

VERMONT LABOR RELATIONS BOARD

DAVID NZOMO et al

Remand from Supreme Court
Decision, #250-76

v.

VERMONT STATE COLLEGES

DOCKET NO. 75-22

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

This matter came before the Vermont Labor Relations Board on remand from the Vermont Supreme Court decision, David Nzomo et al v. Vermont State Colleges, No. 250-76, 136 Vt. 97, 385 A.2d 1099 (1978), in which the Court reversed an earlier decision of the Vermont State Employees Labor Relations Board (No. 75-22) dismissing a grievance filed by Dr. Nzomo against the Vermont State Colleges.

The grievance arose out of Dr. Nzomo's non-renewal by Castleton State College in August of 1974. In its decision, the Court ruled that Dr. Nzomo had an actionable grievance under 3 V.S.A. §902 (4) based on the college's failure to comply with its own procedures for the non-renewal of faculty. The Court made no attempt to fashion a remedy for Dr. Nzomo but remanded to the Board "for further proceedings consistent with its opinion".

The Vermont Labor Relations Board heard the matter on remand on September 7, 1978. The purpose of the hearing was to determine

an appropriate remedy for Dr. Nzomo based on the Supreme Court's ruling. Dr. Nzomo was represented by H. Thomas Andersen, Esquire, and the Vermont State Colleges were represented by Nicholas DiGiovanni, Jr., Esquire. At the close of the hearing the Board requested that written briefs be submitted by October 7, 1978.

FINDINGS OF FACT

The facts found as set forth below are based on figures and statements cited to the Board in counsels' briefs and on representations made at the hearing by Dr. Nzomo's counsel. In the absence of any demand for substantiation by the employer or any evidence which might controvert their accuracy, we accept these facts and figures as correct.

1. Dr. Nzomo's annual salary at Castleton State College for the year 1974-75, the last year in which he taught there, was approximately \$14,564. (There is a \$105 discrepancy between this amount which the plaintiff in his brief claims to have earned and the amount the college claims in their brief to have paid the plaintiff. In the absence of any evidence presented to us by either party at the hearing on which we could make a determination which figure is the more accurate and taking the evidence in the light most favorable to the plaintiff, we have used the plaintiff's figures for the purposes of our findings.)

2. After leaving Castleton State College, Dr. Nzomo secured another position for the academic year 1975-76 with Stockton State College in Pamona, New Jersey. This was a non-renewal one year appointment. His annual salary there (including all benefits) was \$14,756.

3. After his one year appointment with Stockton State College ended, Dr. Nzomo moved to Nairobi, Kenya because "the after effects of his dismissal at Castleton made it impossible for him to feel secure in any American college". While in Kenya, he obtained a position lecturing at the University of Nairobi. His annual salary there for the years 1976-77 and 1977-78 was 2988 Kenyan pounds.

4. The exchange rate for Kenyan pounds to U.S. dollars as of the date of Dr. Nzomo's brief is \$2.50 per Kenyan pound. Multiplying Dr. Nzomo's salary of 2988 pounds time the exchange rate of \$2.50, the dollars equivalent of Dr. Nzomo's yearly salary is approximately \$7,470.

5. In 1976 the per capita income for Kenya was \$184 compared to \$6926 in the United States.

6. In moving from Castleton State College to Stockton State College and to the University of Nairobi, Dr. Nzomo incurred the following out-of-pocket expenses:

a) Travel from Castleton to Pamona	\$ 105.00
b) Moving expenses from Castleton to Pamona	400.00
c) Air fare from Pamona to Nairobi	1,750.00
d) Out-of-pocket expenses in trip to Nairobi	200.00
e) Moving expenses from Pamona to Nairobi	3,445.00
f) Cost of books which had to be left behind in the United States	300.00
g) Cost of furnishings which had to be left behind in the United States	500.00
h) Forfeited deposit on Rutland, Vermont apartment	150.00
i) Forfeited deposit on Pamona apartment	<u>210.00</u>
Total expenses:	\$7,070.00

OPINION

The issue before the Board in this matter is the appropriate remedy for an actionable grievance arising out of the discriminatory application by the college of a rule or regulation. In this case the college discriminated against Dr. Nzomo by its failure to follow all of the procedures which govern non-renewals of non-tenured faculty members. At the hearing and in his brief, counsel for Dr. Nzomo argues that the appropriate remedy is the reinstatement and back pay less mitigation, with interest, and attorney's fees. The colleges on the other hand argue that since the grievance arose out of a procedural defect which was a harmless error, Dr. Nzomo should not be reinstated and should receive only nominal damages.

We will consider first the question of reinstatement. In our view, reinstatement is not an appropriate remedy in this case. There is no dispute in this case that the employer had an absolute right to terminate Dr. Nzomo's employment with the college by deciding not to renew his appointment. It was not the decision itself which was legally in error, but the procedures by which the decision was made. In determining whether or not that decision should be overturned by reinstating Dr. Nzomo, it is necessary first to determine the effects, if any, of the procedural violations on the renewal decisions.

The Vermont Supreme Court found that the college failed to follow these procedures in the non-renewal of Dr. Nzomo:

1. Prior to making his final decision, the president of the college failed to obtain a recommendation on his decision from the Faculty Committee on Tenure and Promotion;

2. Dr. Nzomo's department chairman and division head did not discuss their non-renewal recommendations with him prior to sending them to the president of the college.

We do not believe that either of these procedural violations affected the final outcome. The ultimate decision on the non-renewal of a non-tenured faculty member rests with the college president. He was not required to give any reason for his decision or to follow any of the recommendations which the procedures required. While he did not receive a recommendation from the Faculty Committee, the same committee had already given Dr. Nzomo its highest recommendation two months earlier. In spite of their positive evaluation, the president decided not to renew Dr. Nzomo. While it may be assumed that the committee might very well have recommended against the non-renewal of Dr. Nzomo, it can also be assumed that the effect of that recommendation on the president would have been no different than the effect of the earlier one. Similarly, it is difficult to see how the failure of the department head and the division chairman to discuss the recommendations with Dr. Nzomo could have affected the president's final decision, and there is ample evidence on the record of extensive consultation with Dr. Nzomo prior to his non-renewal notice.

There is, furthermore, every indication from the record that reinstatement would be a fruitless gesture. Dr. Nzomo would again be a non-tenured faculty member, and there would be nothing to prevent the college from terminating him again at the end of a year. Based on the prior lack of harmony which existed between Dr. Nzomo and the college administration and the events surrounding his non-renewal, this would probably occur.

Federal courts have refused to overturn administrative decisions when failure to follow administrative procedures did not affect the substance of the decision. In Ferguson v. Thompson 430 F.2d 852 (5th Cir. 1970), the fact that a college instructor in a hearing on his termination before the college board of directors, was not permitted to present two witnesses, did not require that his case be referred back to that board for reconsideration. The court noted that the two witnesses would have enhanced the college's termination decision, and thus there was no substantial prejudice to the instructor by not having them testify.

While the errors which occurred in this case are not quite as harmless as the ones made in the Ferguson case, the same principle applies; whether the errors had occurred or not, the final decision would have been the same. This case is distinguishable from Burrill v. Vermont State Colleges, No. 78-89S in which we found that a procedural violation by the college in evaluating the grievant for tenure required that the decision not to grant tenure be reviewed. In that case we would have been forced to speculate as to the result of the tenure decision had no error been made. In this case, no speculation is necessary; we know from the facts surrounding the case that the procedural violations did not affect the non-renewal decision.

Our decision not to reinstate Dr. Nzomo does not diminish in anyway the validity of his grievance against the college. As stated by the Court:

"Defined dismissal procedures, although generous beyond the due process requirements that bind the agency, are binding and must be scrupulously observed." Nzomo v. VSC (supra, 385 A 2d at 1101.)

In Dr. Nzomo's case the college's failure to follow its non-renewal procedures resulted in a grievance based on discrimination and in our view Dr. Nzomo is entitled to damages.

The peculiar circumstances of this case give rise to certain difficulties in determining a back pay award. It is accepted by both sides in this case that if damages are in the form of back pay award, the amount of that award should be determined by deducting from his prior salary the earnings which an employee has earned, or could have earned, between the time of his termination and the decision. The year after Dr. Nzomo left Castleton College, he taught for one year at Pamona and earned a salary which was substantially equivalent to his salary at Castleton. (cf \$14,459 at Castleton v. \$14,756 at Pamona). Thus, for the first year after his termination any damage which resulted from Dr. Nzomo's non-renewal at Castleton was mitigated by what he earned at Pamona.

Unfortunately, Dr. Nzomo's appointment in New Jersey was only for one year and at the end of that year Dr. Nzomo decided to return to Kenya. This extraordinary move is explained in Dr. Nzomo's brief as being the result of the fact that:

"The after effects of his dismissal at Castleton made it impossible for Dr. Nzomo to feel secure in any American college."

Dr. Nzomo has taught in Kenya for the last two years. The problem faced by the Board in attempting to determine a back pay award for this period is that the vast differences in the cost of living and life style between Kenya and the United States makes it impossible for us to make any reasonable judgment as to the monetary difference between Dr. Nzomo's present salary at Kenya and his salary at Castleton. We cannot speculate as to the relative value of countless intangible values which might exist. We, therefore, feel that it would not be fair to even attempt to estimate the difference in value between the two salaries. Since Dr. Nzomo's position is similar to the one he held in the United States, we must assume that his salary, although lower when converted to U.S. dollars by the exchange rate, is approximately equivalent to what he would have earned here when all the intangible factors are taken into account.

We are inclined, however, to compensate Dr. Nzomo for his out-of-pocket expenses which resulted from his non-reappointment at Castleton as they have been listed by the counsel for Dr. Nzomo in his brief. We do so principally to reinforce the Vermont Supreme Court's finding of a deprivation of an important right owed by the college to grievant. We exclude, however, Dr. Nzomo's moving expenses from Pamona to Nairobi which amounted to \$3,445. That figure is unsubstantiated. The amount of furnishings and property a person may own

is a very personal matter. We also believe an award for this sum might by precedent, discourage employment of aliens who may have much to contribute to Vermont education. In view of this and in view of the extraordinary distance between Vermont and Kenya, we do not feel that it would be fair to burden the college with this expense.

We do, however, believe the college should reimburse Dr. Nzomo for all of his other out-of-pocket expenses which are as follows:

Travel from Castleton to Pamona	\$ 105.00
Moving expenses from Castleton to Pamona	400.00
Air fare from Pamona to Nairobi	1,760.00
Out-of-pocket expenses in trip to Nairobi	200.00
Cost of books which had to be left behind in the United States	300.00
Cost of furnishings which had to be left behind in the United States	500.00
Forfeited deposit on Rutland, Vermont apt.	150.00
Forfeited deposit on Pamona apartment	210.00
Total expenses:	\$3,625.00

ORDER

In light of the reasons given above it is hereby ORDERED the Vermont State Colleges pay David Nzomo damages in the amount of Three thousand, six hundred and twenty-five dollars (\$3,625.00).

Dated this 4th day of January, 1979 at Montpelier, Vermont.

Vermont Labor Relations Board

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Jr.
William G. Kemsley, Jr.

Robert H. Brown
Robert H. Brown

*Sup. Ct.
Affirmed
2/5/80*