

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF PROFESSOR KENNETH	)	
BURRILL and THE VERMONT STATE	)	
COLLEGES FACULTY FEDERATION,	)	
AFT LOCAL 3180, AFL-CIO	)	
	)	
vs.	)	DOCKET NO. 78-893
	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case.

This matter involves a motion to enforce a collective bargaining agreement pursuant to 3 V.S.A. §982(g). The grievant, Kenneth Burrill, filed a grievance regarding denial of tenure. On November 16, 1978, this Board found that the grievant had been arbitrarily denied tenure at Johnson State College. The Board ordered that the matter be referred to an ad hoc committee as specified in Article XXIV of the collective bargaining agreement between the Vermont State Colleges and the Vermont State Colleges Faculty Federation. The committee met and made the "final determination, that Professor Kenneth Burrill shall be granted tenure." The determination of the ad hoc committee was presented to the Trustees of the Vermont State Colleges which after reviewing it, decided that the grievant should not be granted tenure. In this matter the issue is whether

the determination of the ad hoc committee is merely a recommendation to the Trustees or is binding upon the Vermont State Colleges.

The parties have filed memoranda of law, stipulated to facts and agreed that the issue in this case is one of law rather than fact. The grievant and the Vermont State Colleges Faculty Federation are represented by Philip H. Hoff, Esq. and the Vermont State Colleges are represented by Nicholas DiGiovanni, Esq.

Findings of Fact.

1. The Vermont State Colleges Faculty Federation (Federation) is the duly certified collective bargaining representative of the faculty bargaining unit of the Vermont State Colleges (VSC).

2. At all times material hereto Professor Kenneth Burrill (the grievant) was a faculty member at Johnson State College, which is a part of the Vermont State Colleges.

3. The grievant is a member of the collective bargaining unit and subject to the collective bargaining agreement between the VSC and the Federation.

4. The collective bargaining agreement between the Federation and the VSC has been filed with this Board and is incorporated herein for the purposes of findings of fact.

5. Article XXIV of the collective bargaining agreement states in part:

"In any arbitration of a grievance under this article based in whole or in part on the reasons of denial, if the Labor Relations Board determines that the reasons are erroneous or that they constitute an arbitrary or discriminatory application of the criteria developed under Article XXII(3) it shall remand the case for final determination to a systemwide ad hoc committee composed of two members from each of the other three campus colleges, one of them being selected by the Faculty Assembly and one by the administration of each of the respective colleges. A seventh member who shall preside shall be chosen from within the Vermont State Colleges by mutual consent of the college and the grievant."

6. The grievant filed a grievance with this Board alleging a violation of the collective bargaining agreement with regard to denial of tenure.

7. In its order of November 16, 1978, this Board found

"In view of the arbitrary basis upon which Johnson State College applied the VSC criteria on tenure as well as the due process violation which occurred during the course of grievant's tenure evaluation, we conclude that this case must be remanded to the ad hoc committee for final determination." See Board order dated November 16, 1978, Docket No. 78-89S.

8. The ad hoc committee was established pursuant to the collective bargaining agreement.

9. The actions of the committee and its determination are set forth in detail in its report dated June 11, 1979, directed to the Vermont State Colleges Board of Trustees which report is incorporated herein by reference.

10. By letter dated June 19, 1979, Richard E. Bjork, Chancellor, Vermont State Colleges, advised the Federation that his office did not concur with the interpretation or conclusion of the committee and counsel for the VSC had previously advised the committee that it did not have authority to grant tenure. He stated that

"The June 11 memorandum of the committee has been referred to counsel for review and response."

11. The grievant was notified on July 17, 1979, that the Trustees had denied him tenure "after reviewing the ad hoc committee decision and all relevant material" because he "did not meet the VSC criteria on tenure due to his lack of terminal degree or 'significant ... accomplishment' in lieu thereof."

12. The prior findings of fact stated in the November 16, 1978, opinion in this matter, the stipulations of counsel, the written correspondence and other documents set forth herein are incorporated and submitted as evidence for purposes of review.

Conclusions of Law and Opinion.

The major issue in this case is whether the determination of the ad hoc committee established under Article XXIV of the collective bargaining agreement between the VSC and the Federation is binding upon the VSC or merely a recommendation. The VSC urge that the Board of Trustees of

the Vermont State Colleges has the statutory right to grant tenure and that it may not delegate its statutory right through the collective bargaining process. The Federation urges that tenure was the subject of collective bargaining and that final determination of tenure could legally be delegated to a committee pursuant to the collective bargaining agreement.

Before discussing the legality of delegating tenure decisions through negotiations, the collective agreement should be reviewed. Article XXIV addresses tenure and refers to Article XX. Article XX provides for settlement of grievances through arbitration in accord with the State law governing Vermont State Colleges faculty. The applicable State law provides

"The Board shall hear and make final determination of the grievances of all employees who are eligible to appeal grievances to the Board."  
(emphasis added.) 3 V.S.A. §926.

This Board clearly has the power to make final decisions with regard to grievances.

The parties have negotiated a bifurcated grievance procedure with regard to tenure.

"If the Labor Relations Board determines that the reasons are erroneous or that they constitute an arbitrary or discriminatory application of the criteria developed under Article XXII(3), it shall remand the case for final determination to a system wide ad hoc committee...." Article XXIV

The Labor Relations Board is responsible for determining the procedural aspects of a tenure grievance. The parties expressly contemplated that the academic community would review the merits of the case. Article XXIV. The parties further agreed to establish a system wide committee "composed of two members from each of the other three campus colleges, one of them being selected by the faculty assembly and one by the administration of each of the respective colleges." Article XXIV. The seventh member "shall be chosen from within the Vermont State Colleges by mutual consent of the colleges and the grievant." Article XXIV. This committee is to make a final determination within thirty days of its hearing. The language in the statute (3 V.S.A. §926) provides that the Board shall make "final determination" of grievances. The contract provides for "final determination." The same words are used and this Board cannot see how they should be construed other than to mean the final binding arbitration.

The parties have provided for binding arbitration in Article XX which is referred to in Article XXIV and it is incomprehensible that the words "final determination" can mean anything other than final and binding on the Vermont State Colleges.

The Vermont Labor Relations Act encourages the resolution of labor disputes through negotiation and grievance

procedures. The legislature has evidenced a desire in favor of collective bargaining and included provisions for determination of grievances. Thus, public policy would encourage the interpretation that a final determination means that it is binding and not advisory on the employer.

As indicated above, the real question is whether the article is null and void under Vermont law because the delegation was ultra vires. The Vermont State Colleges have a duty to demonstrate the existence of a specific statutory provision which limits its authority to enter into the tenure provisions of the collective bargaining agreement. Danville School Directors vs. Flora Fifield, 132 Vt. 271 (1974). Counsel for the VSC has directed our attention to 16 V.S.A. §2174 and §2175 as specific statutory provisions which limit the authority of the VSC to enter into the agreement. We disagree. The sections of the statutes cited are enabling legislation enacted in 1961 eight years before the Vermont Labor Relations Act permitting collective bargaining for employees of the Vermont State Colleges was enacted. The statutory sections cited state very clearly that the by-laws shall contain regulations concerning tenure in terms of employment; however, the statute does not state that the Trustees shall have the final determination regarding tenure. In fact, the VSC agreed in their brief that

the issue of tenure is bargainable. The brief cites a number of cases from outside of the State of Vermont based upon different laws which hold that the determination of tenure should be reserved to the trustees.

Even though this Board is bound by the Danville decision it has reviewed cases of other jurisdictions which are divided as to delegation of powers. (Ridgefield Park Education Association vs. Ridgefield Park, N.J. Superior 393A 2d 278; Central Michigan University Faculty Association vs. Central Michigan, 75 Mich. App. 101, 254 NW2d 802 (1977); Rhineland City Employees AFSCME vs. Rhineland, 35 Wis. 2d 209, 151 NW2d 301; Board of Education vs. Associated Teachers of Huntington, Inc., 30 NY. 2d 122, 282 NE2d 109 (1972)). The cases cited are not controlling and the Board believes that the purposes of collective bargaining is furthered by permitting delegation power when not clearly contrary to law.

The parties entered into a contract which provided for certain procedural and substantive rights regarding tenure. Tenure is an important matter and a permitted subject of bargaining under 3 V.S.A. §904. In this case as is in the Danville decision the employer did not object to the arbitration procedure. The only objection was to the "final determination" by a body other than the Trustees. This issue is addressed in Danville. The Vermont Supreme Court

in the Danville case recognized the advantages of arbitration as the way of settling claims. The legislature has also recognized the advantages of settling labor relations claims through grievance procedure and arbitration. 3 V.S.A. §926.

This Board will not lightly nullify a contract which the parties have entered into after lengthy negotiations. One of the parties may have given up a demand in order to obtain another contract provision. The VSC should not be able to escape the provisions of the contract unless the provision is clearly illegal, which it is not. The Vermont Supreme Court has recognized the negotiation process by refusing to alter separation agreements entered into during divorce proceedings. In this case as in a divorce, after the parties have contracted, if modification is freely granted, "a party may have forfeited rights or positions of advantage, for consideration that suddenly becomes insecure or inadequate." Brain vs. Brain, 127 Vt 211 (1968), at page 213.

The cases from other states relied on by the Vermont State Colleges are of interest but of little relevance because the statutory provisions involved in those cases differ considerably from Vermont applicable statutes. In the Cohoes City School District vs. Cohoes Teachers Association, 40 NY 2d 774, 358 NE2d 878 (1976) the applicable law

authorized solely the school board to appoint persons recommended by the superintendent. In the School Committee of Danvers vs. Lyman, 360 NE2d 877 (Mass. 1977), the applicable statute authorized solely the school committee to determine whether a nontenured teacher would be re-employed. As this Court said very clearly in the Danville case, the employer has the duty to "demonstrate the existence of a specific statutory provision which limits its authority ...." Id p. 276.


The language of the collective bargaining agreement is clear and not in conflict with the law of Vermont. The special ad hoc committee determined unanimously that Professor Kenneth Burrill should be granted tenure. The committee's decision was made on June 11, 1979.

Order.

NOW, THEREFORE, it is hereby ordered that the Vermont State Colleges comply with the provisions of the collective bargaining agreement by granting Professor Kenneth Burrill tenure as of June 11, 1979, and that he be made whole for any economic loss which he may have suffered since that date, including but not limited to loss of income, sick leave and retirement benefits.

Dated at Montpelier, Vermont, this 13<sup>th</sup> day of September, 1979.

VERMONT LABOR RELATIONS BOARD

  
\_\_\_\_\_  
Kimberly B. Cheney

  
\_\_\_\_\_  
Robert H. Brown

  
\_\_\_\_\_  
William G. Kemsley

Filed 9/13/79