

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE COLLEGES	)	DOCKET NO. 94-28
FACULTY FEDERATION,	)	
AFT LOCAL 3180, AFL-CIO	)	
(RE: YU CHUEN WEI)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 6, 1994, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation"), filed a grievance with the Vermont Labor Relations Board on behalf of Dr. Yu Chuen Wei ("Grievant"), an assistant professor at Castleton State College who was denied promotion and tenure in Spring, 1993.

The Federation alleges that the Colleges violated Article 3(D), 8, 20(C)(6), 21(K)(6), 22(E)(2) and (F), 23(H) and I(1) of the collective bargaining agreement between the Federation and the Vermont State Colleges ("Colleges"), effective for the period September 1, 1992 - August 31, 1994 ("Contract"), by: 1) discriminating against Grievant on the basis of her race, national origin and sex; 2) denying her tenure in a manner which was unreasonable, arbitrary and based on erroneous reasons; 3) failing to provide Grievant with a clear and well-defined written assessment as to how well she was progressing toward tenure by April 1 of her fourth year of service; 4) failing to consider Grievant's exceptional accomplishments in the performance area of professional and scholarship in denying her promotion; 5) failing to state the reasons for denial of promotion as distinguished from the reasons

for denial of tenure; and 6) failing to notify Grievant that academic year 1993-94 was her seventh and final year of service.

After extensive discovery, a hearing was held before Board members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on January 26, 27 and February 2 and 6, 1995. The Federation was represented by Attorneys Julie Frame and Jennifer Nelson. The Colleges were represented by Attorney Nicholas DiGiovanni, Jr.

### FINDINGS OF FACT

1. The collective bargaining agreement ("Contract") provides in pertinent part as follows:

#### ARTICLE 3

A. . . (T)he rights and responsibilities of the Vermont State Colleges . . . shall include . . .

1. . . to promote, grant tenure . . .

D. No such management right or responsibility set forth or referred to in this Article shall be enacted, applied, or implemented in a manner which is arbitrary or capricious or in contravention of the Agreement.

...

#### ARTICLE 8

The parties shall not discriminate against any faculty member or against any applicant for employment in positions in the faculty be (sic) reason of age, race, creed, marital status, color, sex, sexual orientation, religion, national origin, citizenship, union activity, political activity, or membership or non-membership in the Federation.

...

#### ARTICLE 20(B)

Performance Areas

1. The following performance areas shall be considered in the performance evaluation of a faculty member for reappointment, promotion, and tenure:

a. Teaching Effectiveness, which shall include the faculty member's:

1. Knowledge of the subject matter.
2. Effectiveness in communicating such knowledge by means or methods such as lecture, discussion, demonstration, laboratory exercise, practical experience, and direct consultation with students.
3. Ability to help students think critically and creatively.

b. Scholarly and Professional Activity, which shall include but not be limited to achievements and projects such as:

1. Published books or treatises and publication in professional journals.
2. Submission of material for publication or evidence of research in progress leading toward scholarly publication.
3. The exhibition of creative works, show and performance credits, etc. when they are appropriate to the field of study.
4. Development of improved instructional materials or methods.
5. Curriculum development, with special emphasis on program development.
6. Presentations to and positions in professional organizations.
7. Obtaining grants, contracts or similar financial support from government, foundations, or other external sources for scholarly purposes.
8. Applying for such grants, contracts or similar financial support referred to in (7) above.

9. Acquiring a degree other than the appropriate VSC required minimum degree at time of appointment.

c. Service to College and Community, which shall include but shall not be limited to activities such as:

1. Serving on departmental and college committees.
2. Serving as department chairperson or program coordinator.
3. Having responsibility in accreditation and reaccreditation activities.
4. Advising students and student organizations.
5. Working with civic and political groups, municipal or state governmental agencies, primary or secondary schools in the State, and community groups.
6. Holding public office.
7. Serving in the VSC Faculty Federation, as provided for in Article 5(E).
8. Obtaining grants, contracts or similar financial support from government, foundations or other external sources for academic support purposes.
9. Applying for such grants, contracts or similar financial supports referred to in (8) above.

...

#### ARTICLE 20(C)(6)

...

The only written material that the committee and the Dean may use . . . and that the President may use in judging the performance of a faculty member is the material placed in the faculty member's personnel file by the appropriate dates and those student evaluations not yet entered into the personnel file as provided for in (E), Student Evaluations, below.

...

#### ARTICLES 21 (K)(6)

Should the President decide to reappoint a faculty member to fifth and sixth years of service, by April 1 of the fourth year of service the President shall provide the faculty member with a written assessment as to how well the faculty member is progressing toward tenure. This assessment shall not be subject to the grievance and arbitration provision of this Agreement.

...

#### ARTICLES 22(E)(2)

The President shall decide whether or not a faculty member shall be promoted. In making this decision, the President shall consider only the performance of the faculty member and the limit on the percentage of faculty in the senior ranks.

In reviewing the performance of the faculty member, the President shall consider all evaluative materials as provided in Article 20(C)(6) and the faculty member's work in the performance areas listed in Article 20(B)(1). The President shall decide whether or not the faculty member's performance meets either one of the following standards:

...

(2) the faculty member's performance in one of the three performance areas has been exceptional since the time of initial appointment or the last promotion.

...

#### ARTICLE 22(F)

The President shall inform a faculty member in writing by May 1 whether or not he/she has been promoted. Should the President not promote a faculty member, the President shall give the faculty member written reasons for his/her decision. These reasons shall be given as a courtesy and are not subject to the grievance and arbitration provisions of this Agreement except as provided for in (G) below.

#### ARTICLE 22(G)

A decision of the President not to promote a faculty member shall not be subject to the grievance and arbitration provisions of this Agreement unless (1) the faculty member or the Federation claims the decision violates Article

7 (Academic Freedom), Article 8 (Anti-Discrimination), or the procedures for promotion set forth in this Agreement . . .

#### ARTICLE 23(H)

The President shall send the faculty member written notification by May 1 of whether or not he/she has been awarded tenure. Should the President decide not to award tenure to a faculty member, the President's written notification shall contain the reasons for this decision and shall inform the faculty member that his/her seventh year is his/her final year of service.

...

#### ARTICLE 23(I)(1)

The decision of the President not to award tenure to a faculty member shall not be subject to the grievance and arbitration provisions of this Agreement unless the faculty member or the Federation claims that the decision is unreasonable, arbitrary or based on erroneous reasons or material or that the decision violates Article 7 (Academic Freedom), Article 8 (Anti-Discrimination), or the procedures for granting tenure set forth in this Agreement . . .

#### ARTICLE 23(i)(2)

If in the arbitration of any grievance arising under J (1) above, the Vermont Labor Relations Board finds that the College violated the Agreement, it shall determine the appropriate remedy. It is further provided, however, that the VLRB shall not substitute its judgment for that of the academic community regarding the merits of a tenure case. In those cases where the VLRB determines that the decision of the President not to award tenure violates Article 7 (Academic Freedom), Article 8 (Anti-Discrimination) or that it is unreasonable or arbitrary or based on erroneous reasons or materials, the Board shall remand the case to a systemwide ad hoc committee composed of two members from each of the other three campus colleges, one of them being selected by the Faculty Federation and one by the administration of each of the respective Colleges. The seventh member, who shall preside, shall be chosen from outside the Vermont State Colleges by mutual consent of the College and the grievant . . .

(Joint Exhibit 1)

2. Grievant was born in Honan, People's Republic of China, April 4, 1935, and grew up speaking Chinese as her native language. Grievant graduated

from Jilin University in China with a Bachelor's Degree in Mathematics. Grievant taught at Jilin University from 1956 to 1975 (College's Exhibit 1, Federation Exhibit A, pgs. 166-169).

3. In 1975, Grievant emigrated to the United States. She worked as a Graduate Assistant at the University of Akron, in Ohio, from 1976-79 where she received a Masters Degree in Mathematics. From 1979 to 1983, she worked on her doctorate in Mathematics at Kent State University, serving as a Teaching Assistant and Teaching Fellow, and received her Ph.D in 1983. After receiving her doctorate, Grievant taught one year as a Lecturer at the University of Wisconsin; one year as a part-time instructor at Kent State University, and one year in part-time research at Kent State University (Colleges Exhibit 1, Federation Exhibit A, p. 166-169).

4. Grievant applied for a position in the Mathematics Department at Castleton State College in 1986, at which time Dr. Thomas Meier was President of the College. Grievant came to the Castleton campus in July 1987 for an interview. She was interviewed by Castleton Academic Dean Joseph Mark, and some members of the Mathematics Department - Dr. Christopher White, Dr. Raymond Pluta and Dr. Frank Morgan. Dean Mark did not recommend against hiring Grievant.

5. On July 17, 1987, Castleton President Lyle Gray offered Grievant an appointment as Assistant Professor of Mathematics, which she accepted. Grievant began teaching August 31, 1987. At all times relevant during her employment, Grievant was the only woman faculty member in the five member Math Department (Federation Exhibit A, p. 71).

6. When Grievant received her appointment to the College, she also received a copy of the collective bargaining agreement between the Colleges and the Federation, which generally remained the same in all pertinent parts from 1987 to 1993. She also received a full orientation to Castleton State College which included a review of relevant procedures for reappointment and tenure. Grievant attended some workshops to assist her in understanding the tenure and review process, which included detailed discussions of the process and the need for faculty members to keep their personnel file updated. Despite this, she had some misunderstanding about who was to take care of her personnel file. She incorrectly understood that the Dean's office would take more responsibility for documenting her file than what actually occurred. Pursuant to the Contract, it is the faculty member's responsibility to maintain his or her personnel file, keep it up to date, and include relevant materials for evaluations and reviews (Article 25(D) of Contract).

7. Grievant taught both upper and lower level Mathematics courses, including Calculus I, Pre-Calculus, Essentials of Mathematics, Finite Math, Elements of Math, College Algebra, Advanced Calculus, Differential Equations, Calculus IV. In the Mathematics Department, instructors are assigned to teach courses according to faculty choice, specialty of the instructor and Department needs. Grievant was agreeable to teaching whatever courses she was asked to teach.

8. During Grievant's first academic year at Castleton, she was evaluated and reviewed for reappointment to a second year. On February 1, 1988, Dean Mark wrote an evaluation of Grievant in which he recommended her for a second year. In the evaluation, Dean Mark stated that Grievant was "a knowledgeable, well-



organized and caring instructor who has many strengths as a math teacher" and that she brought "many positive traits to the classroom". He noted that he had observed her in class and had offered "specific suggestions for improvements . . . in her pedagogy and classroom management". Dean Mark stated that Grievant had some "significant problems". He noted that student evaluations for the first semester contained three areas of concern expressed by students, which Dean Mark stated as follows:

(T)here were numerous statements of concern about her language skills. Dr. Wei needs to take steps to increase her facility with the English language both in terms of her understanding student questions and responses and in terms of her ability to express and explain material clearly . . .

(S)everal students commented that they would find it more helpful if Dr. Wei used examples other than those that can be found in the book . . .

(W)hile most students find that Dr. Wei projects a very helpful attitude, several wish that she would be more willing to spend time in class in explaining different material.

(Colleges Exhibit 2)

9. In order to assist Grievant with her language skills, Dean Mark recommended to President Gray that the College spend \$1,547 to send Grievant to a four-week program in San Francisco to help her improve her English. Grievant attended this four-week program at College expense in the Summer of 1988 (Colleges Exhibits 38-40).

10. During Grievant's second year at Castleton, the 1988-89 academic year, she was reviewed for reappointment by the Reappointment, Promotion and Tenure ("RPT") Committee, the major peer evaluation committee at Castleton. The

RPT Committee consists entirely of faculty members appointed by the Faculty Assembly. The Committee recommended Grievant's reappointment to a third year. The Committee concluded that Grievant was "an enthusiastic, knowledgeable, helpful, well-prepared, fair instructor", but noted some difficulties:

The Committee urges Professor Wei to begin to broaden her contributions to Castleton by developing scholarly and professional activities and increasing her involvement in the College and community. In light of some students' apparent lack of experience with accented speech, the Committee urges her to continue working on her command of English (Colleges Exhibit 3).

11. Classroom observations are also a part of the evaluation of faculty teaching and are considered as part of the evaluation process. During Grievant's second year, she had been observed by Associate Academic Dean Barbara Foley in a pre-calculus class. While this was a generally positive observation, Dean Foley wrote:

Most of the time, I understand you, Yu Chuen. There were times, however, when you were difficult to understand. Some time should be spent with enunciation and pronunciation. Generally speaking, the vocabulary of math was not difficult to understand.

(Colleges Exhibit 4).

12. Each year in accordance with the collective bargaining agreement, Dean Mark or one of the associate deans met with Grievant and reviewed her student evaluations from the preceding year. On January 25, 1989, Associate Dean Foley reviewed Grievant's evaluations from her first year. Dean Foley summarized her meeting with Grievant in which they had discussed the student evaluations. After noting the strengths of Grievant mentioned by students of subject knowledge,

enthusiasm, class preparation, willingness to help, fairness, and sense of humor;

Dean Foley wrote:

On the other hand, the student evaluations contained comments regarding areas of concern of your students. These were in language skills and classroom management. The students made comments regarding their difficulty in understanding you at times. They also wrote that some students took advantage of you and did not have appropriate classroom behavior.

(Colleges Exhibit 5)

13. Dr. Morgan is one of the most senior, tenured members of the Mathematics Department at Castleton. Dr. Morgan has been a member of the Mathematics Department for about 30 years. Dr. Morgan observed Grievant's pre-calculus class on December 5, 1988. Dr. Morgan's evaluation of Grievant's teaching was a positive one. He indicated that he was "very impressed with Grievant's teaching". He stated the following with respect to Grievant's language skills: "Although her language skills are adequate for the mathematics classroom, she will need to improve in ordinary spoken and written English language usage. Her communication skills otherwise are excellent" (Federation Exhibit A, pages 403-404).

14. Dr. White is a senior, tenured member of the Mathematics Department. On February 27, 1989, Dr. White expressed support for Grievant's request that she receive early promotion to associate professor. Dr. White stated that Grievant's "teaching performance at C.S.C. has been very good" (Federation Exhibit A, p. 394).

15. In his second year evaluation of Grievant, Dean Mark stated: "Judging from student evaluations that rate her high in knowledge, preparation, enthusiasm,

helpfulness, and fairness, I would say that Professor Wei is increasing her strengths as a teacher". He noted, however, that Grievant's student evaluations were "extremely bifurcated" with a large group appreciative of her competence and helpfulness "and another large group composed of those who find her oral communication difficulties pose an insurmountable barrier to learning. Even many of those students who are most fond of her report they often have difficulty understanding what she is saying or, conversely, find Dr. Wei frequently does not understand their questions". Dean Mark recommended Grievant's reappointment but stressed that "she must continue to strengthen her oral communication and her aural comprehension abilities". He also reiterated the RPT committee's admonition that Grievant develop her scholarly and professional activities, and increase her college and community service (Colleges Exhibit 6).

16. Prior to the start of Grievant's third year, Dean Mark attempted to further help Grievant with her English difficulties by finding her a personal tutor. He contacted a well-respected area teacher, Ruth Best, and asked if she would be willing to work with Grievant to help her improve her understanding and speaking of English. Over the course of her third year at Castleton, the 1989-90 academic year, Grievant had the personal assistance of Best in helping her with the language, as well as the customs and culture, in which she was working. Best met with Grievant 27 times at the College, attended her classes, talked with her on other occasions, and had dinner with her several times. Best concluded that Grievant had "made progress" during the year. Best chose not to charge for her services but the College did reimburse her for travel expenses (Colleges Exhibit 42).

17. As she started her third year at the College, Grievant was once again observed in her pre-calculus class by Associate Dean Foley on October 24, 1989. In her November 3, 1989, written summary of that class, Dean Foley made the following comment concerning Grievant's interaction with students:

Although you are well planned, Yu Chuen, and seem very happy to be in the classroom, you have very little interaction with the students. You never call on one of them by name. You do not call on individual students very often at all. You spend much of the time looking at the board. Your eye contact with the students is very limited partly because you almost always face the window side of the room . . . I am concerned by how quiet the class is and how few students participate in the course.

(Colleges Exhibit 7, p. 3).

18. Dean Foley also summarized Grievant's second year student evaluations. Dean Foley informed Grievant:

Students consistently praised you for your enthusiasm, positive attitude, helpfulness, thoroughness, preparedness, fairness, willingness to learn, and supportiveness. They are impressed by your knowledge of mathematics and your ability to impart information. However, almost all of the students mentioned language as a problem, a barrier to all of the strengths that you have.

(Colleges Exhibit 7, p. 3).

19. Dean Mark did his own classroom observation of Grievant on November 27, 1989. In summarizing his visit on December 6, after noting strengths he observed in Grievant's teaching of confidence, being well prepared, using an appropriate mix of questions, and being in touch with students; Dean Mark wrote:

I found that your language ability has improved since my last observation. Specifically, you have made some noticeable strides in your articulation of English . . . I also observed, however, that you continue to need to work on your ability to express a given idea in a number of ways. One ingredient of effective teaching is the ability to convey the same idea a number of different ways, including through

the use of similes, metaphors and images to help the students grasp your concepts. This is the aspect of your language development which I noticed continues to need significant work. In your class, for example, if a student did not understand an explanation you had provided, you frequently repeated the exact same explanation over again.

...

On a different but related note, most of these same themes are borne out in the comments students make in your student evaluations. Students, with virtually no exception, find you extremely knowledgeable, well prepared, enthusiastic and quite helpful. An extremely large percentage of students, however, do report difficulty in understanding you.

(Colleges Exhibit 8, p. 1-2)

20. The RPT Committee wrote an evaluation of Grievant on December 29, 1989. In this third year review, the Committee cited the positive aspects of Grievant's performance previously discussed, but noted that "a majority of students, however, continue to cite her spoken English as a weakness". The Committee stated:

Typically, students would mention that sometimes they had difficulties understanding Professor Wei because of "language gaps" and her accent; such difficulties affect both lecture presentations and individual student-teacher exchanges . . . Unfortunately, her Spring 1989 evaluations were dominated by comments voicing a concern about the "language barrier".

While the Committee recommended reappointment to a fourth year, the Committee specifically listed four conditions which "must be met" to warrant further reappointment: "1) that Professor Wei demonstrate a significant improvement in her command of both written and spoken English; 2) that Professor Wei's student evaluations reflect a similar improvement in the area of her ability to communicate with students; 3) that Professor Wei extend her service to the College and

community; 4) that Professor Wei provide supporting materials such as sample papers and letters of acknowledgement in her personnel file" (Colleges Exhibit 9).

21. Dean Mark recommended that Grievant be reappointed to a fourth year. In his written recommendation of February 1, 1990, Dean Mark noted teaching strengths of Grievant previously discussed herein and that Grievant had made an effort to improve her language skills. However, he also stated:

Based both on class visits and my review of her evaluations as well as the review conducted by Dean Foley, I conclude that her language skills continue to be a barrier to successful communication . . . Two components of communication need to be addressed by Dr. Wei: her ability to speak so that students understand her and her ability to rephrase explanations and answers to questions (when students do not fully comprehend her first explanation).

...

In addition to improving her grammar, pronunciation and articulation in oral communication, it is also essential that she develop her vocabulary and command of the English language generally. She needs to be able to explain mathematical concepts and processes to students in a number of ways.

...

I feel obligated to state . . . that she must make substantial progress during this next year in her ability to communicate with students. I echo the four conditions of future reappointment set by the RPT Committee and place primary emphasis on their first two points.

(Colleges Exhibit 10)

22. In addition to her annual review for reappointment, Grievant also had applied for promotion during her third year. On March 6, 1990, the RPT Committee recommended against Grievant's early promotion to Associate Professor, citing her language deficiencies and a weak service record. On March 30, 1990, Dean Mark recommended against early promotion as well, citing Grievant's "difficulties in

articulation and in exposition" as well as her weak service record. President Gray denied the promotion based on Grievant not meeting the criteria of teaching effectiveness and college and community service (Colleges Exhibits 11, 12, 13, 13A).

23. In the Summer of 1990, Dean Mark recommended that Grievant attend another English language course, this one an eight-week summer course at the University of Akron. President Gray approved this, and Grievant attended the course. The Colleges spent \$1,557 to fund this effort (Colleges Exhibits 44-48).

24. On November 14, 1990, Associate Academic Dean Janet wrote to Grievant concerning Dean Reohr's review of Grievant's student evaluations for the 1989-90 academic year. Dean Reohr indicated that students had expressed many of the teaching strengths of Grievant previously discussed, but noted the "striking chord of concern about your 'language difficulties'". She added:

Another somewhat related concern identified again by a number of students in classes across both semesters, indicate that you don't always make your points clear, you sometimes don't answer the questions that students ask, and sometimes you confuse points. As one person put it in Ordinary and Differential Equations, "Dr. Wei doesn't always know how to get her thoughts across".

(Colleges Exhibit #14)

25. Dr. Morgan observed Grievant's Elements of Math course on November 12, 1990. Dr. Morgan indicated in his report on the observation that Grievant made a good presentation and interacted well with her students. He stated that "(o)ver all, I thought the lesson was well done". He observed that Grievant's language skills had improved "compared to previous observations" (Federation Exhibit A, p. 364).



26. During Grievant's fourth year of teaching at Castleton, the 1990-91 academic year, she was reviewed for reappointment to fifth and sixth years. The RPT Committee and Dean Mark recommended that Grievant be reappointed. President Gray approved Grievant's reappointment.

27. The RPT Committee concluded that Grievant had taken the recommendations of the previous year's RPT Committee "seriously by her attendance last summer at an English Language Institute", and that her student evaluations had improved (Federation Exhibit A, p. 355-56, Colleges Exhibit 17).

28. In his fourth year evaluation of Grievant on February 28, 1991, Dean Mark noted that Grievant's service record was minimal for a fourth year faculty member. Dean Mark further noted that "at least half of the students in both semesters of 1989-90 identified (language difficulties) as a problem, with some students indicating this difficulty lessens as the semester proceeds." In summary comments, Dean Mark noted Grievant's previous summer work on improving her English, but stated:

These sporadic efforts are not likely to benefit her as much as year-long, weekly language instructions and tutoring would. She must take the initiative to find other ways to supplement her learning in English, and, in the next semesters, show marked improvement. Castleton students often bring skill deficiencies with them, and it is incumbent on Professor Wei to provide the best teaching, including clarity of presentation, for these students in both core and upper level courses she teaches.

(Colleges Exhibit 18)

29. After receiving the Dean's letter, Grievant did not take any further courses, or work with any tutors, to improve her language skills.

30. Dean Mark, on behalf of President Gray, wrote the fourth year progress report on how well Grievant was progressing towards tenure. Dean Mark typically wrote a draft of the fourth year assessments for President Gray to review after he and President Gray had consulted. In the case of Grievant, President Gray was in Florida at the time of the assessment, but talked to Dean Mark about Grievant's case and instructed him to write the report. Dean Mark did an assessment on behalf of the President on April 1, 1991. Afterwards, he met with Grievant and, in response to her request, he agreed to change part of his treatment of teaching effectiveness. He revised the memorandum and sent it to her, dated May 13, 1991. Dean Mark informed Grievant that she "must make impressive gains in the next two years in . . . pronunciation and command of conversational grammar . . . (and in her) ability to explain course material in a variety of ways". He also informed Grievant that her "record of College and community service must improve dramatically if you are to meet the tenure standard in this area". (Colleges Exhibit 19).

31. Grievant's fifth year at Castleton was the 1991-92 academic year. Associate Dean John Larkin reviewed Grievant's fourth year student evaluations from the 1990-91 academic year, and wrote a memorandum to Grievant on such review on December 16, 1991. He noted that, although there were students who had very positive comments on Grievant's teaching effectiveness, "large numbers of students complain that they cannot understand your English and indicate that you do not understand their questions, so that many say that their only sources of instruction are the textbook and tutors who help with your classes" (Colleges Exhibit 20).

32. Grievant's sixth year at Castleton, the 1992-93 academic year, was her tenure review year. On December 2, 1992, Dean Mark visited one of her classes and, on December 18, 1992, he summarized his observation. Dean Mark indicated to Grievant that, "(o)n the whole, I thought you taught a fine class that day". However, he had these areas of criticism: 1) Grievant's mispronunciation of certain words; 2) her failure to ask more questions of the class; and 3) her ending class 10 minutes early (Colleges Exhibit 22).

33. In that memorandum, Dean Mark noted that he had discussed Grievant's 1991-92 student evaluations with her. While noting positive evaluations in her upper level MAT 308 course in Spring 1992, Dean Mark found frequent mention of the language problem in her other courses. He noted that a total of 32 of 36 students in four sections of Math 107 in Spring 1992 cited communication difficulties. This was a reasonable interpretation of the evaluations. The Dean also indicated that, in the Fall of 1991, some 52 of 64 evaluations in the Math 107 section mentioned communication problems. This was a reasonable interpretation of the evaluations (Colleges Exhibit 22, Federation Exhibit B, Tabs 20, 21, 23, 24, 25, 26, 29)).

34. Dr. Pluta, a tenured Mathematics Department faculty member, observed Grievant's Finite Math course on December 16, 1992. In his written report on the observation, Dr. Pluta stated that he thought "(t)he class went very well". Dr. Pluta noted that there was good student interest; that there were many question and answer exchanges between Grievant and her students; that Grievant developed the content of the class logically; that Grievant had carefully prepared for the class; and that Grievant had "good rapport" with her students. Dr. Pluta observed a "well-

functioning, active, and serious class in Mathematics." He commended Grievant for "doing a fine job" and stated that "her language skills had improved a great deal" (Federation Exhibit A, p. 331).

35. In accordance with the procedures laid out in the Contract, the College RPT Committee reviewed Grievant for promotion and tenure. On March 8, 1993, the Committee recommended against promotion and tenure. The Committee noted Grievant's high ratings for subject knowledge and enthusiasm. However, it also underlined her continuing problem with communicating with students, especially in the lower level courses, citing almost 60 percent of her Math 107 section evaluations for the Fall of 1992 as referring to this problem. The Committee also indicated that many students expressed the difficulty they have in "getting her to understand what they are asking. Those students who comment on this difficulty say that she does not understand the question and that she answers something else." While noting some positive aspects of her teaching, some student testimonials, and Grievant's efforts to learn the language, the Committee concluded "there seems not to have been the significant improvement that would be necessary in order to make insecure students at ease in her classes." In sum, the Committee concluded Grievant had failed to meet the performance criteria of the Contract to be awarded tenure. The Committee also recommended against promotion (Colleges Exhibit 23).

36. It is unusual for the RPT Committee to recommend against tenure. In the last fourteen years, the RPT Committee has recommended against tenure on only one occasion other than Grievant's case.

37. An April 1, 1993, Dean Mark recommended against promotion and tenure for Grievant. However, following an agreement between the College and the Federation, Grievant was allowed to add additional materials to her file despite the contractually provided for closing date of February 1, and Dean Mark was allowed additional time to submit a revised recommendation. Following review of the new materials, Dean Mark wrote a second evaluation on April 27, 1993, once again recommending against promotion and tenure (Colleges Exhibits 24, 25, 27, 28).

38. On the issue of teaching effectiveness, Dean Mark wrote:

Professor Wei has many of the positive traits called for in an effective teacher. She is knowledgeable, she cares about her students' learning, and she is willing to meet with students outside of class to help them understand the material. Consistently, however, concerns have been expressed about the extent to which Dr. Wei's lack of proficiency in English often severely impairs her effectiveness with many students. Indeed, from the initial expression of concern contained in my Dean's recommendation for reappointment in her first year (February 1, 1988), there have been a total of 19 documents entered into her file either by me, one of the other deans, or various RPT Committees which point to this deficiency. Many of these letters also strongly exhorted her to improve her language skills.

(Colleges Exhibit 28)

39. In his recommendation, Dean Mark indicated that he had reviewed Fall 1992 student evaluations of Grievant, and found that 44 of 59 student evaluations for the four Math 107 sections "in one way or another referred to communication problems". This was a reasonable interpretation of the evaluations (Federation Exhibit B, Tabs 12, 14, 16, 17). Dean Mark stated:

These included sweeping, strongly-worded negative statements like "not able to understand her. Major language barrier. Big problem! Does not understand what student is asking for. (Evaluation #33330). Another example of such a strongly negative position is evaluation #33380: "She is impossible to understand". But a number of the 44

statements were more balanced, for example, "sometimes she is very hard to understand" (Evaluation #33332) or "the instructor has a difficult time expressing herself. Math is a weakness for me, and though the instructor is a brilliant woman, there is a language barrier that makes it even more difficult (Evaluation #33356).

(Colleges Exhibit 28)

40. In sum, Dean Mark concluded that Grievant had met the required criteria for awarding tenure in only one of the three performance areas: teaching effectiveness; scholarly and professional activities; and college and community service. Dean Mark concluded that Grievant met the required standards only in scholarly and professional activities.

41. The college and community service of Grievant which she documented in her personnel file consisted of: a) service on the Admissions and Retention Committee (1988-90); b) service for a year on the Faculty Affairs Committee; c) service on the Cultural Affairs Committee (1989-92); d) delivering a dorm program one evening called "knowing China"; e) volunteering for two alumni phonathons; f) advising students; and g) attending her church activities. Grievant also taught "overload" courses during many semesters. While overload contracts were placed in Grievant's "service" folder by the secretary to Dean Mark, overload assignments are not generally considered "service" unless it is to help out a particularly understaffed department. The evidence does not indicate that the Mathematics Department was particularly understaffed (Colleges Exhibit 28, 30).

42. In concluding that Grievant met the required standards in scholarly and professional activities, Dean Mark recognized efforts by Grievant to attempt to solve a 30 year old conjecture of Dr. Paul Erdos, an internationally renowned

mathematician. Grievant believed that she had solved the conjecture, although it has not been established definitely that she did so solve the conjecture. Dean Mark was not persuaded by the evidence before him that it had been conclusively determined that Grievant had solved the conjecture. He found Grievant's work on the conjecture significant, but not exceptional, since there was no conclusive determination that the conjecture had been solved. Dean Mark also considered Grievant's published articles, all of which were prepared and published prior to her arrival at Castleton except for one. Dean Mark also considered the fact that Grievant had submitted two other articles for publication since coming to Castleton, which articles had not been accepted for publication as yet. He also considered presentations which she had done at professional conferences. Although Dean Mark concluded that Grievant met the required tenure standards with respect to scholarly and professional activities, he did not view Grievant's performance in this regard as exceptional (Colleges Exhibit 28, Federation Exhibit A, p. 374).

43. Castleton maintains student evaluations only for the period of the preceding three years. Dean Mark reviewed all of the student evaluations of Grievant for the three years leading up to her tenure review, approximately 600 evaluations. Dean Mark reviewed these evaluations for evidence of bias against Grievant because she was Chinese. The Dean concluded that five or six of the 600 evaluations demonstrated this bias.

44. Dean Mark met with a few faculty while he was considering Grievant's case, all at their request and most in support of Grievant. The Dean also

reviewed a lengthy letter written by Professor Beth Sumner in support of Grievant (Federation Exhibit J).

45. Prior to Dean Mark's tenure recommendation, Dr. Pluta, Dr. Morgan, and Dr. White wrote a brief letter of support for Grievant.

46. In reviewing Grievant for tenure, President Gray read through the student evaluations of Grievant several times. He concluded that a few of the student evaluations reflected bias against Grievant. President Gray also reviewed Grievant's file several times; met with the RPT Committee members to listen their reasoning; and talked to Dean Mark about his recommendation. He also was approached by several faculty members who wished to express their point of view about Grievant's candidacy for tenure. Most of them supported the granting of tenure.

47. One faculty member who discussed Grievant's case with the President was Professor Beth Sumner, Professor of History at Castleton. She supported Grievant and expressed that fact to the President in a meeting. During the meeting, Professor Sumner suggested that a special panel be put together to review Grievant's case. President Gray believed Professor Sumner wanted the President to be part of the panel. President Gray mentioned to Professor Sumner that he had grown up in a Danish enclave and was bilingual, and indicated Grievant probably would not want him on the panel since he had grown up bilingual and had learned to speak English as a second language.

48. President Gray met with Grievant on April 28 prior to the decision to hear her views on why she should be tenured. Grievant came to the meeting with her



Federation representative and Professor Sumner. She had an opportunity at the meeting to defend her candidacy for tenure.

49. Following the April 28 meeting, President Gray entered into an agreement with Grievant's Federation representative. This agreement allowed Grievant until May 3 to respond in writing to Dean Mark's revised recommendation, and allowed President Gray until May 10 to issue his tenure and promotion decision on Grievant. Grievant submitted her response on May 3, 1993, and the President issued his decision on May 7, 1993 (Colleges Exhibits 29-31).

50. Ultimately, President Gray decided that Grievant should not be tenured or promoted. He agreed with the RPT Committee and Dean Mark that Grievant had failed to meet required standards in teaching effectiveness, and college and community service (Colleges Exhibit 31).

51. Grievant did not file a grievance prior to her tenure review claiming she was a victim of racial or ethnic bias, and did not ever consult with the College's affirmative action officer. During her first year, after reviewing her first semester's student evaluations, Dr. Wei wrote a letter for inclusion in her personnel file in which she expressed her opinion that one of her students was racially biased against her. Grievant also wrote a letter to Dean Reohr on November 15, 1990, expressing her opinion that some student evaluations reflected racial bias against her. On January 29, 1992, in responding to an assessment of her student evaluations done by an associate dean, Grievant placed in her personnel file a memorandum expressing the opinion that some of the student evaluations of her "may well be part of a rising climate of hostility toward Asians in America and may influence students in their

attitudes toward my spoken English" (Federation Exhibit A, p. 340-41, 360-361, 408).

52. Students rarely submit letters commending a faculty member. Several students of Grievant submitted such letters with respect to Grievant. Students cited Grievant's concern for students, availability outside of class, and teaching effectiveness (Federation Exhibit A, pgs. 8, 20, 21, 22, 365, 366, 368).

53. Some students found that Grievant's accented English did not interfere with her effectiveness as a teacher, and found her to be more effective as a teacher than some other faculty members of the Mathematics Department. These students found Grievant to have organized lesson plans, and to be clear and concise in her instructions to students. They found her to have genuine concern for students, to be readily available outside of class, and to provide timely and thorough feedback on homework and exams done by students. Some students who had difficulty learning math did well under Grievant's teaching. Some students viewed Grievant as a good role model for women.

54. Some student's in Grievant's classes imitated her accent, mocked her, and ridiculed her if she mispronounced a word. On one occasion, a student commented in Grievant's absence, "why is this oriental bitch teaching us?" Another student called Grievant a "slant-eyed bitch" out of her hearing. Dean Mark and President Gray were not aware of such comments until the hearing in this matter.

55. On one student evaluation of Grievant, the student commented that other students blamed their problems on the fact that Grievant is Chinese (Federation Exhibit B, Tab 13, #23762). On another evaluation, the student stated that Grievant

"has no strengths at all, if she were teaching in Japan, she would be a good teacher" (Federation Exhibit B, Tab 14, #33380). On another evaluation, the student stated that "students cut constantly, imitate her accent, and talk in class" (Federation Exhibit B, Tab 15, #36740). A student on another evaluation stated that Grievant "would be better off as a Chinese cultural professor" (Federation Exhibit B, Tab 19, #44026). On another evaluation, the student stated that Grievant "should go back to where she came from" (Federation Exhibit B, Tab 24, #17898). A student in another evaluation stated that "if she has been in this country for five years she should be able to speak clear English" (Federation Exhibit B, Tab 24, #17902).

56. Dr. Hedayeh Samavati testified at the hearing on behalf of Grievant as an expert in the field of statistical assessment of student evaluations. Dr. Samavati is an Associate Professor of Economics and Statistics at Indiana University - Purdue University at Fort Wayne, Indiana. She has a Ph.D in Economics with a minor in Statistics and Econometrics, obtained from Iowa State University.

57. Dr. Samavati has researched and written an article on the effects of student attitudes as a source of contamination on student evaluations of instructors. Dr. Samavati concluded that decision-making by undergraduate students relative to the quality of instruction they receive is significantly affected by inappropriate attitudes, thereby creating suspicion about the objectivity of undergraduate student evaluators. In her research, Dr. Samavati found that the following attitudes, among others, influenced how students evaluated their professors:

- a) the race, sex or ethnic background of the professor;
- b) the grade that the student expected to receive;

- c) whether the students were required to take the course; and
- d) whether the student was enrolled in an undergraduate program or graduate program.

58. Dr. Samavati analyzed Grievant's student evaluations for the 1991-92, 1992-93 and 1993-94 school years.

59. Castleton's student evaluations contain five questions which directly pertain to the instructor. The questions are:

- a) What is the level of the instructor's interest and enthusiasm in teaching this course?
- b) What is the level of the instructor's day-to-day preparation for this course?
- c) To what extent does the instructor encourage students to ask questions, disagree and express ideas?
- d) How helpful is the instructor when students have difficulty?
- e) How fair and impartial is the instructor in dealing with students?

(Federation Exhibit B)

60. Although the questions dealing with instructor attributes were the same from 1991 through 1994, there were two different types of evaluation forms used during this time period. The "old form" was used prior to the Fall semester of 1992. The "new form" was used in the Fall semester of 1992, Spring semester of 1993, Fall semester of 1993, and Spring semester of 1994. The only difference between the old and new forms pertaining to instructor attributes is the rating system used to evaluate the instructor's performance (Federation Exhibit B).

61. In analyzing Grievant's evaluations, Dr. Samavati separated the evaluation forms into upper and lower level courses. She considered all core courses and all 100 level courses to be lower level courses. She considered all 200 to 400 level courses to be upper level courses. The College usually has 40-50 math majors (out of some 2000 students) each year. Castleton requires all students to take at least two math courses as part of their core requirements. In addition, some other majors, such as Business majors, will be required to take certain math courses as part of their requirements for a degree. Some 70-75 percent of all math student credit hours are in these core or service courses.

62. Dr. Samavati compared the mean or average responses to these evaluation questions for Grievant to the mean or average responses to the same questions for Dr. Byrne for the same period of time in which Grievant was reviewed. Dr. Byrne is the most recently tenured professor in the Mathematics Department, having been granted tenure in 1988 by President Gray. As Academic Dean, Dean Mark also reviewed Dr. Byrne in 1988, and he made a positive recommendation for tenure. In 1988, the provisions of the collective bargaining agreement governing tenure, promotion, and faculty evaluation were substantially identical to those same provisions in the Contract which was in effect when Grievant was reviewed by Dean Mark and President Gray (Federation Exhibits B, C; Joint Exhibits 1, 2).

63. Dr. Samavati statistically compared the mean responses of the evaluations for Grievant and Dr. Byrne by using a t-test. A t-test is the standard test for determining whether the difference in two means is significant. By performing a

t-test, Dr. Samavati determined whether the difference between the mean scores of the two professors was statistically significant or was attributable to random error.

64. The results of Dr. Samavati's analysis demonstrated the following:
- a) For upper level classes using the "old" evaluation form, Grievant's mean responses were significantly higher than Dr. Byrne's mean responses in four out of the five questions dealing with instructor attributes. In one category, there was no significant difference between Grievant's mean value of responses and Dr. Byrne's mean value of responses.
  - b) For lower level classes using the "old" evaluation form, in two categories there was no significant difference between Grievant's mean value of responses and Dr. Byrne's mean value of responses. In three categories, Dr. Byrne's mean value of responses was higher than that of Grievant.
  - c) In upper level classes using the "new" evaluation form, Grievant's mean value of responses was significantly higher than that of Dr. Byrne for three of the questions. In the other two categories, there was no significant difference between Grievant's mean value of responses and Dr. Byrne's mean value of responses.
  - d) For lower level courses using the "new" evaluation form, Dr. Byrne's mean value of responses was significantly higher than Grievant in two categories. In the other three categories, there was

no significant difference between Grievant's mean value of responses and Dr. Byrne's mean value of responses.

(Federation Exhibits B, C, K)

65. Dr. Samavati performed this same analysis for only the Fall 1991, Spring 1992 and Fall 1992 semesters as well by comparing Grievant's and Dr. Byrne's respective student evaluations. These are the three semesters prior to Grievant's tenure review in the Spring of 1993. Dr. Samavati's results were basically the same as the six semester analysis (Federation Exhibits B, C).

66. In his first four to five years of teaching at Castleton, Dr. Byrne received consistent feedback that his teaching needed significant improvement. In his sixth year, upon review for tenure, Dean Mark observed in his March 31, 1988, tenure recommendation:

Dr. Byrne has made significant improvement in his teaching effectiveness in the last two years; all of his recent class observations by either his departmental colleagues or by an academic dean have been, for the most part, quite favorable. Comments contained in his recent student evaluations also suggest improvement, although evaluations from even the most recent semester indicate he still needs to work on projecting enthusiasm and being less boring. My assessment is that Dr. Byrne has reached an adequate level of teaching effectiveness to warrant the award of tenure.

(Federation Exhibit E).

67. In the area of scholarly and professional activities, at the time of his tenure review, Dr. Byrne had published one refereed article, and published two notes in a computer user's magazine. He also had made two presentations, and written three grant proposals. Dean Mark considered Dr. Byrne's accomplishments in this area to

be, "while not prolific, . . . above the line" to be granted tenure (Federation Exhibit E).

68. In the area of college and community service, Dr. Byrne's service record at the point of his tenure review included: a) Chair of the Educational Technology and Computer Committee for three years; b) wrote the College's first five-year computer plan; c) wrote recertification report for the Computer Information Systems program; d) served as faculty advisor of the Math Computer Club and for students in the 3-2 Engineering program with Clarkson College; e) served as a member of the Castleton Planning Commission; f) was active in Cub Scout and Boy Scout affairs; g) worked as a judge in the Mathcourts program held at the College for junior high schools; h) served on the Castleton Planning Commission; i) participated in the conversion of the Math Department's computer system; and j) revised the current Computer Information Services curriculum with another faculty member.

69. The College has several faculty for whom English is a second language. These are:

- a) Pei-Chiang, Chinese - teaches Political Science
- b) Anna Maria Alfaro-Alexander, Peruvian - teaches

Spanish

- c) Maria Bove, Peruvian - teaches Education
- d) Rahola Bhatkal, Indian - teaches Education
- e) Sanjukta Ghosh - Indian
- f) Hector Fernandez - Columbian
- g) Tekamul Buber, Turkish - teaches Math



h) Abbas Rajia, Moroccan - teaches Math

Dr. Buber was hired to replace Grievant. All of the above faculty, with the exception of Dr. Pei-Chiang, were hired while Dr. Mark has been Dean. Only one of these faculty members, Dr. Pei-Chaing, is tenured.

## OPINION

At issue is whether the Colleges violated the Contract when it failed to grant promotion and tenure to Grievant. Grievant's claims fall into three main categories: 1) that the Colleges violated Article 8, the anti-discrimination article of the Contract, by discriminating against Grievant on the basis of her race, national origin and sex; and 2) that the Colleges violated Article 23, the tenure provision of the Contract requiring that tenure denials not be unreasonable, arbitrary or based on erroneous reasons; and 3) that the Colleges violated Articles 8 and 22(E) of the Contract by denying Grievant a promotion even though her performance in the area of scholarly and professional activities was exceptional. We discuss each of these categories in turn.

### I. DISCRIMINATION BASED ON RACE, NATIONAL ORIGIN AND SEX

Grievant's discrimination claim is based on the disparate treatment theory of discrimination. The United States Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burdens of proof in a "mixed motive" case and "pretext" case. Grievance of Butler, 17 VLRB 247, 311 (1994), citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Grievant first argues that this is a "mixed motive" case. Alternatively, she contends that she also should prevail under a "pretext" analysis. We analyze this case under both theories.

#### A. "Mixed Motive Analysis

In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives. Price Waterhouse, 490 U.S. at 247. Once an employee

shows that a prohibited factor, such as race, national origin or sex, played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made even if the prohibited factor had not played such a role. Id. at 244-45, 249. Grievance of McCort, slip. op at 11-13 (Vt. Supreme Court, Docket No. 93-237, Sept. 2, 1994). Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases. McCort, slip op. at 13-15.

Grievant bases her "mixed motive" claim on direct evidence. Grievant contends that statements by President Gray, as well as statements and written comments by students at Castleton, are direct evidence that discrimination motivated the denial of her promotion and tenure. Direct evidence is evidence which, if believed, proves the existence of the fact in issue without inference or presumption. Brown v. East Mississippi Electric Power Association, 989 F.2d 858, 861 (5th Cir. 1993). Grievant contends that the direct evidence in this case is sufficient to prove that sex, race, and national origin were motivating factors in the denial of tenure; and that this is sufficient under the provisions of the Contract to remand Grievant's tenure case to an ad hoc committee.

We first examine President Gray's statement. We have found that President Gray mentioned to Professor Sumner in a meeting, prior to his tenure decision on Grievant's case, that he had grown up in a Danish family that was bilingual. He indicated to Professor Sumner that Grievant probably would not want him on a special panel that Professor Sumner was suggesting be convened to review Grievant's

case, since he had grown up bilingual and had learned to speak English as a second language. Grievant contends that President Gray's statement constituted bias against persons with language difficulties, which is equivalent to a bias against persons with accents.

An employee who proves that he or she has been discriminated against because of an accent establishes a prima facie case of national origin discrimination. Fragante v. City and County of Honolulu, 888 F.2d 591, 595 ((9th Cir. 1989). An adverse employment decision may be predicated upon an individual's accent when - but only when - it interferes materially with an employee's ability to perform job duties. Id. at 596-97. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815, 819 (10th Cir. 1984). Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980 (6th Cir. 1980).

Upon examining President Gray's statement in light of this standard, we conclude that it does not provide direct evidence that Grievant's national origin played a substantial factor in the President's decision to deny tenure and promotion to Grievant. The statement simply is insufficient for us to conclude that it establishes the fact of discrimination against Grievant without inference or presumption. President Gray's statement establishes that his own experience made it less likely that he would have great empathy for Grievant's language difficulties, which were manifested most prominently in her accent.

This statement does not establish by itself, however, impermissible bias based on accent. In making such statement, President Gray may have been motivated by the evidence from student and Castleton Administration evaluations of Grievant that her

language difficulties adversely affected her job performance. We cannot conclude the statement demonstrated impermissible bias without inference. Also, we note that President Gray's statement does not provide direct evidence of discrimination against Grievant for any other prohibited reason.

Nonetheless, Grievant contends that racial and sexist slurs and mimicking by students are direct evidence that discriminatory factors motivated the denial of tenure and promotion. Grievant correctly points out that it is permissible for us to conclude that an evaluation at any level, if based on discrimination, may influence the decision-making process and infect the ultimate decision. Roebuck v. Drexel University, 852 F.2d 715, 727 (3rd Cir. 1988). Lam v. University of Hawaii, 40 F.3d 1551, 1560-61 (9th Cir. 1994). Grievance of Rogers and VSCFF, 11 VLRB 101, 128-32 (1988).

As our Findings of Fact indicate, the evidence does indicate that several student evaluations of Grievant were permeated by bias against Grievant based on her race and national origin. Also, the evidence indicates that some students in her classes imitated her accent, mocked her, and ridiculed her if she mispronounced a word; and that one student called Grievant an "oriental bitch" while another student referred to her as a "slant-eyed bitch". Obviously, these are racist and sexist comments.

However, this does not provide direct evidence that the tenure and promotion denial of Grievant was motivated by impermissible bias. Given that Grievant could establish that only approximately one percent of student evaluations reflected bias and that the College Administration was unaware of the worst racist and sexist

actions by students in the classroom, we could reach such a conclusion only by drawing an inference that such racist and sexist comments by students influenced the RPT Committee, Dean Mark and President Gray to be improperly motivated by such impermissible bias. Kumar v. Bd. of Trustees, University of Massachusetts, 774 F.2d 1, 20-21 (1985). The need for us to draw such an inference defeats Grievant's claim that student actions provide direct evidence of discrimination on behalf of the Colleges.

Our conclusion that Grievant has not produced direct evidence supporting her claim of discrimination with respect to President Gray's statement and student actions does not mean that our consideration of the evidence in this regard is concluded. The evidence is relevant to Grievant's claim under a "pretext" analysis. We now turn to that issue.

#### B. "Pretext" Analysis

Grievant alternatively contends that the legitimate reasons offered by the Colleges for denying tenure and promotion to her are just a pretext for the real reason of discrimination based on national origin, race and sex.

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination. Grievance of Butler, 17 VLRB at 312. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id. In pretext cases, the analysis used is that which is set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Id.

The employee carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Burdine. If the employee succeeds in proving the prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action taken against the employee. Id. Should the employer carry this burden, the employee must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we first determine whether Grievant has established a prima facie case of discrimination based on national origin, race and sex. The burden of establishing a prima facie case of disparate treatment is not onerous. Burdine, 450 U.S. at 253. Grievance of Lowell, 15 VLRB 291, 330 (1992). The employee must prove, by a preponderance of the evidence, that he or she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination. Id. The Burdine court stated:

As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact

believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 254.

In a tenure review case, a prima facie case of discrimination is shown by demonstrating that the employee belongs to a protected class; that the employee was qualified for the position; and that the employee was not granted tenure in circumstances permitting an inference of discrimination. Zahorik v. Cornell University, 729 F.2d 85, 92 (2d Cir. 1984).

Grievant has met the protected class prong of this test since she is a Chinese woman. In the second prong of the test, a prima facie case that a faculty member is qualified for tenure is made out by a showing that some significant portion of department faculty, evaluators of the faculty member's performance and other scholars in the field hold a favorable view on the question. Id. at 93-94. A candidate for tenure does not make out the elements needed for a prima facie case, however, merely by showing qualifications for continuation as an untenured faculty member; this is because advancement to tenure entails what is close to a life-long commitment by a college. Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980). It must be noted, though, that the evidence necessary to be introduced by the tenure candidate in the prima facie case does not have to rise to the level mandating a determination that he or she is qualified for tenure. The qualifications of a tenure candidate must be at least sufficient to place him or her in a group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable



exercise of discretion. Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981).

In keeping in mind that Grievant does not have an onerous burden to prove her prima facie case, although it is a close question, we conclude that Grievant has met her burden with respect to qualifications for tenure. In regard to teaching effectiveness, it is pertinent that three members of her Math Department, two of whom had observed her classroom teaching on more than one occasion, supported her tenure and promotion candidacy. Also, the evaluations of Grievant's teaching effectiveness were sufficiently mixed over the years for us to provide her with the benefit of the doubt in concluding that she has demonstrated a prima facie case in this area.

With regard to scholarly and professional activities, it is undisputed that Grievant met tenure standards. Her publications, and possible resolution of the Erdos conjecture, make it evident that she was a mathematics scholar well-respected in her field. Her accomplishments in the third performance area, college and community service, were much less impressive but sufficient for us to conclude that it would be a reasonable exercise of discretion to grant her tenure despite her failings in this area.

In analyzing the third prong of the test to meet a prima facie case, whether Grievant was denied tenure and promotion in circumstances permitting an inference of discrimination, we consider President Gray's statement and student actions. President Gray's statement constitutes circumstantial evidence, when considered with all other evidence, creating an inference of discrimination on President Gray's part. Although not providing direct evidence of discrimination as discussed above, his

statement demonstrates a degree of insensitivity to a person of another national origin struggling to become proficient in English as a second language.

As discussed above, the racist and sexist student actions represented only a small minority of students and are insufficient to provide direct evidence of discrimination. Nonetheless, they do contribute to an inference of discrimination as evidence of a climate at Castleton which was not always accepting of women and persons of non-Caucasian races and foreign national origins. Thus, we conclude that Grievant has established a prima facie case of national origin, race and sex discrimination.

Grievant having established a prima facie case, the burden shifts to the Colleges to articulate a legitimate non-discriminatory reason for the denial of tenure and promotion. Burdine, 450 U.S. at 253-54. Butler, 17 VLRB at 328. The Colleges need not persuade the Board that the proffered reasons constituted the true motivation for the action. It is sufficient if the Colleges' evidence raises a genuine issue of fact as to whether the Colleges discriminated against the employee. Burdine, 450 U.S. at 254.

To accomplish this, the Colleges must clearly set forth, through the introduction of admissible evidence, the reasons for its actions. Id. at 255. The explanation provided must be legally sufficient to justify a judgment for the Colleges. Id. The Colleges must produce admissible evidence which would allow us rationally to conclude that the Colleges' action had not been motivated by discriminatory animus. Id. at 257. The determination whether the Colleges has met the burden of production involves no credibility assessment. St Mary's Honor Center

v. Hicks, 113 S.Ct. 2742, 2748 (1993). If the Colleges fail to meet its burden of production, then Grievant prevails on her claim of discrimination as a matter of law. Id. Grievance of Day, 16 VLRB 312, 344 (1993).

The Colleges have met this burden. The Colleges articulate as a reason supporting tenure denial that Grievant met the required criteria to be awarded tenure in only one of the three performance areas of: teaching effectiveness; scholarly and professional activities; and college and community service. The Colleges contend that Grievant met the required standards only in scholarly and professional activities.

The evidence presented by the Colleges of Grievant's deficiencies in the areas of teaching effectiveness, and college and community service, is sufficient to allow us rationally to conclude that the action denying tenure and promotion to Grievant did not result from discrimination. As detailed in the Findings of Fact, evaluations and recommendations of the RPT Committee, associate Deans and Dean Mark set forth deficiencies of Grievant on numerous occasions throughout her tenure at Castleton.

The Colleges having sustained its burden of production, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 126. In determining whether the Colleges's explanation was pretextual, we consider the evidence, and inferences properly drawn therefrom, previously introduced by Grievant to establish a prima facie case. Burdine, 450 U.S. at 255, n. 10. Butler, 17 VLRB at 330. Disbelief of the reasons put forward by the employer may, together with the elements of the prima facie case,

suffice to show intentional discrimination. Hicks, 113 S.Ct. at 2749. Day, 16 VLRB at 345.

Grievant attempts to show pretext on the part of the Colleges, with respect to the teaching effectiveness rating of Grievant, based on the Colleges' reliance on Grievant's student evaluations. Grievant contends that the negative evaluations are a pretext in that they were insufficient to motivate a denial of tenure because: 1) a statistical comparison of Grievant's student evaluations with those of Dr. Byrne, the last faculty member tenured in Grievant's department, indicates that Grievant's students rated her the same or higher than Dr. Byrne's students rated him; 2) the racism evident in the student evaluations of Grievant made student evaluations results unreliable; and 3) other and better ways exist to measure teaching effectiveness, such as classroom observations of peers.

We disagree with Grievant that the statistical comparison of Grievant's student evaluations with those of Dr. Byrne contributes to a conclusion that the Colleges' articulated reasons for denial of tenure and promotion constituted a pretext for discrimination. We note that the comparison offered by Grievant is somewhat weak since Dr. Byrne was tenured in 1988, and those student evaluations of his which were compared with Grievant post-dated his tenure review by a number of years. Also, the comparison of student evaluations, in part, post-dated Grievant's tenure review.

In any event, even assuming the statistical comparison was valid, the comparison does not support the conclusion that Grievant was treated in a discriminatory manner compared to her male colleague. The statistical comparison

demonstrates that Grievant was evaluated higher by students than Dr. Byrne with respect to upper level classes, but that Dr. Byrne was evaluated higher than Grievant in lower level classes. Given this "mixed" result, the statistical comparison of evaluations does not demonstrate by a preponderance of the evidence that Grievant's students rated her the same, or better, than Dr. Byrne. Student evaluations generally are one reliable tool to be used in assessing a faculty member's teaching effectiveness, and the statistical comparison here simply did not obviate the Colleges' reliance on the evaluations.

Further, the statistical comparison is insufficient by itself to demonstrate how students evaluated the respective faculty members. The statistical comparison does not take account of the comments made by students on the evaluation forms. Grievant's student evaluations are striking in how often mention is made of Grievant's communication difficulties, particularly language difficulties. No similar problem, or as serious a problem, appears on Dr. Byrne's student evaluations with the frequency in which Grievant's communication difficulties are mentioned.

We also are not persuaded that the racism evident in the student evaluations of Grievant made student evaluation results unreliable. The percentage of evaluations in which racism by students was evident was approximately one percent of the total evaluations. In many other evaluations, in which students refer to communications problems in Grievant's teaching, references to difficulty in understanding Grievant may reasonably be interpreted as expressing a concern about her ability to communicate with students rather than discriminatory animus based on ethnicity or accent. Bina v. Providence College, 39 F.3d 21, 26 (1st Cir. 1994). The fact that a

handful of students exhibited racism in their evaluations is insufficient to call into question the validity of the student evaluations considered as a whole.

This is particularly so given that Dean Mark and President Gray recognized the bias evident in the evaluations in question. We are persuaded by the evidence that neither Dean Mark nor President Gray were influenced by these biased evaluations to make their decision based on discriminatory factors. Kumar, 774 F.2d at 20-21.

Further, although we agree with Grievant that there are ways to measure teaching effectiveness other than student evaluations, consideration of this factor does not support Grievant's pretext claim in this case. It is evident that Dean Mark and President Gray considered several factors other than student evaluations in reaching their decision. They reviewed Grievant's entire personnel file. This included RPT Committee recommendations over the years, classroom observations of Grievant by peers, associate deans, and Dean Mark throughout her period of employment; recommendations by Dean Mark over the years; letters of support from faculty and students; and Grievant's self-evaluations.

A review of Grievant's personnel file, when considered in its entirety, presents a picture of a faculty member who had language difficulties throughout her employment which caused her to have difficulties in being an effective teacher with a significant number of students, particularly in her lower level classes. Although evaluations of Grievant by her Math Department colleagues and some student evaluations did not find Grievant's language difficulties presenting a problem, on balance the record indicates that Grievant's language difficulties did present a significant problem for many students.

Upon review of Grievant's entire record, the RPT Committee, Dean Mark and President Gray all reached the conclusion that Grievant's teaching effectiveness was below standards required to be awarded tenure. Grievant has not persuaded us that the legitimate reasons offered by the Colleges to support such a unanimous conclusion were a pretext for discrimination.

The evidence does not indicate discriminatory animus on the part of the RPT Committee or Dean Mark. President Gray's statement to Professor Sumner does create an inference of discrimination on his part, but we do not conclude that this meant his ultimate decision on Grievant's teaching effectiveness resulted from discrimination. The evidence before the President, including negative recommendations from both the RPT Committee and Dean Mark, was strong against granting tenure and promotion to Grievant. Grievant has not persuaded us that the President ultimately based his decision on discrimination rather than the strong record.

We note in this regard that, during Grievant's tenure of employment, Dean Mark and President Gray attempted on several occasions to assist Grievant in dealing with her difficulties with the English language. They approved sending Grievant, at College expense, to two extensive English language programs during summer recesses. Also, they arranged to have Grievant work with a personal tutor during one entire academic year to improve her language skills. These actions by the Dean and President to improve Grievant's English language skills constitute significant evidence contributing to the defeat of Grievant's claim that the College administration ultimately discriminated against her.

Grievant also contends that the Colleges' assertion that Grievant failed to meet the standard of significant contribution to the college and community was a pretext for the real reason of discrimination. Grievant contends that her service record is not insufficient enough to actually motivate a denial of tenure.

We disagree. Grievant was warned on several occasions during her employment that she needed to substantially improve her minimal record in this regard. Her record in this regard did not substantially improve by the time of tenure and promotion review, and the RPT Committee, Dean Mark and President Gray were warranted in concluding that her record did not meet required standards. The evidence simply does not demonstrate that discrimination against Grievant, rather than her minimal service record, actually motivated the Colleges' rating in this area. We note that the only tenured faculty member whose record is before us for review, Dr. Byrne, had a much stronger college and community service record than Grievant.

In sum, we conclude that Grievant has not established that the decision by the Colleges to deny her tenure and promotion was based on discrimination based on race, national origin or sex.

## II. DENIAL OF TENURE BECAUSE IT WAS UNREASONABLE, ARBITRARY, AND BASED ON ERRONEOUS REASONS

Grievant contends that the tenure decision by the Colleges violated Article 23(I)(1) of the Contract because it was unreasonable, arbitrary, and based on erroneous reasons.

The "erroneous" standard applies to those cases where the stated reasons are plainly contrary to established fact or based on incorrect information. Grievance of



Fairchild, 4 VLRB 164 (1981). Affirmed, 141 Vt. 362 (1982). An "arbitrary" decision is one "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance". Fairchild, 142 Vt. at 453-454. The Board will find that the Colleges applied the tenure criteria in an arbitrary manner if it is determined that the faculty member had insufficient notice in which to comply with the tenure criteria or that the decision to deny tenure constitutes a capricious or unprincipled determination that departs from the established criteria. Grievance of D'Aleo, 4 VLRB 192, 203 (1981). Affirmed, 141 Vt. 534 (1982).

In reviewing a tenure decision based on these standards, we need to be careful not to improperly interfere with the Colleges' authority in this regard. In interpreting an earlier collective bargaining agreement between the Colleges and the Federation, which provided that the Board's scope of review was limited to determining that the "reasons (for denial of tenure) are erroneous or that they constitute an arbitrary or discriminatory application of the (tenure) criteria", the Vermont Supreme Court stated in Fairchild, 141 Vt. at 365:

It is irrelevant whether we would or would not choose to grant tenure to grievant. That decision has not been left to this Court or the Board, but is instead vested in the College. The (collective bargaining) agreement itself expressly mandates that the Board is to dismiss any grievance involving the denial of tenure unless the reasons offered in support thereof represent an "arbitrary or discriminatory" application of tenure criteria.

Subsequent to this decision, the Colleges and the Federation have expanded the Board's scope of review to also consider whether the tenure decision was "unreasonable". Although our scope of review is broadened, we still keep in mind the admonition of the Court that it is irrelevant whether the Board would choose to grant

tenure to a faculty member; that decision has not been left to this Board but is instead vested in the Colleges. We note that should we conclude that a tenure decision is unreasonable, arbitrary, or based on erroneous reasons, Article 23(I)(2) of the Contract provides that the Board "shall not substitute its judgment for that of the academic community regarding the merits of a tenure case", but "shall remand the case to a systemwide ad hoc committee".

Grievant makes several claims to establish that the Colleges' tenure denial was unreasonable, arbitrary, and based on erroneous reasons. We consider each of these claims in turn.

Grievant first contends that the Colleges acted unreasonably and arbitrarily by denying Grievant tenure on grounds of teaching effectiveness without performing a systematic statistical comparison of her student evaluations. We disagree. The tenure criteria "are not drawn with mathematical nicety". Fairchild, 4 VLRB at 176.

Dean Mark and President Gray both reviewed Grievant's student evaluations carefully. Their failure to take it a step further, and perform a statistical comparison of Grievant's student evaluations with those of other faculty members who have been granted tenure, was not arbitrary and was reasonable. Such a comparison is nowhere required by the Contract, and we decline to hold such an involved comparison is necessary before a reasonable tenure determination can be made. The Dean and the President obviously had much experience in reviewing student evaluations, and could reasonably draw on that experience in each tenure review.

Grievant next contends that it was arbitrary and unreasonable to deny Grievant tenure when Dr. Byrne had been granted tenure. The evidence indicates

that, while both Grievant and Dr. Byrne had problems with teaching effectiveness, it was not arbitrary for the Colleges to conclude that Dr. Byrne had less problems in this regard than Grievant. This was due to the extent to which Grievant's lack of proficiency in the English language severely impaired her effectiveness with a substantial number of students. It was reasonable for the Colleges to conclude that Dr. Byrne did not demonstrate a similar problem, or one as serious, to the degree of Grievant. We also note that Dr. Byrne had substantially greater accomplishments in college and community service than did Grievant, and that this entered into the respective tenure reviews.

Grievant further contends that Dean Mark and President Gray acted in an arbitrary and unreasonable manner because they gave different weight to the various performance areas of teaching effectiveness, college and community service, and professional and scholarly activities. Again, the tenure criteria are not drawn with mathematical nicety, and some degree of subjective judgment enters into tenure decisions by necessity. We are not going to second-guess tenure decisions as long as they are within reasonable bounds, and we are persuaded by the evidence that the tenure review conducted by both Dean Mark and President Mark stayed reasonably within the contours of the Contract. Their review did not depart from the established tenure criteria.

Grievant similarly contends that President Gray acted unreasonably by placing more weight on teaching effectiveness, and less weight on scholarly and professional development, than did his predecessor. We would be more concerned about this if the evidence indicated that Grievant had insufficient notice with which

to comply with President Gray's application of the tenure criteria. In Grievance of Burrill, 1 VLRB 386 (1978), the Board concluded that the faculty member was caught in a major policy shift with respect to tenure requirements when he had only 15 months to adjust to the new requirements, and that the Colleges acted arbitrarily in denying Grievant tenure under such circumstances.

In this case, however, President Gray was the College President during Grievant's entire period, leaving Grievant nearly six years to adjust to whatever weight President Gray placed on various performance areas. Also, the record is replete with warnings to Grievant about her teaching effectiveness. Under such circumstances, we cannot find any unreasonable action by President Gray or any arbitrary departure from the tenure criteria.

Finally, Grievant makes two separate allegations that the Colleges failed to follow its procedures for denying tenure. First, Grievant contends that President Gray's failure to allow the RPT Committee to review the newly submitted documents to Grievant's file after it was reopened was a procedural violation. Grievant contends that it was arbitrary and discriminatory not to allow the Committee to review the documents when President Gray and Dean Mark were allowed to review them.

Again, we disagree. Grievant's file was reopened as an accommodation to her, and at her request, to allow her to submit new materials in support of her tenure candidacy, and she never requested at the time that the RPT Committee review such documents. Given such circumstances, and absent any direction by the Contract on how to proceed in such cases, we do not find arbitrary or discriminatory action by the Colleges. This is particularly so where Grievant has presented no evidence that her

situation was handled differently than any comparable situation involving another faculty member.

Grievant's second claim of procedural violation is that conversations which President Gray and Dean Mark had with other faculty members about Grievant's tenure and promotion review violated the spirit of the Contract and amounted to a violation of a dismissal procedure. A review of the Contract warrants no such conclusion. Article 20(C)(6) places a restriction on written material to be reviewed by the Dean and President, limiting review to material placed in the faculty member's personnel file by a certain date and student evaluations. There is no such restriction placed on conversations by the Dean and President.

Given the specificity with which the Contract addresses the issue of written materials, it is doubtful this distinction in treatment simply was an oversight by the parties when the Contract was negotiated. We do not find arbitrary and unreasonable action by the Colleges, again particularly when there is no evidence that the Dean and President proceeded differently in this regard in Grievant's case than in other tenure reviews. Also, we note that these discussions were initiated by the faculty members, not the Dean or President, and most of the faculty members were supportive of Grievant.

In sum, we conclude that Grievant has not established that the tenure decision in her case was unreasonable, arbitrary or based on erroneous reasons.

### III. FAILURE TO GRANT PROMOTION BASED ON EXCEPTIONAL PERFORMANCE

Grievant's final claim is that the Colleges violated the Contract by denying Grievant a promotion even though her performance in the area of scholarly and professional activities was exceptional. Article 22(E) provides, in pertinent part, for the granting of promotion if the President decides that "performance in one of three areas has been exceptional". Our scope of review in such instances is limited by Article 22(G) to a claimed violation of the academic freedom article, the anti-discrimination article, or the "procedures for promotion".

Grievant has claimed no violation of the academic freedom article or the procedures for promotion. This leaves the question whether the Colleges discriminated against her based on national origin, race or sex by not rating her "exceptional" in professional and scholarly activities.

We conclude Grievant has established no such discrimination. Although Grievant had a significant publication record, most of it was developed before coming to Castleton. Also, although Grievant claimed to have solved the Erdos conjecture, Dean Mark reasonably concluded that she had not established that she actually had solved the conjecture. Under these circumstances, and given our consideration of the discrimination issue previously discussed, we conclude that Grievant has not established discrimination. The Colleges reasonably, and based on legitimate reasons, concluded that Grievant had met the tenure standards in this performance area but that her performance was not exceptional.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Dr. Yu Chuen Wei and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO is DISMISSED.

Dated this 22nd day of May, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

---

Charles H. McHugh, Chairman

---

Leslie G. Seaver

---

Carroll P. Comstock