

VERMONT LABOR RELATIONS BOARD

Grievance of:)
)
 JOSEPH S. D'ALEO)
)

BUCKET NO. 80-53

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 2, 1980, Dr. Michael V. Sherbrook filed a grievance with the Vermont Labor Relations Board on behalf of Joseph S. D'Aleo (hereinafter "Grievant"), an Assistant Professor in Meteorology at Lyndon State College (hereinafter "Lyndon"). The grievance alleged violations of Article IV and XXIV of the collective bargaining agreement (hereinafter "Agreement", Joint Exhibit #1) between the Vermont State Colleges Faculty Federation, Local #3180, AFT, VFT, AFL-CIO (hereinafter "Federation") and the Vermont State Colleges (hereinafter "Colleges") in the Colleges' denial of tenure to Grievant. The filing of the grievance with the Board followed its denial at various levels on campus (Grievant's Exhibits #11-14).

On July 14, 1960, the Colleges filed an Answer to the Grievance denying any contract violations occurred. The Colleges further asserted that any Article IV claims regarding sex or age discrimination should not be considered by the Board since such allegations were not raised in the Step I grievance.

Hearings were held at the Board hearing room in Montpelier on March 26, 1981, and April 9, 1981, before the full Board. Grievant was represented by Dr. Michael Sherbrook; Attorney Nicholas DiGiovanni, Jr. represented the Colleges.

At the hearing, the Board ruled that the Article IV allegations would not be considered since the allegations were not raised in the Step I grievance. Vermont State Colleges Faculty Federation and Michael Peck v. Vermont State Colleges __ Vt. __ (February 4, 1981). The case was thus confined to allegations of violations of Article XXIV.

Briefs were filed on behalf of Grievant and the Colleges on April 23, 1981.

FINDINGS OF FACT

1. On June 28, 1974, Grievant was hired by Lyndon as an Instructor in Meteorology for the 1974-75 academic year (Grievant's Exhibit #1). Prior to being hired, Grievant was told by Registrar Robert Addison that a doctorate was not necessary for tenure.

2. Grievant was reappointed for the 1975-76 and 1976-77 academic years (Grievant's Exhibits #2-6).

3. In 1976, the Colleges promulgated an Administrative Policy and Criteria on Tenure (Grievant's Exhibit #15). The policy indicates that the required credentials for the award of tenure are a terminal degree in the major teaching field or significant professional, artistic, or scholarly accomplishment. The policy requires that during the third year of service, the annual evaluation will also serve as the basis for assessing the candidate's progress toward tenure.

4. On February 1, 1977, Ronald Addison, Acting Chief Academic Officer, evaluated Grievant for promotion to Assistant Professor (Colleges' Exhibit A). Dean Addison indicated that the required credentials for promotion were "active pursuit of terminal degree in major teaching field or recognized professional, artistic, or scholarly accomplishment". The Dean judged Grievant to be in pursuit of a terminal degree. He wrote:

Started in doctoral program at New York University and has earned 48 semester hours of credit above his M.S. All of the NYU courses are related to meteorology. Mr. D'Aleo has assured me that he plans to complete this program. He states need to begin work on his thesis. I would judge him to be in pursuit of a terminal degree. I trust the pursuit will become more active.

The Dean recommended Grievant for promotion, noting "I trust Mr. D'Aleo will complete his Ph.D. program as planned. He is a valuable resource: the College needs to do everything possible to encourage him".

5. Grievant had completed courses necessary for the doctorate at NYU by 1972. He still had to complete a qualifying exam and do his thesis to get a doctorate. However, the school discontinued its meteorology program that year. NYU allowed students who had not finished their doctoral work to continue their work at New York Polytech. Doctoral candidates were given a year to complete their work. Grievant decided not to pursue his doctorate any further for three reasons: 1) financial impossibility; 2) the year given was insufficient time; and 3) the professor he was working with left for Arizona.

6. During the period the Dean was reviewing Grievant for promotion, the Dean and Grievant had a conversation concerning Grievant's chances of getting tenure. The conversation was "overall optimistic". Grievant

was told there was a good possibility he would be granted tenure without the terminal degree, but his best bet was to get the doctorate so there would be no question of his getting tenure.

7. On April 1, 1977, Grievant was reappointed by President Stevens for the 1977-78 academic year, and promoted to the rank of Assistant Professor (Grievant's Exhibit #7).

8. Grievant was reappointed for academic year 1978-79 and 1979-80 without written notice.

9. In Fall, 1979, Dean Addison informed Grievant the "way criteria were being implemented then, and for some time actually, a year or so", his chances for tenure were "very dim".

10. In accordance with Article XXIV, Agreement, Grievant was reviewed for tenure during the academic year 1979-80, his sixth year at Lyndon.

11. On January 30, 1980, the Faculty Appointment, Promotion and Tenure Committee recommended Grievant for tenure (Grievant's Exhibit #9).

12. On January 31, 1980, Dean Addison reviewed Grievant for tenure and recommended that tenure be granted (Grievant's Exhibit #8). Dean Addison indicated that Grievant had 48 graduate credits in Meteorology. This was erroneous. In fact, Grievant had 48 hours of graduate credits beyond his Master's Degree.

In his summary statement recommending Grievant for tenure, Dean Addison stated:

Mr. D'Alco lacks a "terminal" degree. He meets all the other criteria. While his experience is not sufficient in my opinion to fully substitute for a terminal degree, I do feel it would be in the best interests of Lyndon State College to award tenure to Mr. D'Alco.

13. On March 24, 1980, Grievant met with President Janet Murphy and Dean Addison. At the meeting, Grievant was told by the President that she was going to recommend that he not be granted tenure. President Murphy told Grievant that an option she saw was that he resign and return to Lyndon when he got his doctorate.

14. On March 27, 1980, President Murphy denied Grievant tenure, stating: "you did not meet the criteria requiring a terminal degree in major teaching field or significant professional, artistic, or scholarly accomplishment."

15. Grievant does not hold a terminal degree (Ph.D) in Meteorology. He holds a Master's of Science Degree in Meteorology from the University of Wisconsin. Additionally, he has obtained 48 graduate credits in Meteorology beyond his Master's Degree. President Murphy, at the time of her decision, realized Dean Addison's statement indicating that Grievant had 40 graduate credits in Meteorology was erroneous. She was aware Grievant had 48 graduate credits in Meteorology beyond his Master's Degree.

16. Besides his educational background, other accomplishments of Grievant cited in his personnel file at the time of the tenure review include:

a. His teaching is considered superior by students and colleagues (Colleges' Exhibit A, Grievant's Exhibit's #8, 9, 23).

b. Grievant was Chairman of the Meteorology Department for three years. During that time, student enrollment in the Meteorology program nearly tripled. Many students came to Lyndon after the program was recommended by Grievant's contacts in the field (Grievant's Exhibits #9, 22, 23).

c. Organized and hosted Northeast Storm Conferences in 1976, 1977. Since then, Lyndon Meteorology students have planned and ran the conferences. The conferences attract well-known meteorologists from all over the Northeast, and has drawn international and national attention to the Lyndon program (Colleges' Exhibit A, Grievant's Exhibits #8, 9, 22, 23, 26, 28, 30, 31, 32, 33). Grievant has submitted writings which have been published in the proceedings from the conferences (see, for example, last 29 pages of Grievant's Exhibit #27).

d. Instrumental in improving campus AFROTC program (Grievant's Exhibits #8, 9, 22).

e. Assisted in setting-up a Meteorological Co-op program which provided summer jobs and relevant work experience to Lyndon students (Grievant's Exhibit #22).

f. Set up a campus weather service to give students forecasting and broadcasting experience. The service provides the community with 24-hour weather forecasting (Colleges' Exhibit A, Grievant's Exhibits #8, 9, 22, 23).

g. Achieved considerable success in placing program graduates in meteorology jobs (Grievant's Exhibits 8, 9, 22, 23).

h. Founder and President of Sentry Weather Services, Inc. Utilizing Lyndon graduates exclusively, Sentry serviced almost all the major ski areas in the Northeast (Grievant's Exhibits #8, 22, 37).

i. With the assistance of several students, he put together the "Great American Weather Calendar" (Grievant's Exhibits #8, 22, 24, 25). The New York Times reported the calendar was "so unusual, and such fun, you might want to tear down the one you've already hung" (Grievant's Exhibit #26).

j. Before coming to Lyndon, Grievant was Staff Meteorologist for WCBS-TV and Broadcast Meteorologist for WVOX in New York City (Colleges' Exhibit A).

17. The article Grievant published in the proceedings of the 1977 Storm Conference (last 29 pages of Grievant's Exhibit #27) is concerned with climatology. Merle Woodall considers Grievant's article of comparable quality to articles in the established professional journals. The article stimulated widespread discussion in the field, and Woodall himself received requests for the article on an international and national basis.

18. The American Meteorological Association does not recognize the Journal from the Storm Conferences as an accepted journal. The Storm Journal is used by some in the field, however, as a scholarly work. The Journal is often used for trial publication. Articles are published in the Storm Journal and, if critically acclaimed, are submitted for publication elsewhere.

19. On May 1, 1980, President Murphy met with Lyndon Students and discussed Grievant's denial of tenure (Grievant's Exhibit #47). At one point, the President told students, "You asked me time and again why I denied him tenure, and my answer is that he did not have a terminal degree." At a later point, she stated: "I did not feel that he met the requirements for tenure." At another point, in referring to the tenure criteria, the President said, "It does make a distinction for people in the arts."

20. Four other faculty members were reviewed for tenure during the Spring of 1980 at Lyndon--Jon Fitch, Ernest Broadwater, Cynthia Baldwin, and Merle Woodall. All four were awarded tenure. Mr. Fitch and Mr. Broadwater held terminal degrees; Ms. Baldwin and Mr. Woodall did not.

However, in the judgment of President Murphy, Ms. Baldwin and Mr. Woodall satisfied the "significant accomplishment" alternative to the terminal degree.

21. Merle Woodall is a faculty member in Grievant's Department at Lyndon. He holds a Master's of Science in Meteorology from the University of Chicago. He has obtained no graduate credits beyond the Master's (Colleges' Exhibits C, D).

22. Besides his educational background, other accomplishments of Woodall cited in his personnel file at the time of the tenure review include:

a. Spent 24 years in the United States Air Force. Highlights of this experience were:

1. Weather observer, weather forecaster, and weather detachment commander in squadron group and wing operations; research and development administrator for meteorology.

2. In 1948, represented Occupied Japan at World Meteorology Organizational meetings in India.

3. In 1949, attended the 7th Pacific Science Congress in New Zealand and presented a paper on the post-analysis of typhoons of Western North Pacific.

4. Research and Development Administrator with System 4330, a joint program to improve the meteorological equipment and techniques of the FAA, USAF, and the National Weather Service (1959-64).

b. Taught at Belknap College, New Hampshire for nine years. He organized the meteorology program and curriculum and selected the other two members of the staff. He won a National Science Foundation grant for instructional scientific equipment. When the College went out of

business in 1973, he brought the entire program, including students, faculty, books, and equipment to Lyndon.

c. At Lyndon, Woodall:

1. Is rated as a superior teacher by colleagues and students;
2. Served as Chairman of the Meteorology Department for three years;
3. Selected new staff;
4. Established an air particulate sampling station at Lyndon;
5. Initiated arrangements which led to the joint Lyndon-

St. Michaels College AFROTC program;

6. Submitted proposal to the National Science Foundation to do a research grant in numerical weather prediction with student participation;

7. Served on several college committees.

d. Published two scholarly articles while at Belknap, one in the Bulletin of the American Meteorological Society (3-page article, "On the Concept of a Weather Observation", 1966) and the other in the Mt. Washington Observatory News Bulletin (2-page article, "Alto cumulus Lenticularis - Flying Saucers on the Eastern Slope", 1971). Both bulletins are recognized publications of the American Meteorological Society. While at Lyndon, Woodall co-authored an article with Dr. Widger, "Integration of the Planck Black Body Function", which was published in the AMS Bulletin (October, 1976). Dr. Widger was the principal author. Woodall also had "Comments on 'Evaluation of a 5-year Forecast'", published in the January, 1980, AMS Bulletin. Woodall termed these published comments "No big deal" (Coll-1335 Exhibits C,D).

23. In his recommendation of Woodall for tenure, Dean Addison stated: "Mr. Woodall's ability as a teacher and his experiences more than outweigh the fact that he does not hold a terminal degree" (Colleges' Exhibit D).

24. President Murphy stated that Woodall was granted tenure because of his "long-range" accomplishments which she deemed significant. His work with the Air Force, Belknap College, and Lyndon, taken together, was seen by the President as constituting consistent long-range commitment to his profession worthy of substituting for the doctorate.

25. Woodall is 62 years of age. Grievant is 34 years old.

26. Cynthia Baldwin is an Assistant Professor in the Communication Arts and Science Department. She holds a Master's of Arts Degree in Speech Communications/Theatre from Southwestern Missouri State University (Grievant's Exhibit #43). In his review recommending that Baldwin be granted tenure, Dean Addison wrote:

Ms. Baldwin is an artist. She takes short stories, magazine articles, and other prose work and makes original adaptation to the stage. Prose work was not written for the stage, and her creative work requires an exceptional talent. Her scripts, comments from colleagues, and reviews indicate the quality of her work. Therefore, a Master's Degree can be considered as a terminal degree (Grievant's Exhibit #43).

27. Dean Addison considered Baldwin's degree to be comparable to a Master's of Fine Arts (M.F.A.) degree.

28. At the time of her tenure review, Baldwin was enrolled in a doctoral program in the field of Educational Administration. She had earned 13 academic credits. In his review of Baldwin, Dean Addison noted, "Ms. Baldwin will have an additional 30 graduate hours in communication related courses before the beginning of the 1980-81 academic year." (Grievant's Exhibit #43).

29. Dean Addison recommended Baldwin be awarded tenure because she "meets or exceeds all the criteria".

30. On March 27, 1980, President Murphy notified Baldwin she was awarded tenure (Grievant's Exhibit #19).

31. The tenure criteria list the M.F.A. as a terminal degree. The Colleges do not consider Baldwin's degree to be a M.F.A. President Murphy, at the time she reviewed Baldwin for tenure, did not consider her Master's Degree to be a terminal degree.

32. President Murphy did not consider the 30 credit hours cited by Dean Addison (see Finding #28) to be an accurate figure and questioned the Dean about it.

33. Enrollment in a doctoral program does not satisfy the basic credentials required for the award of tenure. Baldwin was not awarded tenure because she was pursuing a doctorate.

34. Baldwin was awarded tenure because she was deemed to have significant "artistic" accomplishment sufficient to substitute for the terminal degree. She took prose work and adapted it to the stage. She was responsible for adaptation and direction of six original plays while at Lyndon. President Murphy considered the adaptation, originality, and creativity that went into those six productions equal to publishing an article in a major professional journal.

OPINION

There are three issues before us in this case:

- 1) Were the reasons given to Grievant by President Murphy 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 remand the case for final determination to a system-wide ad hoc committee...

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. Grievance of Diane Fairchild, 4 VLRB 164 (May 14, 1981). Finding no evidence here that such is the case, we find the reasons given to Grievant by President Murphy for denial of tenure were not erroneous.

We will find the Colleges applied the tenure criteria in an arbitrary manner if it is determined Grievant had insufficient notice in which to comply to the tenure criteria (Grievance of Kenneth Burrill, 1 VLRB 386, 398) or that the decision to deny tenure constitutes a capricious or unprincipled determination that departs from the established criteria. Fairchild, supra.

The Federation contends Grievant had insufficient time to conform to the new criteria. We disagree. The criteria were implemented in 1976, and in 1977, Dean Addison told Grievant he had a good possibility of being granted tenure without a terminal degree but, based on an uncertain future, Grievant's best bet would be to obtain a doctorate.

The Dean did not exempt Grievant from the criteria. Thus, Grievant was aware by 1977 that the criteria applied to him. He had over three years to comply with the new criteria; certainly sufficient time, especially since he had completed the bulk of his work leading to a doctorate degree.

The Federation further contends the President's determination that Grievant did not demonstrate "significant professional accomplishment" constituted an arbitrary departure from the tenure criteria.

As we stated in Fairchild, supra, the tenure criteria are not drawn with mathematical nicety. They define "professional, artistic, or scholarly accomplishment" 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".

The President did weigh Grievant's accomplishments against these general standards. She recognized his various accomplishments in his field, but determined they were not "significant" enough to substitute for the terminal degree. Such judgment is, by necessity, somewhat subjective, and one that may be disagreed with by others in the academic community, but does not constitute a capricious or unprincipled departure from the tenure criteria.

Discriminatory Application of Criteria

The remaining question is whether the Colleges applied the tenure criteria in a discriminatory manner. In view of the sharp differences of opinion this case has generated before the Board, I must now examine how the tenure criteria were applied to faculty members similarly situated to Grievant. Fairchild, supra. The Federation contends that comparison

of Grievant's accomplishments to Cynthia Baldwin and Merle Woodall, who were deemed to have "significant professional, artistic, or scholarly accomplishments" sufficient to substitute for the terminal degree, establishes discriminatory treatment of Grievant. Those accomplishments have become the baseline criteria required to substitute for the terminal degree. Muirchild, supra.

Baldwin was awarded tenure because her adaptation and direction of six original plays at Lyndon were deemed significant artistic accomplishments. I cannot readily compare Grievant to Baldwin because his accomplishments were largely professional or scholarly, not artistic. Grievant argues that his weather calendar is an artistic accomplishment equivalent to writing a play. However, this calendar is more a professional accomplishment than an artistic work. I find nothing discriminatory in the Colleges determining that Grievant's "artistic" accomplishments were not significant. Certainly, they are not equivalent to Baldwin's stage work.

Woodall's accomplishments can more readily be compared to those of Grievant. He is a member of Grievant's department whose accomplishments are professional and scholarly. President Murphy determined that his long-range accomplishments demonstrated constant and consistent commitment to his profession worthy of substituting for the doctorate.

On examination of the respective records, it is difficult to distinguish between Grievant and Woodall. Both Woodall and Grievant are considered superior teachers. Woodall's "constant and consistent" accomplishments in a long Air Force career are matched by Grievant's considerable professional accomplishments outside of the classroom. Woodall has certainly had more experience, but Grievant's 48 graduate credits beyond the Master's

can, by the tenure criteria, be considered comparable to 16 years of professional experience. Woodall was given credit for bringing the Meteorology program to Lyndon from Belknap College. Grievant, while Meteorology Department Chairman, was largely responsible for increased enrollment in the program, an achievement of substantial importance to Lyndon comparable to Woodall's transfer of the program. Woodall's college service at Lyndon is matched by Grievant's extensive service to the College, the Department, and its students. The accomplishments of both Woodall and Grievant advanced the development of the Meteorology Department and provided meaningful practical experience to its students.

Thus, the nub of this case turns on the issue of scholarly publications. The Colleges distinguished the accomplishments of Woodall and Grievant on their respective publication records. Woodall published three articles while at Belknap and Lyndon in recognized publications of the American Meteorological Society (AMS). Grievant, meanwhile, published no articles in recognized professional journals. Grievant published in the proceedings from the 1977 Lyndon Storm Conference; these proceedings are not recognized by the AMS.

In Fairchild, supra, we were faced with a situation where the Grievant had no publications whatsoever. The case before us is distinguished on the grounds that Grievant had a publication to his credit, but not in an established professional journal.

We are asked by the Federation to compare the quality of Grievant's article to those published in the established journals. I recognize the force of Merle Woodall's testimony that he considers Grievant's article

comparable to the articles in the recognized professional journals. I am also mindful of the fact that Grievant did not cite the article in his own self-evaluation for tenure (Grievant's Exhibit #22). Whatever the scholarly merits of the article, I do not feel this Board is equipped to sit in judgment on the quality of articles whose subject matter I have little knowledge of. This is not the forum to litigate scholarly quality in any event.

The President's decision here, and in Fairchild, requires that a work be published in a recognized journal in the field in order to be deemed a significant scholarly accomplishment. I presume such work must undergo strict review by others in the field before it is published in the recognized professional journals. Woodall's articles have undergone and passed that review; Grievant's article has not. As Woodall testified, proceedings of the Storm Conference are a trial publication, where if an article achieves critical acclaim it may ultimately be published in a recognized journal, but it is not itself a recognized professional journal. Absent evidence of Grievant publishing in such journals, I cannot find the Colleges applied the tenure criteria to Grievant in a discriminatory manner. Accordingly, the accomplishments of Woodall and Grievant are legally distinguished on their respective publications records.

This was not a discriminatory application of criteria; it was a distinction in judgment after applying the same criteria in the same fashion and after a reasonable consideration of each record. President Murphy, as were all of us on this Board, was faced with a difficult decision in deciding whether to award tenure to Grievant (or remand to

the ad hoc committee); a decision in which Grievant's accomplishments had to be weighed against established criteria. I do not feel on this record that it is appropriate to second-guess her judgment absent a showing of legally arbitrary or discriminatory action or action based on erroneous reason.

I concur with the thoughts of the US Court of Appeals [2nd Circuit] in Faro v. New York University, 502 F2d 1224, at 1232 (1974):

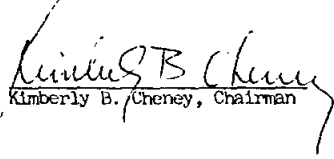
In practically all walks of life, especially in business and the professions, someone must be charged with the ultimate responsibility of making a final decision - even as are the courts. The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring or promotion. Even were it so capable, a new rule would have to be added to appellate rules entitled, "Appeal from a Computer".

For the foregoing reasons, I find the Colleges did not violate the contract in its denial of tenure to Grievant.

I cannot conclude without a word on the discrimination issue so forcefully analyzed by Mr. Kemsley. Unfortunately, this issue was not properly before us. Yet, even if it had been, I think the result would be the same. The Colleges have embarked on a long-term objective of having tenured faculty possess terminal degrees, a policy the Board of Trustees regards as vital to the survival of the Colleges themselves. While I may disagree with the wisdom of that decision, it is not my function to do so in cases of this sort. Granting Grievant tenure, then, would frustrate a legitimately developed policy of the Colleges - potentially for 31 years. True, the age of Grievant may have been a factor in the President's decision, but the ultimate factor was long-range planning for the perceived benefit of the College, which necessarily

included a judgment that Grievant's scholarly accomplishments were deficient. As I see it, a long-range commitment to scholarship in an effort to improve the professional standing of Lyndon State College was the decisive factor, not Grievant's age per se. Therefore, I feel our initial ruling not to consider this issue was legally correct and not decisive of the outcome.

One concluding note. We are informed that Grievant would return to Lyndon to finish out his last year there if our decision was to remand to the ad hoc committee. He would then take the risk of a Supreme Court reversal of our decision and ultimate discharge from employment - assuming of course that the ad hoc committee tenured him. Obviously, an assessment of these risks is his to make, not mine. But my fidelity to the legal system under which we operate, as well as to Grievant, is to give my best considered judgment as to what the Supreme Court would do. My opinion reflects that effort.


Kimberly B. Cheney, Chairman

CONCURRING OPINION

I concur with the decision that the Colleges did not violate the contract in its denial of tenure to Grievant. However, I disagree with the manner in which the Chairman deals with the discriminatory application issue. While the ultimate decision is valid, the meaning of discrimination is expanded beyond a reasonable scope. The Agreement between the parties clearly defines discrimination in Article IV. Grievant was not discriminated against within the scope of this definition. Fairchild, supra. Nowhere does the Agreement refer to "baseline criteria". To the contrary. The bargained Agreement specifically limits the Colleges to the individual's personnel file in making the tenure decision [Article XXI(4)] and specifies that the decision will be reached by making a comparison of the individual's accomplishments to published criteria [Article XXII(3)]. This reasoning is advanced, in detail, in the concurring opinion in Fairchild, supra.

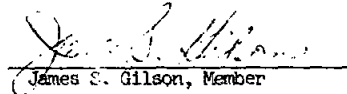
In addition, there is no evidence to demonstrate that the "same circumstances" test, which the Vermont Supreme Court requires, Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 385 A2d 1499 (1978) (see also Fairchild, supra), has been met.

The Colleges are persuasive in their brief in the case before us. In particular is the following (p. 21,22):

One fundamental reason for avoiding detailed reviews is the special subjectivity that must enter academic decision-making. The Fourth Circuit recently wrote:

Unsure how to evaluate the requirements for appointments, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the court review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason. Smith v. University of N. Carolina, 632 F2d 316 (4th Cir., 1980).

Given the requirements and limitations of the Agreement, and
" ...in the absence of abuse of discretion, capricious action, or discrimination of such a nature as to constitute a violation or deprivation of constitutional rights,"¹ Green v. Texas Tech University 335 F. Supp. 249, 4 FEP 126, 127 (N.D. Tex 1971), aff'd 474 F. 2d 594, 5 FEP 677 (5th Cir. 1973), there can be only one conclusion. The Colleges' decision to deny tenure to Grievant was discriminating, to be sure, but not discrimination in violation of the Agreement or of law. The denial of tenure, while a difficult and unpopular decision, should stand.


James S. Gilson, Member

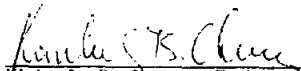
¹ D'Aleo v. Vermont State Colleges, Brief for the Colleges, p. 21.


ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, the grievance of Joseph S. D'Aleo is ordered DISMISSED and is DISMISSED.

Dated this 25th day of May, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


James S. Gilson

*Decision Affirmed
by Supreme Court
Aug 1982*

DISSENTING OPINION

I dissent from my colleagues. I believe the Colleges discriminated against Grievant because of his age which resulted in the tenure criteria being applied to him in a discriminatory manner.

At the hearing on this matter, the Federation attempted to raise the issue of age discrimination. Article IV, Agreement, provides, in pertinent part: "The parties shall not discriminate against any faculty members... by reason of age..." The majority of this Board objected to hearing evidence on age discrimination because such allegations were not made at the first step of the grievance procedure.

I disagreed with that decision as I think the central issue in this case is one of age discrimination. The Board's ruling prevented a full evidential development of the issues. Still, it is obvious the long-range goal of the Colleges is to have only tenured faculty with doctorates. In 1980, Lyndon had two faculty in the Meteorology Department up for tenure review, Grievant and Merle Woodall. Neither had a terminal degree, but both had impressive accomplishments. The constant and consistent accomplishments of both contributed greatly to the development of the Meteorology Department. The Meteorology program became well-regarded in the field and the enrollment and prestige of the program grew dramatically.

On examination of the respective records, I cannot distinguish between Grievant and Woodall. If the Colleges tenured one of them, so should the other be tenured. Yet this would mean having two tenured faculty in the same department without doctorates; a move that would frustrate their long-range goal of having only tenured faculty.

However, if neither was tenured, a well-respected program would lose two faculty members whose positive impact on the development of the program was undisputed. The Colleges chose the option that was most favorable from a business standpoint - they tenured the faculty member who would be around the shortest time; 62 year old Merle Woodall. If Woodall followed the normal route, he would be retired in three years at age 65. D'Aleo, at age 34, conceivably could be around for 31 years before retirement. I do not share the Colleges' view that a doctorate degree is essential to a quality program, but that is a decision for the President of the Colleges to make, not this Board. Yet, it is clear to me that this policy has forced Grievant out of the system solely because of his age. While the decision by the Colleges to tenure the older faculty member is consistent with its announced policy of tenured faculty, it flies in the face of contractual language which prohibits discrimination based on age.

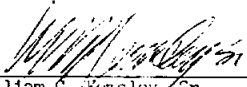
As a result of this age discrimination, the tenure criteria were applied to Grievant in a discriminatory manner. As stated, it is difficult to distinguish between the respective records of Grievant and Woodall. The Colleges attempted to distinguish their accomplishments on their respective publication records. In my view, this attempt failed. Woodall published in journals recognized by the American Meteorological Society while Grievant did not. However, Woodall himself considers Grievant's work of comparable quality to articles in the established professional journals, and he testified the article stimulated widespread discussion in the field. Woodall even characterized one of his own articles as "no big deal", a judgment with which I heartily concur. Given such an opinion by a professional in the field, the respective

publication records seem comparable. It is evident the tenure criteria were applied to Grievant in a discriminatory manner.

The Colleges, through its citation of Faro v. New York University, 502 F2d 1229, 1231-32 (2nd Circuit 1974), urge this Board to show restraint, as the courts have, in second-guessing academic judgments. However, the court in that case, as have courts in other cases, determined whether the Colleges' action was based on discrimination, applying constitutional standards derived from the Civil Rights Act. Our review like the courts, is limited to determining whether the criteria were applied in an arbitrary or discriminatory manner. However, we are applying a collective bargaining agreement, not the Federal Constitution. While the standards may be broadly the same, the intent of a labor contract is to promote fundamental fairness between the parties, not to rectify long-standing social ills. Moreover, if we do find such unfairness, we do not then substitute our judgment for that of the academic community and determine that the grievant shall be granted tenure. That is a position courts are forced into, but we are not. Article XXIV, Agreement, provides for remand to an ad hoc committee to make the final determination. That committee, being a committee of scholars, is not only an apt forum to litigate academic judgments of publication quality, but is also the precise forum the parties agree should do so. Compare Grievance of McDonald 4 VLRB 42 (1981). Thus, the fundamental task of this Board and courts is different, a legal principle Mr. Cheney fails to apply.

For the foregoing reasons, I believe the Colleges applied tenure criteria to Grievant in a discriminatory manner, and this case should be remanded to the system-wide ad hoc committee provided for in Article

XXIV, Agreement, to determine whether Grievant shall be awarded tenure.


William G. Kinsley, Sr.

*Majority Opinion
affirmed
April 1982*