact, have achieved the prerequisites of scholarly development without which you cannot be tenured at Johnson. ...I, therefore, strongly recommend that you and your Division Chairman discuss an acceptable timetable for successfully obtaining the credentials required for award of tenure at your earliest convenience.
(Colleges' Exhibit #8)

17. Grievant and his Divisional Chairman never agreed on a timetable for Grievant "obtaining the credentials required for award of tenure..." Also, Grievant never discussed the preceding letter with President Elmendorf.

18. On March 8, 1979, Grievant was awarded a sum of \$3,951 through the Faculty Development Fund Committee to aid in furthering his doctoral studies at McGill (Grievant's Exhibit #9).

19. During the period 1975-79, Grievant, while not formally enrolled at McGill, did much reading on Dostoyevsky in preparation for his dissertation.

20. Grievant took a leave of absence from Johnson for Fall, 1979, in order to do his doctoral work at McGill. He made use of the McGill libraries (investigating 300 reading sources in the areas of political philosophy, Russian literature, and criticism of Dostoyevsky), prepared his dissertation proposal, met with his advisor, attended classes to prepare for field exams, and passed a language exam in French.

21. In early 1980, Grievant's thesis proposal was accepted by his advisors at McGill. Charles Taylor, Grievant's dissertation advisor at McGill, described Grievant's dissertation proposal as excellent, and a "superb job" that, if continued, "would make a very interesting publication in some form". Taylor stated he was "very impressed" with Grievant's accomplishments at McGill (Grievant's Exhibit #13).

22. On August 8, 1980, the Colleges adopted a revised Administrative Policy and Criteria for Initial Appointment, Promotion, and Tenure of Full-time Faculty (Joint Exhibit #3). It superseded previous policies and criteria adopted by the College in January, 1976 (Joint Exhibit #2), and was effective at the time of its adoption.

23. The 1980 criteria provide that candidates for tenure must demonstrate excellent teaching performance, scholarly and professional achievements and potential, and distinguished college and community service. Additionally, candidates must have a terminal degree or an approved substitute in their major teaching fields (Joint Exhibit #3, Pg. 10-11). Faculty may offer professional experience, attainment and/or training which may represent a substitution for an appropriate terminal degree (Joint Exhibit #3, Pg. 5).

24. The 1980 criteria further established a staffing plan which provides each college may not have an excess of 70 percent tenured faculty until 1995, and that by 1995 each college may not have more than 60 percent tenured faculty (Joint Exhibit #3, Pg. 3).

25. On August 20, 1980, Academic Dean Gary Confessore, in recommending Grievant for reappointment, rated him a "superior teacher" and stated Grievant's "professional and scholarly growth is superior. He does not hold a terminal degree at this time. However, he is actively and productively involved in completing the Ph.D. at McGill" (Grievant's Exhibit #14).

26. Grievant was evaluated for tenure in Fall, 1980. Review for tenure at Johnson includes two formal steps of faculty review, plus letters which may be submitted by colleagues.

27. On September 29, 1980, Dr. Victor Swenson, Executive Director of the Vermont Council on the Humanities and Public Issues, noted Grievant's involvement in Council panel discussions and rated Grievant as "one of the most able and appealing scholars we know" and "one of the top scholars we recommend to our grantees in Northern Vermont" (Grievant's Exhibit #15).

28. Grievant was described on October 14, 1980, by Professor John Schindler of McGill as "one of the outstanding graduate students that we have had here over the last decade" (Grievant's Exhibit #16).

29. On October 28, 1980, the Humanities PRT Committee recommended Grievant be granted tenure. Grievant was rated highly as a teacher and called "a patient and skilled faculty advisor...a model faculty member" who has "untiringly supported the college". Also cited were Grievant's work as a selectman and zoning administrator in Stannard and his participation as a scholar in public forums (Grievant's Exhibit #18).

30. On November 12, 1980, the Faculty Assembly PRT Committee unanimously recommended Grievant for tenure, citing his excellence in teaching, accomplishments as a scholar in public forums, college committee work, and community service in his hometown of Stannard. The Committee stated they were "impressed by the energy and effectiveness with which Jan has applied himself in recent years as a scholar" at McGill, and believed "Jan's abilities as a teaching scholar rank among the best in our profession" (Grievant's Exhibit #19).

31. Grievant has served as a zoning administrator for the Town of Stannard, Vermont (population - 150), since 1977. This is an appointed office. Grievant has also served one three-year term as selectman for that town and is currently in a second term. Selectman is an elective office. Grievant's experience as town official allows him to supplement his theoretical knowledge of political science with practical experience.

32. Grievant participated in various panel discussions sponsored by the Vermont Council on the Humanities and Public Issues and the Central Vermont Regional Planning Commission.

33. At the hearings on this matter, Philip Allen and William Doyle, colleagues of Grievant at Johnson who also teach political science courses, were unanimous in their praise of Grievant's teaching effectiveness.

34. Academic Dean William Cook evaluated Grievant for tenure on November 19, 1980. In his evaluation, Cook rated Grievant's scholarly and professional growth "not substantially above average", noting "of particular importance here is the lack of the minimum qualification in his field of expertise, the Ph.D." Cook did not consider Grievant's work towards the doctorate as professional growth. Cook rated Grievant substantially above average or superior in all other areas, but

recommended Grievant not be granted tenure since he did not meet the criteria for scholarly and professional growth (Grievant's Exhibit #2).

35. Grievant answered Dean Cook's negative evaluation in a detailed self-assessment on November 23, 1980, addressed to President Elmendorf. Therein, Grievant defended his accomplishments as clearly warranting tenure (Grievant's Exhibit #20).

36. On November 26, 1980, President Elmendorf recommended to the Chancellor that Grievant be denied tenure (Grievant's Exhibit #1). The President stated Grievant did not meet the stipulated criteria for tenure because he did not have a terminal degree or an approved substitute in his major teaching fields.

37. On December 17, 1980, the President informed Grievant that he recommended Grievant not be granted tenure and the Chancellor and the Board of Trustees concurred with his recommendation. The reason stated for denial of tenure was:

The required credential for the award of tenure is the terminal degree, a doctorate, in your major teaching field. You do not possess a terminal degree in the major teaching field or an approved substitute.

(Grievant's Exhibit #22)

38. Grievant was evaluated for tenure under the August 8, 1980, Policy and Criteria.

39. President Elmendorf evaluated Grievant under five categories: teaching effectiveness, professional growth, college service/community service, academic credentials and length of employment at the College.

40. The President concluded Grievant met or exceeded the stipulated criteria in every category except for academic credentials.

41. The President reviewed Grievant's personnel file for evidence of professional experience, attainment or training which may be a substitute for a terminal degree. The President felt Grievant's work towards a doctoral degree did not constitute attainment, since Grievant had published no work arising from his doctoral research. The President considered Grievant's doctoral work to date to be progress, not attainment. The President did not consider Grievant's experience as a zoning administrator and selectman in Stannard as evidence of professional experience which might be counted towards substitution for the terminal degree because he included those experiences under community service. The President concluded Grievant did not possess an approved substitute for the terminal degree, and thus did not meet the academic credentials criterion of the tenure criteria.

42. President Elmendorf and Chancellor of the Colleges Richard Bjork testified there is no substantial difference between the 1976 and 1980 tenure criteria with regard to the academic credential requirement for the award of tenure.

43. Chancellor Bjork testified the Colleges had previously not applied the tenure criteria rigorously and have, in the past few years, made a managerial decision to adhere more rigorously to the tenure criteria. The Chancellor stated President Elmendorf was in the forefront of applying the criteria more rigorously and his denial of tenure in 1978 to Professor Kenneth Burrill reflects this.

44. Dr. Philip Allen was evaluated for tenure at Johnson in Fall, 1980, along with Grievant. Both Grievant and Allen were faculty members within the Humanities Division. Dr. Allen was originally hired in

1973 to teach African Studies. Currently, he teaches the majority of his subjects in Political Science, and a minority of subjects, approximately three out of eight courses each year, in other disciplines. Among the disciplines he teaches in are French, African Art, and Economics.

45. Allen possesses a doctorate in Liberal Arts. His coursework was interdisciplinary, some components of which concerned political science. His degree was intended to prepare him for teaching in an interdisciplinary capacity.

46. Allen was granted tenure by the Colleges. Dean Cook and President Elmendorf considered Allen to be a multi-disciplinary teacher with a multi-disciplinary degree who had a terminal degree appropriate to his major teaching fields.

47. President Elmendorf considered the impact on the staffing plan of tenuring both Grievant and Allen. He recognized that if both were tenured, the percentage of tenured faculty at Johnson would be under 60 percent. The effect of rendering two tenure decisions in the same division did not influence his decision in either case.

OPINION

The Federation raises five issues in their contention that Grievant was wrongly denied tenure. Each will be discussed in turn.

The first claim of the Federation is President Elmendorf's decision to deny Grievant tenure was arbitrary since this decision, taken together with other tenure decisions from 1980 on, reflects a pattern of tenure denials which show that the terminal degree has been given priority over effective teaching in tenure cases, and that this is an arbitrary departure from stated policy.

Both the 1976 and 1980 tenure criteria provide that teaching is the single most important activity in considering a candidate for tenure. This does not mean, however, that if a faculty member demonstrates excellence in teaching he has met the tenure criteria. The 1976 and 1980 criteria require a tenure candidate to meet criteria in four areas - teaching, professional growth, college and community service, and academic credentials. If a candidate does not meet the minimum qualifications in one of these four areas, he has not met the stated criteria.

In the case before us, President Elmendorf determined Grievant had not met the Academic Credentials criteria, and, thus, concluded he had not met the test for being awarded tenure. This does not mean the President gave possession of the terminal degree priority over teaching; it just indicates the Academic Criteria credential is a minimum qualification that must be met and had not been met by Grievant in the judgment of the President. Thus, we must conclude the President's determination did not constitute an arbitrary departure from the criteria.

The second claim of the Federation is the President erroneously evaluated Grievant's political experience by placing it in the category of "community service" instead of "professional and scholarly growth". The Federation contends the holding of political office by Grievant in Stannard contributed vastly to his professional growth by balancing his overly ideological approach to politics with practical experience which was able to make him a more effective teacher. By evaluating this experience as community service the President, the Federation holds, stripped it of its professional relevance and erroneously did not consider it as a substitute for the terminal degree.

The argument by the Federation stretches the meaning of the erroneous standard of the Agreement beyond reasonable bounds. We interpret the erroneous standard of Article XXIV of the Agreement to apply to those cases where the stated reasons given by the President for denial of tenure are plainly contrary to established fact or based on incorrect information. Grievance of Diane Fairchild, 4 VLRB 164, at 175 (1981). The reason given by President Elmendorf for denying tenure to Grievant was that he did not possess a terminal degree or an approved substitute. Clearly, this reason was not plainly contrary to established fact as Grievant did not possess a terminal degree and the determination of whether he had an approved substitute was a question of judgment by the President and not clearly evident. Also, the President's decision was not based on incorrect information. President Elmendorf was aware of Grievant's political activities in Stannard, and he did take them into consideration in making his evaluation. He felt they were most appropriately considered under the category of community service, however, and not as evidence of professional experience in fulfillment of the terminal degree requirement. This was not an error of fact by the President, but simply, a judgment. We are not prepared to say this judgment was unreasonable. For faculty in areas other than political science, clearly, political activity would fall within community service. The 1976 criteria define community service as "voluntary public service"; and the 1980 criteria "includes work with bonafide civic or political groups" as community service. Given these definitions, it was not unreasonable for the President to put Grievant's work in Stannard in the community service slot. In any event, such judgment in no way falls under the erroneous standard of the contract.

The third claim of the Federation is the President discriminated against Grievant in granting tenure to Dr. Philip Allen, who, it is claimed, does not have a terminal degree in his major teaching field; and, thus, Grievant was held to a rigid and unreasonable interpretation of the terminal degree requirement which was not invoked for his colleague.

Initially, it should be pointed out that there is no dispute over whether Allen has a terminal degree. He does; an interdisciplinary degree in Liberal Arts. The dispute is whether Allen's degree is in his major teaching field. The Federation contends Allen does not have a terminal degree in his major teaching field since he teaches the majority of his courses in Political Science and he does not have a doctorate in Political Science. The Colleges consider Allen to be a multi-disciplinary teacher with a multi-disciplinary degree appropriate to his major teaching fields.

The 1980 criteria, under which Allen was evaluated for tenure, requires a terminal degree in one's major teaching fields (Joint Exhibit #3, Pg. 11). Allen has more than one teaching field - Political Science, African Art, French, and Economics. His doctoral coursework encompassed these fields, including Political Science. His degree prepared him to teach in many different subject areas generally falling within the category of Liberal Arts. The subjects he teaches are considered Liberal Arts offerings. It is evident his terminal degree was in his major teaching fields. Thus, the Colleges did not discriminate against Grievant relative to Allen since Allen had a terminal degree in his major teaching fields and Grievant did not.

The fourth claim by the Federation is the President erred in applying the 1980 criteria to Grievant instead of the 1976 criteria. The Federation compares Grievant's situation to that of the grievant in Grievance of Kenneth Burrill, 1 VLRB 386 (1978). There, the grievant was denied tenure by President Elmendorf because he did not have a terminal degree or significant professional, artistic, or scholarly development. We determined that the denial of tenure was arbitrary since the grievant was caught in a major policy shift with regard to tenure requirements. He was given only 15 months to obtain a terminal degree and conform to the new tenure criteria.

Here, we must determine whether Grievant was caught in a similar major policy shift since he was evaluated under the 1980 criteria. Grievant was evaluated for tenure by the President only four months after the criteria were adopted. Grievant was denied tenure because of his failure to meet the "Academic Credentials" criterion of the 1980 criteria. Thus, it is important to compare the academic credential requirement of the 1980 criteria with that of the 1976 criteria to see whether Grievant was harmed by use of the 1980 criteria. It is undisputed Grievant did not have a terminal degree; the question is whether whatever he offered as a substitute for a terminal degree would have been any more likely to qualify under the 1976 criteria than under the 1980 criteria.

The 1976 criteria allows "professional, artistic, and scholarly accomplishment" to substitute for the terminal degree. Such accomplishments are defined as "those accomplishments in scholarship, professional public service, business, industry, the fine or performing arts and crafts which contribute to the goals of higher education" (Joint Exhibit #2, Pg. 3).

The 1980 criteria allows "professional experience, attainment and/or training" to substitute for the terminal degree (Joint Exhibit #3, Pg. 5).

Grievant offers his holding of political office in Stannard, his publication, and progress towards attainment of a terminal degree, as substitutes for the terminal degree. As already determined, holding of political office was considered by the President under community service and it is evident he would have done so under the 1976 criteria. Both the 1976 criteria (under "scholarship") and the 1980 criteria (under "attainment") allow for consideration of publications as a potential substitute for the terminal degree.

The Federation contends that one of the possibilities open to Grievant under the 1976 criteria closed off by the 1980 criteria was having his work toward the degree weighed as professional achievement contributing to the goals of higher education. The President felt precluded by the 1980 policy from considering doctoral work as a potential substitute for actual possession of the degree. The criteria required "attainment", and progress was deemed insufficient. The evidence before us indicates that the President felt no less precluded under the 1976 criteria from considering doctoral research as a potential substitute. "Scholarship" is allowed as a substitute for the terminal degree under the 1976 criteria. The President never indicated to Grievant that progress towards a doctorate would be evidence of scholarship sufficient to substitute for the terminal degree.

Instead, Grievant was warned repeatedly under the 1976 criteria of the need to get his terminal degree or give evidence of scholarly achievement. In May, 1976, the Faculty FRT Committee urged Grievant to

"sustain progress towards completion of his doctoral dissertation and acquisition of the terminal degree in his field. His evident scholarly distinction can only become indelibly confirmed by achievement of the Ph.D." Susan Smith, Grievant's Division Chairperson, in July, 1977, warned Grievant it would be necessary for him to complete his Ph.D. requirement to receive tenure. In June, 1978, John Duffy, Grievant's then-Division Chairperson, noting "During recent years he has been both encouraged to complete his degree and cautioned that without the degree he will not receive tenure", recommended President Elmendorf give Grievant notice of termination effective Spring of 1980, unless Grievant produced a completed first draft of his dissertation by May, 1979. President Elmendorf did not take the advice of Dr. Duffy. Yet, in notifying Grievant he was reappointed, the President clearly warned Grievant what was required of him to be awarded tenure:

This reappointment is not to be understood as implying a favorable judgment on your qualifications for tenure at Johnson. As you know, a tenure appointment requires the prior possession of a terminal degree or firm evidence of significant growth in scholarly achievement. Although this subject has been treated in various communications between the officers of the college and yourself, your file contains no evidence that you will, in fact, have achieved the prerequisites of scholarly development without which you cannot be tenured at Johnson. ...I, therefore, strongly recommend that you and your Division Chairman discuss an acceptable timetable for successfully obtaining the credentials required for award of tenure at your earliest convenience.

These warnings were clear notice to Grievant that progress toward a terminal degree would not, under the 1976 criteria, constitute "significant professional, artistic, or scholarly accomplishment" sufficient to substitute for the terminal degree. Further, Grievant should have been aware Johnson was applying the tenure criteria rigorously since President

Elmendorf had denied tenure to Burrill in early 1978 because of lack of a terminal degree. Like the 1980 criteria, attainment, not progress, was necessary under the 1976 criteria as a substitute for the terminal degree.

The principal difference between the 1976 and the 1980 criteria was the 1980 criteria provided for a staffing plan. However, the Colleges say the existence of the staffing plan did not influence the decision to deny tenure to Grievant. Such a claim is creditable because even if Grievant had been granted tenure, the percentage of tenured faculty at Johnson still would have been below the 60 percent guideline established by the staffing plan.

Thus, the 1976 and 1980 criteria were not substantially different in what was required to meet the Academic Credentials criterion, and Grievant was warned as early as 1977 what was required of him to meet such criteria. Grievant cannot claim insufficient notice for failure to satisfy the Academic Credentials criterion. He was not caught in a Burrill situation.

The last claim by the Federation is, if there is no substantive difference between the 1976 and 1980 criteria, then the granting of tenure to Merle Woodall and Peter Kramer and denial of tenure to Grievant is discriminatory since Woodall and Kramer were tenured without a terminal degree and, it is claimed, their accomplishments are not distinguishable from Grievant's.

Merle Woodall is a faculty member at Lyndon State College who was granted tenure in 1980. See Grievance of Joseph D'Aleo, 4 VLRB 192 (1980). We do not think it appropriate to compare Grievant's record

to that of Woodall. The presidents of each college within the system are bound to abide by the same system-wide tenure criteria. However, they are not responsible for or knowledgeable of what a president on another campus within the system decides in a tenure case. Thus, a tenure decision by the President of Johnson cannot be overturned on grounds of discriminatory treatment because of a tenure decision by the Lyndon President. We will not make a system-wide comparison in tenure cases. See In Re Hackel, Esiason, et al., 3 VLRB 175 (1980).

Peter Kramer is a faculty member in the Physical Education Department at Johnson who was granted tenure in 1979. In their brief, the Federation made reference to the tenure decision on Kramer for the purpose of comparing President Elmendorf's actions in the case of Kramer to his actions in the case of Grievant. There was no evidence presented in the case before us comparing the tenure decision on Grievant to that on Kramer. The colleges filed a motion in objection to these references being made since they were not raised in the hearing. In an effort to resolve this case fairly to the parties and conscious of the inordinate length of time this case has taken already, we have decided to compare the accomplishments of Grievant and Kramer, although we do not think it is the best procedure and are unsure whether the two cases, one and one-half years apart, meet the "same circumstances" test (See concurring opinion, Grievance of Fairchild, supra, at 184-87). We have taken official notice of Findings 33-36 in our Findings of Fact, Opinion, and Order in Fairchild, supra, at 172-74, for the purpose of comparing Grievant's accomplishments to those accomplishments of Kramer which the President accepted as a substitute to the terminal degree. In comparing

the records, we do not find Grievant's accomplishments comparable to those of Kramer's. Thus, we do not find the Colleges have applied the tenure criteria in a discriminatory manner.

Subsequent to the close of hearings and the filing of briefs in this matter, the Federation filed a motion for a rehearing on the ground that the Board lacks "subject-matter"(sic) jurisdiction to render a decision in this case since no single Board member was present at all three days of testimony. The Federation states this case is controlled by Sutor v. Sutor, 137 Vt. 110 (1979), which held that the presiding judge of Superior Court, acting alone, did not constitute a statutory court for actions triable to the full court, and, therefore, his order is without basis in law. We think the Board is in a different situation than the Superior Court. The Board has jurisdiction to act when only two members are present (1 VSA §172). Since two members were present here on all three days of testimony, we do not lack jurisdiction to hear the case. However, we do believe there is a due process question here. Grievant has a right to have two of the same members of the Board hear this case throughout. However, Grievant waived this right by agreeing to go forward with the hearings in the absence of the full Board with the understanding that all three Board members would participate in the decision after reviewing the entire record and reading the transcript of the testimony they missed. We believe a due process right can be willingly and knowingly waived, as it was here, and this distinguishes it from a jurisdictional defect. We, therefore, dismiss the Federation's motion for a rehearing.

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

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

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

*Affirmed by
Supreme Court
Docket # 52481
Nov 1982
(Rec'd 2/7/83)*

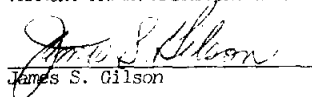
CONCURRING OPINION

I agree with the way the majority of the Board dealt with the first four issues posed by this case. However, I disagree with the majority in their handling of the Federation's last claim that denial of tenure to Grievant is discriminatory since Peter Kramer was tenured and his accomplishments are indistinguishable from Grievant's. I believe that to compare and contrast academic accomplishments before this Board subverts the tenure criteria and expands the meaning of discrimination beyond a reasonable scope for the reasons I enunciated in my concurring opinion in Grievance of Diane Fairchild, 4 VLRB 164, at 183-187 (1981).

Article XXII(4) of the Agreement limits the president's attention in tenure cases to the faculty member's personnel file. This interpretation of the Agreement is one held by the Federation. In a recent argument before the Supreme Court in the case of In Re Hackel, Esiason, et al., 3 VLRB 175 (1980), Supreme Court Docket #204-80, Donald Hackel, counsel for the Federation, argued that the Colleges were limited to the contents of the employee's personnel file in tenure decisions. Article XXII and Article XXIV of the Agreement requires the President to compare the faculty member to a set of published criteria, not to another individual's accomplishments. There has been no "baseline" concept bargained for by the parties.

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

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 Jan Lewandoski and the Vermont State Colleges Faculty Federation, AFT Local #3180, AFL-CIO, is ordered DISMISSED and is DISMISSED.

Dated this 5th day of November, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Jr.


James S. Gilson