

VERMONT LABOR RELATIONS BOARD

Grievance of:)	
)	
Richard McDonald and the)	
Vermont State Colleges)	DOCKET NO. 80-66
Faculty Federation, AFT)	
Local #3180, AFL-CIO)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of the Case

On August 18, 1980, Richard F. McDonald, (hereinafter "Grievant") Associate Professor at Castleton State College and grievance officer for the Vermont State Colleges Faculty Federation, AFT Local #3180, AFL-CIO, (hereinafter "Federation") filed a petition on his own behalf with the Vermont Labor Relations Board. The petition followed denial of his grievance at various levels on campus (Joint Exhibits Nos. 2-6). Grievant contended the Vermont State Colleges (hereinafter "Colleges") violated Articles III, XXI, XXII, XXIII, and XXIV of the collective bargaining agreement (hereinafter "Agreement") between the Federation and the Colleges and violated the Colleges Administrative Rules concerning the tenure process in denying him tenure in March of 1980.

Specifically he charged:

1. Denial of tenure based on arbitrary or discriminatory application of criteria developed under Article XXII(3); Article XXIV.
2. Failure of the Academic Dean to enter her written evaluation and recommendation into his personnel file by the contract deadline of February 1, 1980 [Article XXII(3), as specified in Article XXIV(3)].

3. Violation of his right to respond to and grieve the contents of his personnel file due to the untimely submission of the Dean's evaluation (Article XXI).

4. Procedural violations concerning evaluation and tenure decision by President T. Meier (Articles XXII and XXIV).

5. Errors in the Academic Dean's review and recommendation documents (Article XXII).

6. Failure of the College to notify him of progress toward tenure (Castleton State College Faculty Handbook).

On August 28, 1980, the Colleges answered the petition denying the allegations.

A hearing was held at the Board hearing room in Montpelier on December 4, 1980. Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown were present. Grievant was represented by Stephen Butterfield. Counsel Nicholas DiGiovanni, Jr. represented the Colleges.

Requests for findings of fact were filed by the Federation and the Colleges on December 18 and 22, 1980, respectively.

FINDINGS OF FACT

1. Grievant was hired by Castleton State College in August of 1974 as an assistant professor of Criminal Justice. At that time, he held a Master's Degree in Criminal Justice from the State University of New York at Albany, obtained in 1970.

2. At the time he was hired, there was no requirement for the holder of his position to obtain a terminal degree (Ph.D.) Qualifications for the job were listed in advertising for the position as a Master's Degree, teaching and work experience (Grievant's Exhibit #1). When

hired, Grievant was told by Division Director Holman Jordan and Academic Dean Dorothy Burns that a terminal degree would not be required. To this date, Grievant has not obtained nor is he pursuing a terminal degree.

3. In January of 1976, the Colleges Board of Trustees promulgated and distributed to faculty new criteria for promotion and tenure (Grievant's Exhibit #4). These criteria state in part that the requirement for promotion to Associate Professor and for the award of tenure is a terminal degree in the major teaching field or significant professional, artistic, or scholarly accomplishment.

4. The criteria also state:

"In the third year of probationary service, the regular annual evaluation will also serve as the basis for assessing the candidate's progress toward tenure. The candidate will be notified of the results of this assessment by August 31st..."

5. In Grievant's third year of probationary service, on February 16, 1977, Academic Dean William Feaster submitted the regular annual evaluation of Grievant (Grievant's Exhibit #5). Nowhere in the written recommendation is Grievant's progress toward tenure mentioned. Mr. Feaster does state:

"While I do not know the field of criminal justice well, it would seem advisable to suggest to Mr. McDonald that he begin work on a terminal degree so that his personal and professional growth at Castleton can continue."

This evaluation was placed in Grievant's personnel file. Grievant was not directly notified of the result of the assessment of his progress toward tenure by August 31, 1977, as is required by the Colleges' tenure and promotion criteria.

6. Beginning in the 1977-78 academic year, and continuing through Grievant's duration of employment at the College, he was granted a 25 percent reduction in his courseload to act as coordinator for the Criminal Justice program (Employer's Exhibit #1).

7. Feaster submitted the annual evaluation of Grievant in the following academic year also. The evaluation, dated March 8, 1978, (Grievant's Exhibit #6), recommended that Grievant be promoted to associate professor. He was cited for his accomplishments in developing the Criminal Justice program at Castleton where it was a "top quality program" and successful in placing students in criminal justice agencies. His teaching performance was highly supported by peers, students, and his department chairman.

Feaster also recommended that Grievant be advised to pursue a terminal degree in order to achieve tenure. This recommendation was placed in Grievant's personnel file [as required by Article XXII(3) of the Agreement]. This evaluation was not sent to Grievant or discussed with him.

8. On March 29, 1979, Grievant was notified by Castleton State College President Wilson of his promotion to the rank of associate professor. Grievant was evaluated under the 1976-issued tenure and promotion criteria. This letter praised Grievant's contributions to the institution, but said nothing about the advisability of Grievant pursuing a terminal degree in order to achieve tenure.

9. Following his promotion, Grievant asked President Wilson where he stood with respect to the terminal degree, and Wilson told him his Master's in Criminal Justice would probably be considered as terminal for his field.

10. On February 27, 1979, Academic Dean Feaster submitted an evaluation of Grievant (Grievant's Exhibit #7) stating:

"It is necessary and appropriate that he seriously consider application and enrollment in a terminal degree program within the next year or two. I believe that it would be difficult to recommend tenure without significant progress toward achieving a terminal degree."

The recommendation was again placed in Grievant's personnel file, and was not discussed with him.

11. On December 27, 1979, Grievant reviewed the contents of his personnel folder for the first time. Under Article XXI of the Agreement, a faculty member is permitted to review such file "at reasonable hours upon request". Grievant testified that he had not looked at his personnel file until this time because he had the idea that evaluations would be oral, and because he talked candidly with administrators about all matters, he expected some notice regarding tenure. He assumed that since he had met the criteria for associate professor in 1978, he met the criteria for tenure in 1980. He viewed the stated criteria for the two as identical.

12. After reviewing the file, Grievant wrote, on January 11, 1980, to Professor Kenneth Flowers, Chairman of the Reappointment, Promotion, and Tenure Committee (hereinafter "RPT Committee") which was reviewing his case for tenure (Grievant's Exhibit #12). Grievant informed Flowers that he was startled to find statements by Dean Feaster that he be advised to consider enrollment in a terminal degree program. Grievant claimed in the letter that he had never been so advised in writing or in person by any member of the College administration. The letter goes

on to cite Grievant's accomplishments at Castleton in support of his candidacy for tenure. The accomplishments cited include:

1. Substantial development and redirection of the criminal justice program.
2. Distribution, in 1976, of an annual national employment search that informed students about career opportunities.
3. Establishment of the College as a regional depository for the National Council on Crime and Delinquency's Volunteer program.
4. Improving relationships between the program and criminal justice agencies, to the extent that placement of students in criminal justice agencies improved.
5. Establishment in 1978 of a Criminal Justice Advisory Board consisting of heads of various criminal justice agencies to review the program's curriculum and objectives and to recommend improvements.
6. Presentation of a paper in 1979 at the Convention of the Academy of Criminal Justice Sciences; and ongoing work on a book about capital punishment.
7. Lectures on criminal justice topics in forums sponsored by the Vermont Council on the Humanities and Public Issues.
8. Member of the Rutland County Youth Services Division, a Board which meets monthly to review cases involving juvenile delinquency in the area.
9. College committee work.
10. Service as secretary and grievance officer for the Federation.

A copy of the letter to Flowers was placed in Grievant's personnel file.

13. Article XXIV of the Agreement provides that the faculty member must be notified in his sixth year of service that either he is granted tenure or that the next year is his last one-year appointment. All evaluations and recommendations must be forwarded to the faculty member's personnel file no later than February 1 of that year. Notification by the President of the College of the decision shall be made by April 1.

14. Evaluations and recommendations (per Article XXII of the Agreement) are to be submitted by "a committee established by each faculty assembly" and in a separate independent review, the "Dean or other appropriate administrative officer". At Castleton State College these evaluations were done by the faculty Reappointment, Promotion and Tenure (RPT) Committee and the Academic Dean. The review by the RPT Committee is in accordance with the faculty's own criteria; the reviews by the Dean and President are in accordance with the tenure criteria promulgated by the Board of Trustees.

15. Since 1979-80 was Grievant's sixth year at the College, a tenure decision had to be made on him.

16. The RPT Committee, President Thomas Meier, and Academic Dean Rose Marie Beston reviewed Grievant for tenure. Meier was appointed president of Castleton State College in September, 1979; Beston became Academic Dean in January, 1980.

17. The RPT Committee submitted their recommendation on the grievant to President Meier on February 6, 1980; this was placed in Grievant's personnel file February 7, six days after the contractual deadline (Grievant's Exhibits #13 and #10).

18. The RPT Committee recommended that Grievant be granted tenure. Cited were student evaluations "ranging from ratings of very good to excellent", his activities in the college and department, strengthening of the Criminal Justice program, strong recommendation by his Department chairman, and his community affairs activities.

19. Dean Beston made her review and recommendation to deny tenure on March 5, 1980, and it was entered into Grievant's Personnel file on March 20, 1980, 49 days after the deadline specified by the contract.

20. Dean Beston missed the February 1 deadline for two reasons:

1. She had just arrived on the campus January 7, 1980, and was immediately confronted with the need to make one tenure recommendation, nine promotion recommendations, and numerous reappointment recommendations - all of which had to be completed by February 1. She said there was no way to adequately review all of these by the contract deadline.

2. In checking with prior Dean Feaster, she learned that there had been some flexibility in the past regarding the February 1 deadline.

Dean Beston never spoke with Grievant about waiving the February 1 deadline.

21. In reviewing Grievant's case, Dean Beston testified that she first familiarized herself with the Colleges' criteria on tenure. Then she reviewed his personnel file (which included Employer's Exhibits #1 #6, Grievant's Exhibits #1, #2, #5 - #7, #12, and #13) several times, reviewed all of his student evaluations, and checked with the prior Dean Feaster regarding Grievant's performance.

22. Under the Colleges' criteria, a candidate for tenure is rated in three categories - teaching, professional growth, and college and community service. A rating of "superior" in the first two categories and a rating of "average" in the third category is required in order for a candidate to be favorably considered for tenure. In addition, the Board's criteria specifies that the candidate must have the following credentials: terminal degree in major teaching field or a significant professional, artistic or scholarly accomplishment (Grievant's Exhibit #4).

23. Dean Beston rated Grievant as "average" in all three categories. She also noted that he had no "significant professional, artistic or scholarly accomplishment" which could have substituted for a terminal degree (Grievant's Exhibit #8). She subsequently did not recommend him for tenure.

24. Dean Beston's recommendation misrepresented Grievant's rank. She referred to him as an Assistant Professor, when in fact he was an Associate Professor.

25. President Meier conducted his own tenure review of Grievant. He measured Grievant's record against the Colleges' tenure criteria, reviewed a number of times Grievant's complete personnel file, read all of Grievant's student evaluations, and spoke with the Dean about her recommendation.

26. On March 5, 1980, President Meier decided against a favorable tenure decision (Grievant's Exhibit #11). Like Dean Beston, he too referred to Grievant as an assistant professor. We find that this misrepresentation was a typographical error and that both the President and the Academic Dean were aware of Grievant's true rank. This document also was not entered into Grievant's personnel file until March 20.

27. Subsequent to the March 5, 1980, recommendations by the Dean and the President and prior to their insertion into Grievant's personnel file, the Personnel Committee of the Colleges' Board of Trustees held a March 14 meeting on Grievant's case.

28. On March 21, 1980, the full Board of Trustees met on Grievant's case. No one was allowed to speak for Grievant at this meeting.

29. The Board of Trustees and the Chancellor concurred with the decision by President Meier not to grant Grievant tenure.

30. On March 27, 1980, the President informed Grievant by letter that he would not be granted tenure. He stated:

The reason for the denial of tenure is that you did not meet the criteria of a terminal degree and professional growth as required in the VSC Administrative Policy on Tenure.
(Grievant's Exhibit #3)

(In this letter, Grievant's rank was correctly stated as "Associate Professor".)

31. In making his determination, President Meier disagreed with Dean Beston that Grievant's teaching was "average", and rated his teaching performance "superior". In the President's view, Grievant's teaching was sufficient to meet the tenure criteria, but he was found lacking in other areas.

32. President Meier called Grievant in for a conference before he gave him the March 27 rejection letter to discuss his review.

33. Grievant testified that if the cited recommendations had been placed in his personnel file by February 1 he would have been able to rebut the Dean's statements in her evaluation which he viewed as erroneous. He would have asked President Meier and Dean Beston to talk to their predecessors about his performance.

34. At the hearing, the Federation argued inconsistent application of the tenure criteria and cited the following instances:

1) William C. Kuehn, Associate Professor of Sociology and Criminology, was granted tenure by Castleton State College in March, 1977, without a terminal degree (Grievant's Exhibits # 15 and #16).

2) Merle Woodall, Associate Professor of Meteorology at Lyndon State College, was granted tenure in Spring, 1980, without the terminal degree. His ability as a teacher and his experience were cited as more than outweighing the fact that he does not hold a terminal degree.

35. There was no evidence submitted from which we are able to find that those cases are comparable to this case, or that discriminatory

treatment occurred. President Meier, in addition to Grievant's case, reviewed nine candidates for promotion in the Spring of 1980. Four faculty members were denied promotion to full or associate professor because, in part, they did not have the terminal degree required for such promotion. Two received promotions to those ranks who have terminal degrees. The other three cases involved promotions where a terminal degree requirement is not in force.

OPINION

The issues presented to the Board in this matter are twofold:

- 1) Did the Vermont State Colleges deny Grievant his right to due process by violating any of the procedures for tenure evaluation as contained in the Agreement and the Colleges' Administrative Policy and Criteria on Tenure? and
- 2) Are the reasons given by the Colleges for denial of tenure to Grievant erroneous or an arbitrary or discriminatory application of the criteria developed under Article XXII(3) and Article XXIV of the Agreement?

1977 Assessment Notification

The Colleges Administrative Policy and Criteria on Tenure requires that a faculty member's progress toward tenure be assessed in the third year of probationary service, and that he be notified of the results. The Federation contends that Grievant was never notified of the results of such assessment, and asks this Board to rule that his due process rights were violated in this regard.

The Board is precluded from ruling on the merits of this particular issue because the timeliness requirements for filing a grievance have not been fulfilled. Both the existing and previous contract between the parties provide that a complaint must be filed "within 30 calendar days following the time at which the complainant could have reasonably been aware of the existence of the situation created by the College which is the basis of the complaint." Since Grievant had ready access to the Colleges Administrative Policy and Criteria on Tenure at the time the alleged violations occurred he certainly "could have been reasonably aware" of the existence of the violation well before the filing of the tenure grievance in 1980 by a simple reading of the criteria. Whatever violation may have occurred in this regard we deem waived.

1980 Non-tenure Notice

The Federation makes the contention that Grievant's due process rights were violated by the failure of the College to forward the Dean's and President's recommendations to the personnel file by the February 1 deadline specified in the contract. It is undisputed that the Dean's and President's recommendations were not inserted into Grievant's personnel file until March 20.

Article XXIV of the Agreement states, "All evaluations and recommendations shall be forwarded to the faculty member's personnel file no later than February 1". By Article XXII, Agreement, the faculty committee and "Dean and other appropriate administrative officers" are required to submit these evaluations and recommendations. The president is not obligated by the Agreement to make recommendations, but to make "final determinations." [Article XXII(4)] The Board thus cannot find the

President in violation on this count because there was no contractual obligation on his part to meet a February 1 deadline. We do find, however, that the Dean violated the contract provisions, which we believe, to use the parties' phrase, is a "due process" violation.

Courts have consistently held that defined dismissal procedures must be scrupulously observed.

In Nzomo v. Vermont State Colleges, 250-76, 136 Vt 97, 385 A2d 1099 (1978), the Vermont Supreme Court stated:

"Defined dismissal procedures, although generous beyond the due process requirement that bind the agency, are binding and must be scrupulously observed."

As this Board held in Burrill v. Vermont State Colleges, 1 VLRB 386, 398 (1978), Nzomo, supra, is applicable to tenure evaluation procedures.

"Denial of tenure is similar to dismissal in that a faculty member who has been denied tenure can only continue to teach for one more academic year. The Administration has a responsibility therefore to scrupulously abide by the procedural due process requirements which are contained in the Agreement."

We find that the Employer must be held bound to defined dismissal procedures. Any other result would require this Board to involve itself in resolving endless disputes and justifications for departure from contractually mandated procedures. This we refuse to do.

The Colleges, however, argue that even if Grievant's "due process" rights were violated, no harm was done to him and, therefore, this Board should uphold the President's action. In essence they argue that all those who reviewed Grievant had access to the entire contents of his personnel file which contained ample documentation of the facts Grievant claims are "significant professional, artistic, or scholarly accomplishments". The Colleges claim that nothing Grievant could have

said or done during February or March would have altered that record, and that it was deficient.

The Vermont Supreme Court decision in Nzomo v. Vermont State Colleges II, Docket #51-79 (1980), is relied on by the Colleges for the proposition that not every violation of procedure gives rise to a reversal of the decision. In Nzomo II, supra, the grievant's department chairman and division head did not discuss their nonrenewal recommendations with him prior to sending them to the president of the college, as was the defined procedure. In that case, this Board and the Supreme Court determined that procedural shortcomings had no significant effect on the President's decision, and denied the grievant's claim to reinstatement. The Colleges contend that Nzomo II and this case involve similar situations.

We disagree with the Colleges. We find three significant differences between the two cases, differences which demonstrate that harm was done to Grievant in this case through violation of his due process rights.

1) In Nzomo II, supra, the grievant was not contractually entitled to the right to respond to negative assessments of him. That is not the situation in the case before us. The contractual right of Grievant is clear. Article XXI(1) of the Agreement provides

The faculty member shall have the right to grieve the insertion in his personnel file of any administrative report which he or she alleges to be untrue or inaccurate . . . The faculty member shall have the right to respond to any document in his personnel file and have such response included in such file and attached to the appropriate document.

In Burrill v. Vermont State Colleges, 1 VLRB 386, 398(1978), we found:

The purpose of placing recommendations in a faculty member's personnel file by February 1 is so that the faculty member will have sufficient time to review the recommendations and respond to a negative or incorrect assessment of his abilities prior to the President's final determination on April 1.

Grievant was justified in alleging that certain statements by the Dean in her recommendations were "untrue and inaccurate". He had reason to grieve reference of him as "Assistant Professor", when he is an Associate Professor, and rating of his teaching as "average" although he had been rated superior in the past and no evidence was introduced reflecting a downturn in his teaching. The right of Grievant to respond to this "negative or incorrect assessment of his abilities" was violated by the late insertion of the Dean's recommendation into his personnel file.

The claim by the Colleges that nothing Grievant could have said or done during February or March would have altered his record may be true, but if Grievant had been allowed to present his rebuttal of the Dean's assessment to President Meier, he would have had the opportunity to defend his teaching performance and professional accomplishments against Dean Beston's negative assessment. We are unwilling to say that the right to present arguments and facts, perhaps buttressed by third party testimonials, is valueless, or always and inevitably futile. "Significant professional...accomplishments" are a subjective matter at best. Even in the face of a policy requiring a terminal degree, Grievant's record might have passed muster. We cannot speculate what effect Grievant's review and response might have had on the final decision of President Meier. It is one thing to speak, argue and present evidence while the decision-maker's mind is undecided, and quite another to do so after a firm decision has been made. We do find that Grievant was denied his due process rights under the Agreement.

2) In Nzomo II, supra, the Vermont Supreme Court "considered that the failure of the Division Director and the Department Chairman to discuss their recommendations with the plaintiff was an error which did not affect the decision in view of the fact that extensive other consultations with the plaintiff predated notice of non-renewal." In the case before us, no such "extensive other consultations" with Grievant occurred. No evidence was presented demonstrating any consultation with Grievant during the review process.

3) Most importantly, this case differs from Nzomo II, supra, in one significant aspect. That case ultimately concerned the appropriate amount of money damages to be awarded as compensation for a "due process" violation. There we awarded money damages "to reinforce... a deprivation of an important right", that is, to police the contract. Thus in Nzomo II, supra, the fashioning of appropriate remedies in instances of due process violations was a matter left to outside parties (e.g. this Board, Vermont Supreme Court). In the case before us the parties themselves have provided a contractual remedy for instances of significant due process violations: remand to a system-wide ad hoc committee as provided for in Article XXIV of the Agreement. We, by the contractual language, are not allowed to substitute our judgment for that of the academic community regarding the merits of a tenure case. Nor are we given freedom to substitute our judgment for theirs concerning the appropriate remedy.

This is not to say that every violation of procedure requires remand to the ad hoc committee. We follow Nzomo II, supra, to the extent that if it is known from the facts surrounding the case that the procedural violations could not affect the non-renewal decision, then the non-renewal decision itself must be allowed to stand. Some due process

violations are undoubtedly de minimus. However, if we are forced to speculate as to the result of the tenure decision had no error been made, then the denial of tenure itself is called into question. The purpose of the ad hoc committee, we believe, is to make final determination in cases where a "due process" violation taints the final decision.

The task before us, then, is to determine whether there is sufficient departure from the due process procedure to trigger the contractual remedy of remand to an ad hoc committee. As we have already found, it would be a matter of speculation to determine whether President Meier's decision would have differed had not Grievant's due process rights been violated. Accordingly, the system-wide ad hoc committee provided for in the Agreement should make the final determination in this case. We, of course, reach no conclusion in this opinion as to whether or not Grievant should be awarded tenure. In view of the violation of due process which occurred during the course of Grievant McDonald's tenure evaluation, we conclude that his case must be remanded to the ad hoc committee for final determination.

In view of our finding that Grievant was denied his due process rights under the Agreement during the tenure evaluation process and that his case should be remanded to the system-wide ad hoc committee, we find it unnecessary to further rule whether the reasons given to Grievant for denial of tenure were erroneous or constitute an arbitrary or discriminatory application of the tenure criteria.

ORDER

In accordance with the reasons state above, it is hereby ORDERED that the grievance of Associate Professor McDonald be remanded to a

system-wide ad hoc committee as provided for in Article XXIV of the Agreement.

Dated this 29th day of January, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

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