VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
DANIEL SWEETLAND AND THE	)	
VERMONT STATE COLLEGES	)	DOCKET NO. 83-14
FACULTY FEDERATION, AFT	)	
LOCAL 3180, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 7, 1983, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation") filed a grievance with the Vermont Labor Relations Board on behalf of Daniel Sweetland ("Grievant"). The grievance alleged that by terminating Grievant, a professor at Johnson State College, in his sixth year, the Vermont State Colleges ("Colleges") violated article 22 of the collective bargaining agreement between the Federation and the Colleges, effective for the period September 1, 1982 to August 31, 1984 ("Contract"), and Colleges' Policy 201, Administrative Policy and Criteria for Tenure; thus depriving Grievant of his right to a tenure review. In addition, the grievance alleged the Colleges violated Article 14 of the Contract by seeking to obstruct the grievance process by claiming Grievant did not timely file a grievance on his own behalf. As relief, the grievance requested the Board order Grievant be reviewed for tenure during the 1983-84 academic year; he be informed, contingent on this review, that he is either granted tenure or that his seventh year is his last year of employ; and that Grievant and the Federation be made whole for any and all damages resulting from the Colleges' actions.

A hearing was held before the full Board on September 22, 1983. Dr. Stephen Butterfield, Federation Grievance Chairman, represented Grievant.

Attorney Paul Sutherland represented the Colleges. At the hearing, the Colleges withdrew an objection, stated previously in its Answer to the grievance, to the timeliness of the grievance and the Federation waived any claim regarding the timeliness issue.

Requested Findings of Fact and Memoranda of Law were filed by the Federation and the Colleges on October 6 and 7, 1983, respectively. The Colleges filed a Rebuttal Brief to Grievant's brief on October 14, 1983.

FINDINGS OF FACT

1. Grievant is a full-time faculty member in the Education Department of Johnson State College ("College"). He was hired full-time in 1975.

2. During the Spring semester, 1980, in the midst of his fifth year of full-time teaching at the College, Grievant applied for a leave of absence for the 1980-81 and 1981-82 academic years for purposes of pursuing a doctorate in Early Childhood Education at the University of Massachusetts.

3. Gary Confessore, Dean of Academic Affairs at the College, told Grievant, at some point prior to Grievant requesting a leave of absence, that he needed a terminal degree in his field in order to be granted tenure. The explicit purpose of Grievant's request for leave was to prepare himself to be reviewed for tenure by the College.

4. The College granted Grievant $3,517 from the Faculty Development Fund to pursue his doctoral studies.

5. Confessore recommended to the College President, Edward Elmendorf, that Grievant be granted a leave of absence, noting:

Given the present tenure criteria, it is essential that Mr. Sweetland acquire a terminal degree before he completes another semester of active faculty status.

(Grievant's Exhibit 1)

6. President Elmendorf granted Grievant a leave of absence for the 1980-81 and 1981-82 academic year, and informed Grievant, "we look forward to your return to Johnson to share the results of this enrichment of your professional career" (Grievant's Exhibit 2).

7. On March 19, 1982, while Grievant was still on his leave of absence, William Cook, the College's Dean of Academic Affairs, wrote a letter to Grievant which provided, in pertinent part:

> Because of the low enrollments (in the College's Education Department program) and because of faculty needs in other concentrations, the College does not need nor can we now project a need to continue a full-time position in the Early Childhood Program--your program.
>
> It is for that reason that I informed you by phone, well in advance of this letter, that Johnson may not have need for your services following next academic year, 1982-83.
>
> Johnson will honor its commitment to you, made at the time you received your sabbatical, that you will have a full-time position during the 1982-83 academic year. At this moment, continuation beyond that year does not look good, and your layoff is probable. You should also know that we will review you for tenure and promotion at that time in keeping with the provisions of the VSC/VSCFF Agreement, Article XXXV and XXXVI. In keeping with that review, you are reminded of the need to update your file as provided for in Article XXXIX.
>
> (Grievant's Exhibit 3)

8. On April 1, 1982, Grievant, in response to Cook's letter, wrote Cook, stating in pertinent part:

> ...At this time I am still uncertain as to what you mean by probable layoff. Is this letter dated March 19, 1982, my official notice of layoff for the 1983-84 academic year?

> I would appreciate hearing from you on this matter at your earliest convenience, so that I may continue to map out my career plans...
>
> (Colleges' Exhibit 2)

9. Between April, 1982, and August, 1982, Grievant requested, and was granted, by the College President, a third year's leave of absence for the 1982-83 academic year.

10. On August 27, 1982, Dean Cook called Grievant and told him he would not be reappointed for the 1983-84 academic year. When Grievant protested, Cook told Grievant he would have an appointment for the 1983-84 academic year which would be Grievant's sixth year of full-time teaching service. Cook told Grievant there would be no appointment for the 1984-85 academic year (Colleges' Exhibit 1).

11. On September 20, 1982, Grievant received a letter from College President Eric Gilbertson, which provided in pertinent part:

> This is to inform you, pursuant to Article XX of the Agreement between the Vermont State Colleges and the Vermont State Colleges Faculty Federation, AFT, Local 3180, AFL-CIO, that your appointment as a member of the faculty of Johnson State College will not be renewed following the 1983-84 academic year. You will, however, be employed by the College for the 1983-84 academic year, following your leave of absence during the current (1982-83) academic year.
>
> The reason for your non-reappointment is the fact that the College does not have an academic degree program in the area of your specialization, nor do we regard it as feasible to begin such a program. Moreover, enrollments in Education have declined, and no significant increases are predicted.
>
> (Grievant's Exhibit 4)

12. On December 13, 1982, the Federation, on behalf of Grievant, filed a grievance over Grievant's non-reappointment. As a remedy, the grievance requested that the letter of non-reappointment be rescinded

and Grievant be assured that he would "be afforded the sixth year review for tenure to which all faculty members are entitled".

(Grievant's Exhibit 6)

13. In responding to the grievance on January 7, 1983, President Gilbertson took the position that the 1983-84 academic year would be Grievant's last year of employment and that Grievant would not be reviewed for tenure during his sixth year, the 1983-84 academic year. Gilbertson further stated:

> It may well be that Professor Sweetland wishes to be evaluated, if only to determine whether he would have received tenure had his appointment not been terminated for other reasons. The College would be agreeable to conducting such a review, but it must be clearly understood that the question of his tenure is a moot question. Moreover, he will not be provided with an additional year of employment following this review...
>
> Accordingly, the College will, upon Professor Sweetland's request, conduct an evaluation of his performance during the 1983-84 academic year. However, any such evaluation will be for advisory purposes only.

(Grievant's Exhibit 7)

14. As of the date of the hearing in this matter, September 22, 1983, Grievant had not requested the College to conduct an evaluation of his performance as offered by President Gilbertson.

15. There is no allegation in this grievance that Grievant was, in fact, laid off from his position. The Colleges, likewise, do not contend Grievant was laid off.

16. Outside of the non-reappointment of Grievant, there is evidence of only one other instance in which a faculty member at the College serving the sixth probationary year of full-time employment had previously been notified of non-reappointment for the seventh year of employment.

The person was Eugene Sapadin, and, as with Mr. Sweetland, the College took the position that it was not required to provide the sixth year tenure evaluation and review. The grievance which followed was ultimately settled. A result of the settlement was that notice of non-reappointment was withdrawn and tenure review was provided. The circumstances leading to that settlement are unknown.

17. It is normal procedure for the Colleges and the Federation to agree that the terms of any grievance settlement they reach shall not create a binding precedent for either the Colleges or the Federation. It is unclear whether such an agreement was made in the Sapadin case.

18. Article 20 of the Contract, entitled "Appointment, Reappointment and Review", provides in pertinent part:

> "Reappointment" shall mean full-time employment by the College of non-tenured faculty after the first year of full-time employment...
>
> REAPPOINTMENT
>
> Reappointment is presumed unless there is a written notification of non-reappointment no later than a) March 1 of the first year of service, b) December 15 of the second year of service, c) September 1 of all succeeding years, or unless the appointment is terminal...
>
> (Joint Exhibit 1)

19. Article 22 of the Contract, entitled "Tenure", provides in pertinent part:

> "Tenure" shall mean the right of a faculty member to continuing employment unless dismissed for cause...
>
> The Colleges may grant tenure in accordance with the following: during a faculty member's sixth year of full-time teaching service with the Colleges and after consideration of the evaluation of the faculty member in accordance with the provisions of Article 19, Faculty Evaluation, a College shall notify the faculty member that the next year (his/her seventh) is his/her last one-year appointment or that he/she is tenured...
>
> (Joint Exhibit 1)

20. On August 8, 1980, The Colleges promulgated an "Administrative Policy and Criteria for Initial Appointment, Promotion and Tenure of Full-Time Faculty". Section V of that policy provides in pertinent part:

> For the first six years of full-time employment in the Vermont State Colleges, all full-time faculty are appointed by the Board of Trustees for a term of one academic year or less...
>
> During the last year of the six-year probationary period, full-time faculty members must be considered for reappointment with tenure...
>
> (Joint Exhibit 2)

OPINION

At issue is whether the Colleges violated Article 22 of the Contract by notifying Grievant prior to his sixth year of full-time faculty service that he would not be reappointed for a seventh year and by not reviewing Grievant for tenure during his sixth year.

In order to decide this grievance, we must resolve a literal inconsistency between the provisions of Article 20 and Article 22 of the Contract. Article 22 provides that during a faculty member's sixth year of teaching service, the College shall notify the faculty member that the next year (his/her seventh) is his/her last one year appointment or that he/she is tenured. Article 20 provides reappointment, meaning full-time employment of non-tenured faculty after the first year of full-time employment, is presumed unless there is written notice of non-reappointment no later than March 1 of the first year of service, December 15 of the second year of service and September 1 of all succeeding years. A literal inconsistency results from these provisions because the College cannot, under Article 22, be required to offer every sixth year faculty member a

seventh year re-employment or tenure and also, under Article 20, have the right to break the presumption of reappointment of non-tenured faculty members by notifying them prior to September 1 of their sixth year of service that they are not going to be reappointed for a seventh year.

The Colleges' interpretation of this language is that when, under Article 20, a non-tenured faculty member has been notified in a timely manner that she/he will not be reappointed beyond his sixth year of full-time teaching, there is no obligation on the part of the College to either consider him/her for tenure or grant him/her a seventh, terminal year. The Colleges argue the tenure review is made moot by the fact that the notice of reappointment has already been given, and the seventh year reappointment is foreclosed by timely notice that there will be no reappointment beyond the sixth year.

The Federation contends the language of Article 22 is clear and unambiguous; during a faculty member's sixth year, he/she shall be notified that the seventh year is his/her last or that he/she is tenured. The provisions of Article 20, the Federation maintains, do not abridge a faculty member's right to tenure review and a seventh year because that language applies only in a general sense to reappointment while Article 22 applies specifically to the case of a sixth-year person.

The central issue here is whether the Colleges have the contractual right to make the sixth year of employment a terminal appointment. In interpreting these contract provisions, we are guided by the rule of construction that a contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole.

In re Grievance of Vermont State Employees Association on Behalf of Certain "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Adele Stacey, 138 Vt. 68, 72 (1980).

In viewing the provisions of Article 20 and Article 22 together, we conclude the President had the right to take the action he did here of notifying Grievant prior to his sixth year that his sixth year would be his last year of employment and denying Grievant tenure review.

Article 20 provides that in all cases of nonreappointment, written notice of reasons shall be given after the third full year of service. In Grievance of Shockley, 5 VLRB 192 (1982), 5 VLRB 280 (1982), we determined the nonreappointment of a faculty mmber for a fourth year would be upheld as long as the reasons given were rational. We see no reason why this same rule should not apply when a non-tenured faculty member is timely notified prior to his sixth year that his sixth year of employment will be his last. Here, President Gilbertson abided by the Contract in notifying Grievant prior to September 1 of his sixth year of employment that his sixth year appointment was a terminal appointment, and there is no contention that the reasons given by the President had no rational basis.

If we accepted the Federation's argument, it would mean that there would be no such thing as a sixth terminal year; that once a faculty member was reappointed for the sixth year he/she must be either granted tenure or a seventh probationary year. The result would be terminal years may occur in years one through five of probationary employment, or in year seven, but not in year six. In our view, the Federation's approach is not consistent with the apparent intent of the Contract to grant the College the right to not reappoint any non-tenured faculty member every

year of the probationary period so long as proper notice is provided and the reasons for non-reappointment do not violate the Contract.

The logical conclusion to be drawn from our interpretation of the Contract is that a sixth year faculty member, who has been previously notified in a timely manner that the sixth year of employment is the last, does not have to be reviewed for tenure. Tenure review would be a useless act since the faculty member already would have been notified that his/her employment was being terminated. Read as a whole, the Contract requires that a sixth-year faculty member will be reviewed for tenure and notified that he/she is tenured or that the next year of employment, the seventh, is the last if he/she has not been previously notified in a timely manner of non-reappointment for a seventh year.

The Federation maintains its interpretation of the Contract is supported by the following factors: 1) the provisions of the Colleges' "Administrative Policy and Criteria for Initial Appointment, Promotion and Tenure of Full-Time Faculty"; 2) the past practice of the College with respect to review of sixth year faculty, and 3) the explicit promise made in writing to Grievant by Dean Cook that he would be reviewed for tenure when he returned from leave.

We are skeptical about looking to the provisions of the Colleges' unilaterally-promulgated Appointment, Promotion and Tenure Policy to determine the intent of the Contract. The Supreme Court has determined that we may not look to unilaterally-promulgated employer policy where the contract addresses the involved subject matter. In re Grievance of Muzzy, 141 Vt. 463, 475-476 (1982). Here, the provisions of the Colleges' Policy the Federation requests we look to (See Finding #20) deal with

the same subject matter as Article 20 and 22. In any event, the provisions of the Colleges' policy are consistent with our interpretation of the contractual language.

With regard to the past practice of the College with respect to review of sixth year faculty, we are not convinced by the evidence there is a binding past practice of the College to interpret the Contract provisions here to review a faculty member in Grievant's position for tenure. The evidence indicates that in one instance the College, as a settlement of a grievance, reviewed a sixth year faculty member for tenure after that faculty member had previously been notified his sixth year of employment was a terminal appointment. However, the circumstances leading to that settlement are unknown and it is the normal procedure of the Colleges and the Federation to agree that the terms of any grievance settlement they reach shall not create a binding precedent. If contractual effect is to be granted to a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Grievance of Cronin, 6 VLRB 37, 68-69 (1983). Based on the record before us, we cannot conclude the parties, as a result of the settlement, reached a "mutual agreement or understanding" to interpret the Contract in the future to provide tenure review to faculty members in Grievant's situation. The Federation has the burden of demonstrating a binding past practice exists and the evidence does not convince us the grievance settlement was intended to apply to anything beyond that settlement.

The final contention raised by the Federation is that Dean Cook's March 19, 1982, letter to Grievant that he would get tenure review is a

binding promise having the force of an individual contract. We disagree that any binding promise was created by Dean Cook's letter. Our Supreme Court has held it will not recognize an individual contract inconsistent with the collectively-bargained agreement, stating: "The very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining powers and serve the welfare of the group". Morton and Essex Town School District, 140 Vt. 345 (1982). Dean Cook's "promise" was inconsistent with the contractual provisions regarding reappointment and tenure because under the Contract, as previously discussed, whether a faculty member is reappointed for a seventh year determines whether she/he is entitled to tenure review and the Dean did not know at the time he wrote the letter whether Grievant would be reappointed for a seventh year and that reappointment decision was not his to make. Reappointment decisions are made by the College President, and assuming Grievant had returned to campus for the 1982-83 academic year, the deadline for notice of non-reappointment would not have been until September 1, 1982.

We note that we would be inclined to award damages to Grievant if the evidence indicated he was adversely affected in pursing alternative employment opportunities as a result of being misled by the Dean's letter. However, the evidence indicates Grievant was subsequently notified of non-reappointment almost two years prior to the effective date of the non-reappointment and almost a year prior to the contractual deadline for non-reappointment notification. Accordingly, since Grievant had ample time to pursue alternative employment opportunities, we will not award damages.

ORDER

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

The Grievance of Daniel Sweetland and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO is DISMISSED.

Dated this 15th day of December, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William C. Kemsley, Sr.

James S. Gilson