

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-8
HAL COCHRAN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 22, 2000, University of Vermont Lecturer Hal Cochran ("Grievant") filed a grievance with the Labor Relations Board, alleging that the University violated its rules and regulations by not counting Grievant's evening teaching assignments through the University's Continuing Education Division in determining his full-time equivalency status, and thereby not granting Grievant benefits.

A hearing was held on December 14, 2000, in the Labor Relations Board hearing room before Board Members Edward Zuccaro, Acting Chairperson; and John Zampieri. Grievant represented himself. Attorney Nicholas DiGiovanni, Jr., represented the University. The University filed a post-hearing brief on January 4, 2001. Grievant filed a brief on January 5, 2001.

FINDINGS OF FACT

1. The University of Vermont and State Agricultural College is an educational institution and instrumentality of the State of Vermont with its principal place of business in Burlington.
2. The Officers' Handbook of the University provides in pertinent part as follows:

**Section 150. The Academic Structure of the University**

- .1 *Approved Academic Units.* For carrying out the teaching, research and service missions of The University of Vermont, the following are the only approved academic units: division, college, school, department,

program, center, and institute. These missions are also supported by the University of Vermont Extension System, Continuing Education, the Libraries, the Fleming Museum, Computing and Information Technology, and other related administrative units.

.2 As set forth in Section 202, only departments of the colleges and schools, or schools if not organized into departments, and the Department of Military Studies may appoint Officers of Instruction . . .

...

**154.1** *Continuing Education* is an enrollment unit of the University of Vermont which is responsible for the coordination and administration of Summer Session, Evening Division, Conferences and Institutes, and the Church Street Center.

.2 The Dean of Continuing Education, in cooperation with concerned deans and chairpersons, arranges for faculty and facilities to offer appropriate courses, with or without school or college credit, in the Summer Session and in the Evening Division, both on and off campus . . .

...

## **156. *The Faculties***

.1 The membership of the faculty of each undergraduate college or school and of the College of Medicine consists of the President, the Provost, the dean of the college or school, and all Professors, Associate Professors, Assistant Professors, Instructors, and Lecturers, part-time, full-time, or visiting, including adjunct and clinical ranks, who are responsible for teaching students in the college or school concerned . . .

## **Section 200. Officers of Instruction.**

**201.** *The term Officers of Instruction* shall include all persons with the titles of professor, associate professor, assistant professor, instructor, full or part-time persons with adjunct appointments . . ., clinical appointments, visiting appointments, and lecturers.

**202.** *Only departments of the colleges and schools*, or schools if not organized into departments, and the Department of Military Studies may recommend appointment of Officers of Instruction.

...

## **Section 220. Appointment of Officers of Instruction**

**222.** . . .10 . . . Officers on a temporary appointment will have the same rights and privileges as other Officers of Instruction with the exception of eligibility for tenure and sabbatical leave and the right to any notice of reappointment . . .

. . .

## **Section 240. Conditions of Employment.**

. . .

### **242. *Supplemental Compensation and Outside Professional Service.***

.1 *Supplemental Compensation.* The salary of a full-time officer is intended as compensation for all activities performed for, or in the name of, the University. However, there will be instances in which the University wishes to provide opportunities and incentives to officers to engage in special activities beyond their normal assignments. Examples include evening instruction and certain outreach activities, limited and specific consultation on a grant or to an administrative unit.

. . .

.3 An officer may have some outreach, evening instruction, or other continuing education responsibilities. In such cases, the dean should provide a written stipulation of those responsibilities in the definition of the officer's duties.

. . .

(Grievant's Exhibit 71)

3. "Full-time salaried officers of the University" are eligible for fully paid health insurance and dental insurance benefits as set forth in the University booklet, Benefits for Officers of the University. They also are eligible for group life insurance, long-term disability insurance, a retirement savings plan and tuition remission. Officers are considered full-time if their appointment is 100% full-time equivalency for 9, 10 or 11 months, or at least 75% for 12 months. A full-time faculty-member's entitlement to benefits is based on full-time equivalency for the current semester. Part-time salaried

officers of the University are entitled to more limited benefits if they are employed on such basis for four consecutive semesters (Grievant's Exhibit 70).

4. In the Fall of 1997, Grievant taught four courses as an Officer of Instruction through and for the Department of English in the College of Arts and Sciences. As such, he was considered a full-time employee for that semester with full-time benefits. In the Spring semester of that academic year, his assignment was reduced to two courses and he was not entitled to full-time benefits (Grievant's Exhibits 13, 14).

5. In the Fall of 1998, Grievant accepted an appointment as an Officer of Instruction in the Department of English to teach two Written Expression courses for a total salary of \$5,991. He also entered into a contract with the Division of Continuing Education to teach two Written Expression courses at a salary of \$3,500 for each course. The University refused to consider the Continuing Education courses as part of his full-time equivalency, and thus Grievant was deemed not entitled to full-time benefits. Grievant filed the grievance in this case based on that refusal (Grievant's Exhibits 15, 16, 21, 24).

6. The Division of Continuing Education offers courses to the general public as well as to University students. The Division does not receive any general funds from the University for instructional costs. Instead, it essentially pays its own way as an income/expense unit. It receives income from students in the form of tuition payments to cover the instructional expenses. If an insufficient number of students sign up for a course, the course is canceled and the instructor who contracted to teach the course receives no payment.

7. Since the Division of Continuing Education is not considered a school or college of the University but instead is defined as an “enrollment unit” pursuant to the Officers’ Handbook, it may not appoint Officers of Instruction. The Division does not have permanent core faculty. Instead, it contracts with individuals to teach courses on a semester by semester basis and enters into approximately 2000 contracts a year for courses taught throughout the state. Such instructors may be faculty members elsewhere in the University, administrators or other professionals employed by the University, or professionals and educators from the community with no other employment with the University.

8. Any person who teaches a credit-bearing course in Continuing Education must be approved by the academic department in terms of their credentials and recommended to the Dean of Continuing Education. Also, the academic department gives credits for a course; the Division of Continuing Education cannot give such credits. The Dean of Continuing Education has final approval on the selection of individuals to teach particular courses and may choose not to hire a recommended candidate. In all cases, the hiring of an instructor to teach a course is a separate contractual transaction, with the individual signing a separate contract with Continuing Education to teach a specific course for a specific amount. Thus, a person may be appointed as an Officer of Instruction on a full-time or part-time basis in a particular department and have a defined salary and responsibilities, but will enter into a separate contract with the Division of Continuing Education if they also are teaching in Continuing Education.

9. The Division of Continuing Education makes an independent judgment on the salary that is going to be paid for teaching a course in Continuing Education. The

individual instructor is paid directly by Continuing Education, and the salary is not based on what the instructor may be earning elsewhere in the University. For example, in the Fall of 1998, Grievant was teaching the same Written Expression courses in Continuing Education as he was through the College of Arts and Sciences. He received more than \$500 per course from Continuing Education than he did through the College of Arts and Sciences.

10. If someone who is otherwise an Officer of Instruction in a department of the University is teaching in Continuing Education, such person is employed by Continuing Education for purposes of teaching the Continuing Education course. Also, that person is not required to teach the offered Continuing Education course as a condition of their employment within the department.

11. In deciding what courses to offer, Dean of Continuing Education Edward Twardy reviews the successes or failures of past offerings, considers the level of student interest, assesses particular needs which the public has expressed for various courses, and examines other market indicators. As part of his planning, Dean Twardy speaks with deans and department chairs as to their course offering needs and their financial capabilities to run such courses from their own budgets. A department may need to offer more sections of a course due to overenrollments, but the department does not have sufficient funds through its general fund budget to pay for instructors to teach all the necessary courses. In such situations, the department often seeks to have the course offered through Continuing Education. This allows matriculating students at the University to take the course, but the funds to pay for the course come from Continuing Education and not the department budget. Continuing Education generally reserves a

certain number of seats for University students who need to take the course, and the balance of persons taking the course are non-matriculating students.

12. A department also may want Continuing Education to run courses because it provides an opportunity for additional income for part-time faculty. Another reason is for scheduling flexibility due to student needs making it more feasible to run the course during evening hours.

13. The University has never considered Continuing Education teaching assignments to count toward full-time equivalency (“FTE”) credit for benefit purposes. For teaching assignments to count toward FTE, the teaching assignment must be in a particular school or college and paid for by that school or colleges out of its budget. Since the Division of Continuing Education has not been considered a school or college, and does not appoint Officers of Instruction, teaching through that Division has not counted toward FTE. The Division has not given its instructors benefits, and the University has not counted the time one has spent teaching there in measuring eligibility for benefits.

14. The University has a Personnel Action Form which is used to submit changes to salary and assignment information to the University’s payroll office. “University FTE” is defined on the form as “(t)he overall full-time equivalency from all assignments.” The instructions provide specific job codes for each assignment. One of the job codes is “Summer Sess, Cont Ed, Church Str”. This form has been used only for Officer and regular staff appointments. The Division of Continuing Education has never used this form and has not reported any FTE information to payroll for any of its instructors (Grievant’s Exhibit 60).

15. The Division of Continuing Education pays the University a rate equal to 33 percent of a Continuing Education instructor's salary if the individual is otherwise employed by the University. This practice is designed to keep down the overall cost of benefits for University employees. It also is significant when the University competes for grants. The government examines an institution's benefits rate and this can be a factor in awarding grants.

### OPINION

The issue in this grievance is whether the University violated its rules and regulations by not counting Grievant's evening teaching assignments through the University's Continuing Education Division in determining his full-time equivalency status, and thereby not granting Grievant benefits.

At the outset, we discuss our jurisdiction to decide this case. The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Boynton v. Snelling, 147 Vt. 564, 565 (1987), which statutory definition provides:

"Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. Section 902(14).

Since there is no applicable collective bargaining agreement here, Grievant must allege and prove the discriminatory application of a rule or regulation. Discrimination in this instance means unequal treatment of individuals in the same circumstances under the



applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988). Failure of an employer to follow a binding rule is sufficient to result in an actionable grievance. Id. In re Grievance of Gobin, 158 Vt. 432, 434 (1992). Employer regulations governing procedures, or guidelines mandating procedures, for management constitute binding rules or regulations. Grievance of Gobin, 158 Vt. at 435.

Grievant cites four alleged rules or regulations which he claims the University violated. We first discuss alleged violations of the Officers' Handbook cited by Grievant. The provisions of the Officers' Handbook are rules and regulations which must be followed by the University. Grievance of Gobin, 14 VLRB 40, 45-46 (1991). Grievant contends that the University violated Section 242.3 of the Officers' Handbook. Section 242.3 provides:

An officer may have some outreach, evening instruction, or other continuing education responsibilities. In such cases, the dean should provide a written stipulation of those responsibilities in the definition of the officer's duties.

Grievant contends that the University has not followed that rule in this case. We disagree that this rule is applicable to Grievant's situation. Section 242.3 is a subset of Section 242, which deals with supplemental compensation and outside professional services. When Section 242.3 is reviewed together with the rest of Section 242, it is evident that it relates to supplemental compensation assignments, which pursuant to Section 242 apply only to full-time officers. Section 242.3 means that, when a full-time officer has some "outreach, evening instruction, or other continuing education responsibilities", then the Dean of the college or school will "provide a written stipulation of those responsibilities in the definition of the officer's duties."

As a result, this provision is not applicable to Grievant because he was a part-time officer of the College of Arts and Sciences during the Fall 1998 semester at issue in this grievance. He taught two courses through the College of Arts and Science that semester, and would have needed to teach four such courses to be considered full-time.

Despite his claims to the contrary, Grievant was not teaching the two additional Continuing Education courses he taught that semester as a lecturer on the faculty of the Department of English of the College of Arts and Sciences. While the Department of English sanctioned Grievant's credentials and the two additional courses he was teaching, the Division of Continuing Education appointed and employed Grievant to teach the courses. Grievant entered into a contract with the Division of Continuing Education, separate from his acceptance of appointment with the College of Arts and Sciences, to teach the Continuing Education courses. The Division of Continuing Education paid Grievant to teach those courses, not the College of Arts and Sciences.

Grievant also contends that the University violated section 222.10 of the Officers' Handbook. Section 222.10 provides:

Officers on a temporary appointment will have the same rights and privileges as other Officers of Instruction with the exception of eligibility for tenure and sabbatical leave and the right to any notice of reappointment . . .

Grievant contends that, since he is an officer "on a temporary employment", the University violated this section by failing to provide him with the "rights and privileges" of benefits for which he was otherwise eligible. Grievant contends that, when he teaches Continuing Education evening classes, he is an officer of instruction as a lecturer on the faculty of the Department of English of the College of Arts and Sciences, just as he is

when he teaches other courses. As a result, Grievant contends that evening teaching assignments should count toward full-time equivalency and entitlement to benefits.

We disagree that Grievant is an officer of instruction within the meaning of the Officers' Handbook when he teaches Continuing Education courses. Sections 150.2 and 220 of the Handbook provide that only departments and schools can appoint Officers of Instruction. The Division of Continuing Education is an “enrollment unit”, not a school or college, pursuant to Sections 150.1 and 154.1 of the Handbook. Since the Division of Continuing Education appoints Grievant to teach Continuing Education courses, and the Division cannot appoint Officers of Instruction, then Grievant is not an Officer of Instruction when teaching Continuing Education courses. Thus, Grievant is entitled “to the same rights and privileges as other Officers of Instruction” pursuant to Section 222.10 when he is appointed by the College of Arts and Sciences, but this section is not applicable when he is teaching Continuing Education courses.

The next rule violation alleged by Grievant is that the University violated its rules extending benefits of health insurance, dental insurance, disability insurance, life insurance, retirement plan, and tuition remission through an “incorrect determination” of Grievant’s full-time equivalency, resulting in Grievant being denied benefits to which he was entitled.

In providing benefits to “salaried officers”, the University practice has been to never consider Continuing Education teaching assignments to count toward full-time equivalency credit for benefit purposes. For teaching assignments to count toward full-time equivalency, the teaching assignment must be in a particular school or college and paid for by that school or college out of its budget. Since the Division of Continuing

Education has not been considered a school or college, and does not appoint Officers of Instruction, teaching through that Division has not counted toward full-time equivalency. The Division has not given its instructors benefits, and the University has not counted the time one has spent teaching there in measuring eligibility for benefits.

In order to overcome this consistent, longstanding practice of the University in applying its benefits policy, Grievant would have to point to a rule or regulation requiring that Continuing Education work be counted toward full-time equivalency. Grievant has identified no provision of the Officers' Handbook, or any other rule or regulation, leading us to call into question the University's practice. Since an individual contracting with the Division of Continuing Education is not appointed as an Officer of Instruction, we can find no violation of a rule or regulation by the University not considering such individuals as "salaried officers" for benefits purposes.

The final alleged violation of a rule or regulation cited by Grievant is that the University violated the Personnel Action Form which is used at the University to submit changes to salary and assignment information to the University's payroll office. Since "University FTE" is defined on the form as "(t)he overall full-time equivalency from all assignments", and one of the job codes for assignments is continuing education assignments, Grievant contends that his continuing education assignments should count toward full-time equivalency.

The University contends that the Personnel Action Form is not a rule or regulation. We agree. The evidence does not indicate that the Personnel Action Form is an employer regulation governing procedures, or a guideline mandating procedures, for management to follow. Grievance of Gobin, 158 Vt. at 435. Instead, it is simply a

processing form used to submit salary and assignment information to the University's payroll office. Such a form can be used to implement rules and regulations, but it is not a rule or regulation itself.

Moreover, even assuming *arguendo* that the Personnel Action Form is a rule or regulation, the evidence does not establish that it applies to all University employees under all circumstances. Absent more extensive evidence on the origin and development of the form, the form must be viewed in the context of University practice. The form has been used only for Officer and regular staff appointments. The Division of Continuing Education has never used this form and has not reported any full-time equivalency information to payroll for any of its instructors. Thus, Grievant has not demonstrated that the form is relevant to his Continuing Education assignments.

In sum, Grievant has not demonstrated that the University violated any rules or regulations by not counting his Continuing Education assignments toward full-time equivalency for benefit purposes. Thus, we deny his grievance.

#### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered that the Grievance of Hal Cochran is dismissed.

Dated this 22nd day of February, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Acting Chairperson

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John J. Zampieri