VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 02-47
HAL COCHRAN	)	

MEMORANDUM AND ORDER

The issues before the Labor Relations Board relate to a motion for summary judgment filed by Hal Cochran ("Grievant") and a cross-motion for summary judgment filed by the University of Vermont ("Employer"). On September 16, 2002, Grievant filed a grievance with the Board contesting his nonreappointment as a lecturer at the University of Vermont.

On January 16, 2003, Grievant filed a motion for summary judgment. Grievant contends that the Employer violated provisions of the Officers' Handbook by not following the standard consideration procedure in deciding whether to reappoint a faculty member. Specifically, Grievant alleges that Department of English Chair Robyn Warhol violated the standard consideration procedure in his case by not conducting an annual performance review, failing to request the advice of tenured and tenure-track faculty members of the department, not privately discussing with Grievant his status, and not providing a written explanation of reasons for not reappointing Grievant.

The Employer filed a response in opposition to Grievant's summary judgment motion, and a cross-motion for summary judgment, on February 14, 2003. The Employer contends that Grievant was appointed to his lecturer position with the University pursuant to Section 222.10 of the Officers' Handbook, and this section provides that an officer appointed pursuant to this section is not entitled to any expectation or notice of non-reappointment. The Employer contends that the grievance should be dismissed on the

grounds that Grievant is estopped from alleging that he was not appointed pursuant to Section 222.10 since he took a directly contrary position before the Board two years ago in a prior grievance against the Employer.

On March 5, 2003, Grievant filed a memorandum in opposition to the Employer's cross-motion for summary judgment. Grievant contends that he should not be estopped from alleging that he was not appointed pursuant to Section 222.10 because the issue in the grievance now before us is different than the issue before the Board in his previous grievance. Grievant further maintains that the Board should grant his motion for summary judgment because the Employer has failed to create a genuine issue as to any material fact.

The most common method by which cases are closed by Board decision prior to any evidentiary hearing is through a motion for summary judgment pursuant to Rule 56 of the Vermont Rules of Civil Procedure, which has been incorporated into Section 12.1 of the Board Rules of Practice. Summary judgment may be granted only if there is a showing "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law". V.R.C.P. 56(c)(3). The moving party has the burden of proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 158-59 (1992). Price v. Leland, 149 Vt. 518, 521 (1988). Grievances of Choudhary, 15 VLRB 118, 179-80 (1992).

Once the moving party meets its initial burden of showing an absence of uncontroverted material fact, the burden shifts to the non-moving party which must go

beyond the pleadings and set forth specific facts showing that there is a genuine issue for hearing, and demonstrate sufficient evidence to support a *prima facie* case. V.R.C.P. 56(c). State of Vermont v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995). Kelly v. Town of Barnard, 155 Vt. 296, 299-300 (1990). Choudhary, 15 VLRB at 180. If the nonmoving party fails to establish an essential element of their case on which they have the burden of proof at hearing, the moving party is entitled to summary judgment as a matter of law. Blodgett, supra. Choudhary, 15 VLRB at 180.

To defeat a motion for summary judgment, an issue of fact in dispute must be both genuine and material; that is, the evidence is such that a reasonable factfinder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Choudhary, 15 VLRB at 180. In deciding if there is a genuine issue of material fact, all of the allegations presented in opposition to summary judgment, if supported by affidavits or other evidentiary material, are regarded as true, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists. Messier v. Metropolitan Life Ins. Co., 154 Vt. 406, 409 (1990).

Material Facts

We now set forth the material facts necessary to decide Grievant's motion for summary judgment and the Employer's cross-motion for summary judgment. These material facts are gleaned from the grievance and the Employer's answer to the grievance, Grievant's Motion for Summary Judgment and attachments; the Employer's response to the summary judgment motion, cross-motion for summary judgment and attachments; and Grievant's response to the cross-motion. The following facts are uncontroverted.

The Officers' Handbook of the University constitutes rules and regulations setting forth standards governing the employment of faculty members. Among the provisions of the Officers' Handbook are the following:

> **201.** ***Titles of Officers of Instruction***
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> 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 (i.e., adjunct professor, adjunct associate professor, adjunct assistant professor, or adjunct instructor), clinical appointments, visiting appointments, and lecturers.
>
> . . .
>
> **222.** ***Appointments and Reappointments, Without Tenure***
> . . .
> ***222.10*** An appointment may be made on a temporary basis to fill a special need or to meet unexpected enrollment pressures. A temporary appointment does not carry with it any expectation of employment beyond the original appointment period. 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 nonreappointment. Accumulated time spent as a temporary officer will not count toward eligibility for tenure or sabbatical leave.

The Employer employed Grievant as a lecturer during academic years 1997-1998, 1998-1999, 1999-2000, 2000-2001 and 2001-2002. In the first three academic years, the Employer appointed Grievant for one semester at a time. In the last two academic years, the Employer appointed Grievant for an academic year at a time. Grievant taught introductory level English courses to undergraduate students.

By letter dated August 7, 2001, the Employer informed Grievant of his appointment for the 2001-2002 academic year. The letter stated in pertinent part:

> We are pleased to offer you the position of Lecturer in the Department of English at the University of Vermont. The appointment will be part-time for the academic year 2002-2002 . . . This appointment is temporary, for a one-year period only, and carries with it no expectation of reappointment.
> . . .

(Exhibit 2 of Affidavit to Grievant's Motion for Summary Judgment)

On February 13, 2002, Robyn Warhol, Chair of the Department of English, sent Grievant an e-mail which stated:

> Dear Hal:
>
> I am writing to let you know that I will not be assigning you any courses for AY 02-03, because of complaints about your teaching that I have received from students and from students' parents.
> Yours,
> Robyn
> (Exhibit 5 of Affidavit to Grievant's Motion for Summary Judgment)

The Employer did not provide any other reason for its decision than that stated in the February 13 e-mail.

In a prior grievance filed with the Board on February 22, 2000, Grievant alleged that the Employer 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. In the grievance, Grievant alleged that "at all pertinent times, Grievant has been an 'officer on a temporary appointment' within the meaning of Officers' Handbook Section 222.10." Grievant contended, among other things, that the Employer violated Section 222.10 by not considering him entitled for benefits when he taught in the University's Continuing Education Program as well as when he was a lecturer on the faculty of the Department of English of the College of Arts and Sciences. Grievance of Cochran, 24 VLRB 54, 63-64 (2001). The Board concluded that Section 222.10 was not applicable when Grievant was teaching Continuing Education courses but that it did apply when Grievant was appointed by the College of Arts and Sciences to teach Department of English courses. Id.

Discussion

We first address the Employer's contention that Grievant is estopped from alleging that he was not appointed pursuant to Section 222.10 of the Officers' Handbook since he took a directly contrary position before the Board two years ago in a prior grievance against the Employer. We address this first because, if we agree with the Employer, dismissal of the case is warranted.

Grievant concedes, and we concur, that if Section 222.10 applies to Grievant's appointment, his grievance would fail. This is because Grievant contends that the Employer violated provisions of the Officers' Handbook by not following the standard consideration procedure in deciding whether to reappoint him, and the standard consideration procedure providing for such things as annual performance reviews, input of tenured and tenure-track faculty, and specific reasons given for non-reappointment does not apply to faculty appointed pursuant to Section 222.10. Instead, a faculty member so appointed is entitled to neither an expectation of reappointment nor notice of reappointment.

The doctrine of collateral estoppel prevents a party from relitigating those issues necessarily and essentially determined in a prior action. Grievance of Choudhary, 15 VLRB 118, 176 (1992); *citing* Berisha v. Hardy, 144 Vt. 136, 138 (1984). A party who has litigated, or who has had an opportunity to litigate, a matter in a former action should not be permitted to relitigate the same issue against the same adversary. Vermont State Colleges Faculty Federation, AFT, VFT, Local 3180, AFL-CIO v. Vermont State Colleges, 16 VLRB 1, 11 (1993); *citing* Lerman v. Lerman, 148 Vt. 629 (1987).

The elements of collateral estoppel, or issue preclusion, are: 1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; 2) the issue was resolved by a final judgment on the merits; 3) the issue is the same as the one raised in the later action; 4) there was a full and fair opportunity to litigate the issue in the earlier action; and 5) applying preclusion in the later action is fair. Gallipo v. City of Rutland, 173 Vt. 223, 236-37 (2001). Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990).

Each of these criteria is met in this case. The parties in this grievance are the same parties as in the earlier grievance filed by Grievant. The issue of application of Section 222.10 to Grievant's appointment in the English Department was resolved by the Board's decision in the earlier grievance. Although the Board did not conclude that Grievant's appointment in the Continuing Education Division was made pursuant to Section 222.10 as contended by Grievant, Grievant and the Employer agreed, and the Board concluded, that Grievant's appointment in the English Department was made pursuant to Section 222.10. Grievance of Cochran, 24 VLRB at 64.

Further, the issue in this grievance is the same as the one in the earlier action. The applicability of Section 222.10 to Grievant's appointment was involved in the earlier grievance as well as this grievance. We recognize that Grievant's appointment involved in the earlier grievance was for an earlier academic year than the year that is involved in the grievance now before us. We also recognize that Grievant had an appointment in the Continuing Education Division in the earlier grievance, as well as an appointment in the English Department. Nonetheless, this does not result in a conclusion that the issue in this grievance differs from the issue in the earlier grievance. Grievant has offered no facts

supporting a conclusion that the nature of his appointment in the English Department in this grievance differed from that in his earlier grievance.

Grievant also had a full and fair opportunity to litigate the issue of the applicability of Section 222.10 to his appointment in the earlier grievance. Finally, applying issue preclusion in this grievance is fair. It would be unfair to allow Grievant to now argue that Section 222.10 is not the source of his appointment in the English Department because it is to his disadvantage, when in the earlier grievance it was to his benefit to agree that Section 222.10 was the source of his English Department appointment. This is particularly so when the Board concluded in the earlier grievance that Grievant's appointment in the English Department was made pursuant to Section 222.10.

Thus, we conclude that Grievant is collaterally estopped from contending in this case that Section 222.10 of the Officers' Handbook is not the source of his appointment in the English Department. Since Grievant did not have any right of notice to nonreappointment to his lecturer position, we deny Grievant's motion for summary judgment and grant the Employer's cross-motion for summary judgment.

Based on the foregoing material facts and for the foregoing reasons, it is ordered that Grievant Hal Cochran's Motion for Summary Judgment is denied and the University

of Vermont's Cross-Motion for Summary Judgment is granted, and the grievance filed by Hal Cochran is dismissed.

Dated this ____ day of June, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Carroll P. Comstock

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John J. Zampieri

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Edward R. Zuccaro

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Joan B. Wilson