

VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES)	
FACULTY FEDERATION AND)	
MICHAEL PECK)	
)	DOCKET NO. 78-81S
v.)	
)	
VERMONT STATE COLLEGES)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

This matter initially came before the Vermont Labor Relations Board on June 9, 1978, when the Vermont State Colleges Faculty Federation ("Federation") filed a petition on behalf of Michael Peck ("Grievant") alleging that the Vermont State Colleges ("Colleges") violated the collective bargaining agreement ("Agreement") in the non-renewal of Grievant. On September 21, 1978, the Board issued its Findings of Fact, Opinion, and Order. The Board found the Colleges did not violate the Agreement and dismissed the grievance (1 VLRB 329). Grievant appealed to the Supreme Court.

On February 4, 1981, the Court reversed the Board's dismissal of the grievance and remanded to the Board. The Court found the failure of the Dean to forward a written evaluation of Grievant to his personnel file violated Article XXII of the Agreement. The Court made no decision on the proper remedy due Grievant, and stated:

The Board must decide upon the proper remedy...If the Board finds that the breach caused the President to exercise his discretion not to rehire Peck, a back-pay award may be appropriate. The Board is not limited, however, to that result. If the College had evaluated Peck according to the Agreement, Peck may have been able to use the evaluations to find a new job. Without them, he may have had difficulty obtaining employment, suffering consequential damages as a

result. If Peck's evidence warrants such damages, the Board may choose to make an award commensurate with the proven injury... The Board might choose to order compliance (with the Agreement) by requiring the College to fulfill its duty to evaluate Peck according to the Agreement, or invoke any other remedies which may be appropriate.

The Court also ordered the Board to address the issue of whether the College failed to establish and publish criteria for evaluating faculty for reappointment, and if they did not, to fashion a proper remedy for that violation as well.

A hearing was held on this matter September 10, 1981, in the Board hearing room in Montpelier. The full Board was present. Dr. Stephen Butterfield represented Grievant, and the Colleges were represented by Attorney Nicholas DiGiovanni, Jr. The Federation and the Colleges submitted briefs on October 2 and 5, 1981, respectively.

FINDINGS OF FACT

1. Grievant was employed by Lyndon State College ("Lyndon") as the Director of Cooperative Education for two years, beginning in September, 1976. Grievant was officially granted faculty status effective July 1, 1977, and was covered by the Agreement effective between the Federation and the Colleges for the period December 18, 1976 - September 1, 1978.

2. The Cooperative Education Program at Lyndon was designed to place students with business and industry to give them practical experience in the business world. The Director plans, implements, and administers the program. He contacts employers to encourage their participation in the program, counsels students and helps them find cooperative education jobs, and coordinates his activities with academic department personnel (Colleges' Exhibit A).

3. Grievant's supervisors were Lyndon President Janet Murphy and Academic Dean Ronald Addison. Grievant's office was in the same suite as the office of President Murphy.

4. In November, 1977, pursuant to the request of Grievant, Grievant and President Murphy met on several occasions to discuss the status of the Cooperative Education Program. As a result of those meetings, President Murphy discovered that few placements had been achieved by Grievant. The President expressed her dismay to Grievant that more placements had not been made. Grievant replied it was difficult to find them in the relatively unpopulated Northeast Kingdom.

5. At some point during this period, President Murphy was able to secure the placement of a business student at Fairbanks Morse. She reported this to Grievant, and asked him to pursue other placements and report them to her.

6. The Cooperative Education Program was funded by a five-year Federal grant. 1977-78 was the second year of the grant.

7. Grievant testified the first year of the Cooperative Education Program was a year of implementation and setting up, that student placements in the first year are not expected to be high, and any placements in the first year would be "gravy".

8. In December, 1977, Grievant met with both President Murphy and Dean Addison to discuss the Cooperative Education Program. No indication was given to Grievant that the purpose of the meeting was to evaluate his job performance. During the meeting, the President and the Dean expressed dissatisfaction with Grievant's job performance; particularly with regard to the low number of student placements in the program.

9. In February, 1978, Dean Addison told President Murphy he was recommending Grievant not be reappointed. Addison forwarded no written evaluation to Grievant's personnel file.

10. President Murphy did not expect a written evaluation from Dean Addison because in the nine other reappointment cases she had reviewed she had not received any evaluations from the Dean. She was under the impression that a written evaluation was not required.

11. The "criteria" used by President Murphy to evaluate Grievant's job performance was his job description (Colleges' Exhibit A). This job description was developed by Grievant and approved by his project director.

12. There is no evidence before us that the Colleges developed and published criteria for evaluating faculty for reappointment as required by Article XXII(3) of the Agreement.

13. In evaluating Grievant, President Murphy also discussed his performance with Dean Addison, and with a citizen advisory committee set up in conjunction with the Cooperative Education Program, some members of which were critical of Grievant's work.

14. President Murphy decided not to reappoint Grievant for the 1978-79 Academic Year based primarily on the low number of student placements in the Cooperative Education Program. On February 28, 1978, President Murphy notified Grievant he was not reappointed.

15. The non-reappointment of Grievant, and subsequent grievance proceedings, were publicized in both the Caledonia Record and the Burlington Free Press.

16. Grievant's employment at Lyndon officially terminated in August, 1978.

17. After he was terminated, Grievant applied for other jobs for approximately six months (from August, 1978 - January, 1979). He applied for 20-30 jobs with schools and businesses within a 100-150-mile radius of his home. Grievant applied for jobs he considered suitable to his background, training, and experience. He was granted no interviews as a result of these applications and received all negative responses (Grievant's Exhibits 1-12).

18. Grievant has applied for no jobs since January, 1979, and remains unemployed to date.

19. In the Fall of 1978, Grievant was treated by Dr. George Linton for "mild depression". The doctor stated: "I feel his employment problems at Lyndon State College may have contributed to his illness."

20. Since his termination at Lyndon, Grievant and his family have relied on three sources of income:

- 1) his wife's salary as a reading specialist;
- 2) Grievant's retirement pension from the military (\$1,000 a month); and
- 3) unemployment compensation received by Grievant for 13 weeks in Fall, 1978, at \$109 a week.

21. Grievant was receiving his retirement pension while employed at Lyndon.

22. Grievant sold his house after he was terminated because he could not maintain the mortgage payments, heat costs, and upkeep of the house without the type of salary he was receiving from Lyndon. Grievant purchased a smaller home.

23. Grievant's annual salary his last year at Lyndon was \$14,000.

OPINION

The Colleges committed two procedural violations of the Agreement in the process of not reappointing Grievant:

- 1) The failure of Dean Addison to forward a written evaluation of Grievant to his personnel file violated Article XXII(3); and
- 2) The Colleges failed to develop and publish criteria for evaluating faculty for reappointment as required by Article XXII(3).

It is our task to decide the proper remedy to apply here as a result of these contractual violations.

We must first determine if these breaches caused President Murphy to exercise her discretion not to reappoint Grievant. In this regard it is important to note Grievant was a first-year faculty member. Article XXIII of the Agreement allows the President full discretion in reappointment decisions of first and second-year faculty. She is not even required to give written reasons for his/her decision. Grievance of Esther Swett, 4 VLRB 98, at 104 1981. Grievance of Stewart McHenry, 4 VLRB 236, at 251-52 (1981).

Grievant contends the failure of the Dean to forward a written evaluation to his personnel file tainted the substance of the President's ultimate decision to not reappoint Grievant. He argues that if the Dean did a written evaluation, Grievant would have responded to any negative assessment of his job performance since Article XXI(1) of the Agreement gives faculty members the right to "respond to any documents in his personnel file and have such response included in such file..." Grievant

claims he may have been able to produce evidence in this response which would have convinced President Murphy his job performance was excellent and resulted in his reappointment.

We think this possibility highly unlikely. President Murphy was a supervisor of Grievant and well aware of his job performance. She had several discussions with him about the Cooperative Education Program, particularly the lack of placements in the program. She decided not to reappoint Grievant primarily because of the low number of placements in the program. We doubt Grievant could have produced evidence in response to the Dean's evaluation to persuade the President to reappoint him. She obviously felt number of placements was a critical factor in measuring Grievant's performance. Placements, in fact, were low, and she was dissatisfied with his performance. And, as his Supervisor, she was in a position to know the facts. Based on these facts and the discretion allowed the President by Article XXIII of the Agreement in such reappointment decisions, we cannot find that the failure of the Dean to do a written evaluation was responsible for President Murphy's final negative decision.

We also do not find the Colleges' failure to develop and publish criteria for evaluating faculty for reappointment caused President Murphy to exercise her discretion not to reappoint Grievant. Grievant argues that the absence of evaluative criteria deprived him of the ability to use a published set of standards as a basis of discussion and rebuttal, which may have allowed him to affect the President's decision. Such reasoning, however, is contrary to the circumstances of this case. Even if the Colleges had developed evaluative criteria, and Dean Addison had conducted his evaluation in accordance with the criteria, it is

unlikely this would have assisted him. The criteria should have been developed for teaching faculty. Grievant, however, was an administrator. Moreover, President Murphy had told Grievant clearly what was expected of him. Thus, we do not find the procedural violations committed by the Colleges here material to the President's decision to exercise her discretion not to reappoint Grievant. Accordingly, we deny Grievant's request for reinstatement and back-pay. David Nzomo v. Vermont State Colleges, 138 Vt 73 (1980).

However, the procedural violations by the Colleges were not without negative consequences to Grievant. If the Colleges had developed evaluative criteria and the Dean had done a written evaluation of Grievant's performance based on these criteria, Grievant would have been provided with an assessment of his performance, his procedural rights would have been protected, and this may have been an aid to him in securing employment elsewhere. Grievant is clearly entitled to have a written evaluation of his performance by the Dean placed in his personnel file if he desires.

We believe this would not make Grievant whole, however, for the damage done him by lack of an evaluation. As the facts indicate, Grievant attempted to gain employment elsewhere for approximately six months after he was terminated by Lyndon. Such attempts were unsuccessful. If Grievant had been able to establish any direct link between the lack of an evaluation and failure to secure employment, it would be appropriate to award Grievant the equivalent of his salary at Lyndon for the entire period he was actively looking for work. However, the evidence before us establishes no such direct link. Still, there was evidence that his discharge and filing of a grievance resulted in news stories which would undoubtedly not have been favorable to Grievant's re-employment.

Accordingly, we believe Grievant is entitled to recompense for some of the period he was actively looking for work.

We feel other considerations, besides making Grievant whole, exist here for awarding substantial monetary damages. 3 VSA §982(g) authorizes the Board "to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party." Here, the Colleges have clearly violated the express terms of the Agreement through failure to develop and publish criteria for reappointment and failure of the Dean to submit a written evaluation of Grievant to his personnel file. As the facts indicate, the procedural violations in Grievant's case were not an isolated occurrence. President Murphy testified she did not expect a written evaluation from Dean Addison because in the nine other reappointment cases she had reviewed she had not received any evaluations from the Dean. We believe it is appropriate to discourage such disregard of negotiated provisions. If the Colleges can violate these procedures knowing that only a token penalty will be imposed, they are invited to continue ignoring procedural rights of employees.

For these reasons we believe a monetary award is appropriate. Grievant received unemployment compensation for 13 weeks at the rate of \$109 per week, a total of \$1,417. We think it is appropriate that the Colleges pay Grievant his salary for those 13 weeks minus unemployment compensation received by Grievant. Grievant's annual salary being \$14,000, for 13 weeks he would have received \$3,500. Thus, the Colleges should pay Grievant \$2,083.

As a concluding note, we would further require the Colleges to develop and publish criteria for evaluating faculty for reappointment, but the issue is moot. Since the initial filing of this grievance, the Colleges have, on August 8, 1980, developed and published criteria for evaluating faculty for reappointment. See Grievance of Stewart McHenry, 4 VLRB 236, at 248-50 (1981).


ORDER

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

1. Dean Ronald Addison shall submit a written evaluation of Grievant Michael Peck to Grievant's personnel file in accordance with Article XXII(3) of the Agreement, within 30 days of the date of this Order if Grievant requests such submission within 10 days of the date of this Order; and
2. the Vermont State Colleges shall pay the Grievant the sum of \$2,083; and
3. the decision not to reappoint Grievant shall be allowed to stand.

Dated this 30th day of October, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson