

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
GUSTAV VERDERBER and the	)	DOCKET NO. 00-22
VERMONT STATE COLLEGES	)	
FACULTY FEDERATION, AFT	)	
LOCAL 3180, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 11, 2000, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation") filed a grievance on behalf of the Federation and Gustav Verderber, a part-time faculty member at Johnson State College. The Federation alleged that the Vermont State Colleges ("Colleges") violated Articles III, VII and XVIII of the collective bargaining agreement between the Federation and the Colleges, covering the part-time faculty of the Colleges ("Agreement") by denying Verderber a teaching assignment in Johnson State College's external degree program. Specifically, the Federation alleges that Verderber was entitled to the assignment pursuant to Article XVIII of the Agreement, the Colleges discriminated against Verderber on the basis of union activity and the Colleges acted in an arbitrary and capricious manner by denying him the teaching assignment. The Federation further alleges that the Colleges violated the Agreement by failing to recognize the bargaining unit status of faculty who have taught in the external degree program with respect to eligibility for Federation membership, accrual of seniority for course assignments and other matters addressed in the Agreement.

A hearing was held on September 21, 2000, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri in the Board hearing room in Montpelier. Federation Grievance Chairperson Russell Mills

represented the Federation and Verderber. Attorney Nicholas DiGiovanni, Jr., represented the Colleges. The Colleges and the Federation filed post-hearing briefs on October 12 and 13, 2000, respectively.

#### FINDINGS OF FACT

1. Article III of the Agreement, entitled "Management Rights", provides in pertinent part as follows:

...

- 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.

2. Article VII of the Agreement, entitled "Antidiscrimination", provides in pertinent part as follows:

The parties shall not discriminate against any faculty member or against any applicant for employment in positions in the faculty by reason of . . . union activity . . . or membership . . . in the Federation.

3. Article XVIII of the Agreement, entitled "Semester Appointments and Assignments", provides in pertinent part as follows:

...

- E. The College reserves the right to give preference to full-time faculty for teaching courses on an overload basis or to individual administrators prior to offering courses to part-time faculty.
- F. Except as provided in Section E and Section H, and except that no individual may be assigned more than eleven (11) credits per semester. Two (2) available teaching assignments with a minimum of six (6) credits per semester shall be first offered to bargaining unit members on the basis of seniority as defined in (G) below and on the basis of:
1. The academic qualifications of the part-time faculty including teaching ability.

2. The availability and stated preferences of the part-time faculty as indicated on the teaching availability form.
  3. Experience in teaching available courses.
  4. The curricular needs of the department.
- G. The term "seniority" as used in this Article shall be based upon the number of credits taught by part-time faculty at a particular campus-based college within the VSC . . .
- H. In addition to the normal non-unit assignment of courses that may occur consistent with this article, the Colleges may offer assignments to *individuals without following the procedures above. Such assignments shall be limited to individuals with exceptional qualifications or expertise or in extraordinary circumstances.*

4. Gustav Verderber is a part-time faculty member at Johnson State College ("JSC"), and is a member of the part-time faculty bargaining unit represented by the Federation. He has taught biology and environmental science courses at JSC since 1990. He also is an environmental interpreter and has led numerous ecotourist environmental tours. He developed a web site which features his tours and his nature photography (Federation Exhibits 2, 3).

5. JSC has been offering courses in the external degree program ("EDP") for approximately 22 years. The EDP is a state-wide program which enables people with at least 60 college credits to earn a BA degree from JSC by taking traditional and nontraditional courses.

6. David Cavanaugh currently is the director of the EDP and has held that position for approximately four years. Cavanaugh reports directly to JSC Academic Dean Vince Crockenberg. Organizationally, the program is carried out with eight mentors located throughout the State who directly report to Cavanaugh. EDP mentors are advisors

and act as troubleshooters for their students. They help students design programs which will fulfill their educational needs. Mentors are assigned to the following eight areas: Brattleboro, Springfield-White River Junction, St. Johnsbury-Newport, Johnson, Barre-Montpelier, Rutland - Bennington, Burlington - Middlebury and St. Albans.

7. EDP courses are tailored for a student body that is typically older than traditional college age students; 98% of EDP students are over 22, compared to just 24% of campus-based students who are over 22. EDP courses may be offered during weekends or on Sundays or evenings, or by interactive television or independent study. Cavanaugh relies on the eight mentors to find suitable instructors for EDP courses. Mentors use their community contacts and knowledge of available instructors in the area to find instructors within their geographic areas.

8. Cavanaugh also relies on the eight EDP mentors for making recommendations for course offerings each semester, as EDP courses generally are developed in response to the needs of the EDP students enrolled in the program at the time. Any Johnson State College student is eligible to enroll in an EDP course. However, few EDP courses are offered on the JSC campus. EDP instructors do not have offices on the JSC campus and rarely go the JSC campus.

9. EDP instructors who have never worked for JSC, or as an EDP instructor, must be approved by the chair of the appropriate department. Cavanaugh sends the individual's resume to the chair for approval. Cavanaugh makes all hiring recommendations for EDP instructors. Crockenberg approves all hiring decisions, but has never reversed Cavanaugh's recommendations. EDP instructors interact with their

mentors and Cavanaugh. They do not interact with the academic dean or department chairs.

10. Occasionally a part-time faculty member, who also may be in the part-time faculty bargaining unit, will teach an EDP course. This is an infrequent occurrence. Over the past five years, only seven of the nearly 100 EDP instructors have been part-time faculty bargaining unit members (Colleges Exhibit 3).

11. *The Colleges have never considered the EDP instructors to be covered by the Agreement.* Cavanaugh has never been instructed to offer EDP courses to bargaining unit members pursuant to the Agreement. Prior to this grievance, the Federation has never taken the position that EDP instructors are covered by the Agreement.

12. During the 1997 - 1998 academic year, the mentor in St. Albans recommended offering an Environmental Interpretation course in St. Albans. The mentor recommended a local school teacher, E. Anthony Burton, as an instructor. Burton is a social studies teacher and environmental educator.

13. Burton was approved to teach the Environmental Interpretation course recommended by the St. Albans EDP mentor. He spent a considerable amount of time developing a curriculum for the course. The course was offered to students as a 1998 Summer course. However, an insufficient number of students enrolled in the course. The course was canceled and Burton was not paid (Federation Exhibit 9).

14. Canceling an EDP course is not an infrequent event. Typically, five or six out of 35 courses offered each semester are canceled due to low enrollment. Instructors of EDP courses are not paid if a course is canceled.

15. The Agreement between the Colleges and the part-time faculty provides that, under certain conditions, bargaining unit members receive a cancellation fee for a canceled course. JSC has never paid an instructor a fee for a canceled EDP course.

16. During the 1998 – 1999 academic year, the EDP mentor in St. Albans again recommended offering the Environmental Interpretation course for the 1999 Summer session. The course was offered as a weekend course over the course of three weekends. Cavanaugh offered the course to Burton because he had spent time developing the course the previous year and had not received any pay when JSC had canceled the course.

17. During the 1998 – 1999 academic year, Verderber spoke to Cavanaugh and asked him to review his web site and told him that he would be available to teach the following summer. Cavanaugh reviewed Verderber's web site.

18. Cavanaugh did not consider offering Verderber the opportunity to teach the Environmental Interpretation course, nor did he compare Verderber's experience to Burton's. He simply made a decision to offer the course to Burton because of the time Burton already had invested in developing the course the previous year.

19. Verderber has been actively involved in the Federation for many years and has been on the Federation negotiating team for several contract negotiations. He filed a grievance with the Labor Relations Board in 1999. Grievance of Verderber, 22 VLRB 317.

20. Cavanaugh has never been involved in contract negotiations between the Colleges and the Federation and, at the time he made the decision to hire Burton, was

unaware that Verderber was a member of the Federation negotiating team or an active union member.

21. Approximately six years ago, JSC hired a chemical training officer to ensure that JSC remains in compliance with worker safety and environmental laws. One of the duties of the training officer is to provide annual training before the beginning of the school year to anyone who will be working in a JSC lab. Verderber could not attend the regularly scheduled training in August 1999 because he was on the coast of Maine photographing lunar tides for a book he was writing. He was scheduled to teach a course for the Fall 1999 semester and was not allowed to enter the lab until he completed the required training. The chemical training officer was unable to reschedule training for Verderber until several weeks after the start of the academic year. During the intervening period, Verderber taught the field work portion of his class and another JSC faculty member retrieved his lab equipment for him because he was not allowed to enter the lab.

22. Office space is limited at JSC. Verderber occasionally has complained about his lack of privacy and insufficient office space. Office space is a system-wide problem for the Colleges. The Federation and the Colleges have set up a joint study committee to study the problem.

23. EDP courses and non-EDP courses carry the same credits at JSC. JSC pays EDP instructors the same amount as it pays part-time faculty for teaching bargaining unit work.

24. JSC uses the same individual contract form for EDP instructors as it does for non-EDP courses. The form states that the "appointment is subject to the terms and conditions of the current agreement between the Vermont State Colleges and the Part-

Time Faculty Federation". JSC also uses this form to pay campus-based instructors who may not be eligible to be in the bargaining unit (Federation Exhibit 8).

#### OPINION

The Federation and part-time faculty member Gustav Verderber contend that the Colleges improperly denied Verderber a teaching assignment in Johnson State Colleges' external degree program in violation of Article XVIII of the part-time faculty Agreement and that the Colleges discriminated against Verderber on the basis of union activity by denying him this teaching assignment. The Federation also contends that the Colleges violated the Agreement by failing to recognize the bargaining unit status of faculty who have taught in the external degree program with respect to eligibility for Federation membership, accrual of seniority for course assignments and other matters addressed in the Contract. The Federation concedes that if the Board determines that EDP courses are not subject to the provisions of the Agreement, then Verderber has no standing to bring a grievance under the Agreement.

The external degree program at Johnson State College predated the 1991 certification by the Labor Relations Board of the Federation as the exclusive bargaining representative of a bargaining unit of adjunct faculty of the Colleges and predates the negotiations of collective bargaining agreements covering the adjunct faculty. There is nothing in the Agreement which states that EDP courses are bargaining unit work. Neither the Colleges nor the Federation have ever treated EDP courses as bargaining unit work. Under these circumstances, we conclude that assignment of EDP courses are not subject to the provisions of the Agreement.



We recognize that Johnson State College ("JSC") uses the same pay scale to pay for bargaining unit work as it does to pay for the teaching of EDP courses, and it also uses the same individual contract form to pay instructors of EDP courses as it does to pay adjunct faculty for teaching bargaining unit work and this form references the Agreement. We do not find this evidence persuasive. JSC also uses the individual contract with part-time faculty members who may not be eligible to be in the part-time faculty bargaining unit. Further, with respect to pay scales, the Colleges have discretion to use a common pay scale if it chooses and this does not indicate that EDP courses are bargaining unit work.

The evidence with respect to common pay scales and contract forms easily is outweighed by the silence of the Agreement and the historic practice over many years of neither the Federation nor the Colleges treating EDP courses as bargaining unit work or considering EDP courses to be covered by the Agreement. For example, EDP instructors have never been paid a cancellation fee for canceled courses; to the contrary, under certain conditions, adjunct faculty covered by the Agreement receive cancellation fees for canceled bargaining unit courses. The Federation further has presented no evidence that the myriad of other provisions of the Agreement have applied to EDP courses and instructors.

In sum, we conclude that teaching EDP courses is not bargaining unit work and the Colleges did not violate Articles III and XVIII of the Agreement by failing to offer Verderber the EDP 1999 Summer course entitled Environmental Interpretation. Further, we conclude that the Colleges has not violated the Agreement by its failure to recognize the bargaining unit status of faculty who have taught in the external degree program with

respect to eligibility for Federation membership, accrual of seniority for course assignments and other matters addressed in the Contract.

Verderber also claims that the Colleges' denial of the teaching assignment constituted a pattern of discrimination against him on the basis of his union activity in violation of Article VII. Given our conclusion above, we hold that the Colleges did not violate Article VII because Verderber had no claim to EDP work under the Agreement. Even assuming that EDP courses are covered by the Agreement, the evidence does not support a conclusion that Verderber was discriminated against on the basis of union activity. There was no evidence that the EDP Director responsible for selecting the Environmental Interpretation instructor had any knowledge of Verderber's union activities. Verderber relies on assignment of office space and exclusion from the lab to support a claim of a pattern of discrimination against him due to his union activities. The evidence in this regard is not persuasive. There was no evidence that Verderber was treated any differently than any other faculty member at JSC with respect to office space or with respect to not being allowed into a lab until he received appropriate chemical training.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Gustav Verderber and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, is DISMISSED.

Dated this 20<sup>th</sup> day of November, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank  
Catherine L. Frank, Chairperson

/s/ Carroll P. Comstock  
Carroll P. Comstock

/s/ John J. Zampieri  
John J. Zampieri