

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE COLLEGES)	DOCKET NO. 04-41
FACULTY FEDERATION, AFT,)	
UPV LOCAL 3180, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 17, 2004, the Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO (“Federation”) filed a grievance with the Vermont Labor Relations Board. Therein, the Federation alleges that the Vermont State Colleges (“Employer”) violated Article 21 of the collective bargaining agreement between the Federation and the Employer for full-time faculty and ranked librarians by issuing a letter of non-reappointment to tenure track faculty member Jeannette Eicks, and instead offering her a one-year contract as a visiting faculty member for the 2004-2005 academic year.

The Board held a hearing on December 9, 2004, in the Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; and Carroll Comstock. Attorney Nicholas DiGiovanni, Jr., represented the Employer. Russell Mills, Federation Grievance Chair, represented the Federation. The Colleges and the Federation filed post-hearing briefs on December 22 and 23, 2004, respectively.

FINDINGS OF FACT

1. The Contract, which covers full-time faculty and ranked librarians of the Employer, provides in pertinent part as follows:

ARTICLE 17

LAYOFF

- A. Should layoff become necessary, a tenured faculty member shall be laid off according to the provisions of this article. A non-tenured faculty member shall not be eligible for layoff.
- B. Layoff shall take place only after the College experiences any one or any combination of the following bona fide circumstances or conditions:
 - 1. Demonstrable financial exigency
 - 2. Program or discipline curtailment
 - 3. Declining enrollment in a department or program
- ...
- D. . . 2. Before tenured faculty members shall be laid off, adjunct faculty and faculty on temporary contracts, including administrators, shall not be reappointed in the department, discipline, or program affected, and non-tenured faculty on continuing appointments shall be terminated. Non-tenured faculty terminated under these terms shall retain recall rights for the duration of the period covered by the continuing appointment. . .
- ...
- F. Before any new faculty are hired in any department, discipline, or program which has experienced layoffs, the laid off faculty shall be offered the opportunity for rehire in the inverse order of their layoffs . . .
- ...
- K. Persons removed as a result of layoff shall be appointed in any full-time teaching position for which they qualify at the Colleges for a period of three (3) years . . .
- ...

ARTICLE 21

APPOINTMENT AND REAPPOINTMENT

- A. "Appointment" shall mean initial full-time employment as a faculty member by the Vermont State Colleges.
- ...
- G. . . 3. Visiting Ranked Appointment

- a) The College may appoint an individual to a Visiting Ranked Appointment. A Visiting Ranked Appointment will be a non-tenure track appointment and will be utilized to meet a need to contribute to the development and/or implementation of a new academic program (certificate or degree) where the long term viability of the program is uncertain or the program is expected to have a limited viable duration. The total number of Visiting Ranked Appointments shall not exceed four (4) on any campus in any given year. . .
- b) Such appointments shall be for a specified term not to exceed one year. However, the College may give faculty member(sic) a maximum of three such one-year terminal appointments. Salary will be determined using the same point formula defined the (sic) Agreement for other faculty. A person holding such position will be entitled to all the benefits accorded other full-time faculty.
- c) Consideration for further appointments will include a review of the continuing need for the particular expertise . . . The review shall be solely administrative and the decision not to provide further appointments shall not be grievable.

. . .

H. "Reappointment" shall mean full-time employment by the Vermont State Colleges of a non-tenured faculty member after the first year of full-time employment.

I. Except for a faculty member on terminal appointment, reappointment will be presumed unless there is written notification of non-reappointment no later than:

. . .

- b. March 1 in the second year of service as to whether a faculty member shall be reappointed to a third and fourth year of service.
- c. April 1 of the third year of service as to whether or not the faculty member's fourth year of service shall be his/her last year of employment with the Colleges.
- d. April 1 of the fourth year of service as to whether a faculty member shall receive a two-year appointment to fifth and sixth years or whether the fifth year of service shall be the faculty member's last year of employment with the Colleges. This date does not apply if the faculty member has already been notified in his/her third year that the fourth year will be the terminal year of employment.

. . .

J. Reappointment to a Second and to a Third and Fourth Year of Service

...

2. In the first year, the President shall decide whether or not a faculty member shall be reappointed to a second year of service: in the second year, whether or not a faculty member shall be reappointed to a third and fourth year of service: and in the third year, whether a faculty member's fourth year will be his/her last year of employment. In making these decisions, the President shall consider only the performance of the faculty member and the faculty staffing needs at the College.

3. In reviewing the performance of a faculty member, the President . . . shall use as the standard for reappointment the faculty member's growth toward tenure and his/her demonstrated potential for meeting the standards for tenure.

4. A decision of the President not to reappoint a faculty member to a second year appointment or not to reappoint to a two year appointment covering the third and fourth year; or to notify a faculty member that his/her fourth year will be his/her last year of employment shall not be subject to the grievance and arbitration provisions of this Agreement unless the faculty member or the Federation claims the decision violates Article 7 (Academic Freedom), Article 8 (Anti-Discrimination), or the procedure for reappointment set forth in this Agreement.

...

(Joint Exhibit 1)

2. Jeannette Eicks is a faculty member in the Business Department at Vermont Technical College. She was originally hired during the 2000-2001 academic year as a part-time faculty member to teach in a new two-year program at the College entitled "E-Commerce". The program is now entitled "Website Development and Internet Management". Eicks was appointed to full-time employment for the 2001-2002 academic year as a visiting ranked faculty member on a terminal appointment. In the 2002-2003 academic year, Eicks was appointed as a first-year tenure track Assistant Professor. She was reappointed to a second year in this position for the 2003-2004 academic year (Colleges Exhibit 1).

3. The E-Commerce program began in the 2000-2001 academic year in response to the development of internet and e-commerce companies in the 1990's. The program was expected to lead to careers in e-commerce and website design work. There were a total of 19 first-year and second-year students enrolled in the program in its first year. Enrollment increased to 46 students in each of the next two academic years. However, by the 2003-2004 academic year, enrollment was down to 33 students. Eicks has served as the only full-time faculty member in the program. Part-time faculty also teach in the program (Employer Exhibit 10).

4. Factors contributing to the decline in program enrollment were a decline in e-commerce and the program not addressing some emerging needs in website development and internet management. Eicks has made efforts to redesign the program to improve its currency. Such efforts are ongoing.

5. Pursuant to the Contract, College President Allan Rodgers had to decide by March 1, 2004, whether to reappoint Eicks to a two-year tenure track appointment. By late February, President Rodgers noticed that enrollment indicators for the next academic year showed a continuing decrease for the E-Commerce Program. He, Academic Dean Linda Lucas and Business Department Chair Joyce Twing met with Eicks on March 1, 2004. President Rodgers informed Eicks that she would not be reappointed to her tenure track position for a third and fourth year. He told Eicks that his decision was not due to her performance. He informed her that the E-Commerce program was under review due to declining enrollment and that he was not sure that the program would continue into the 2004-2005 academic year. If the program was to be discontinued, first year students would not be admitted for the 2004-2005 academic year. However, there would be a need

to offer courses to second-year students returning to complete the program during the year. At the March 1 meeting, President Rogers offered Eicks a visiting ranked appointment for the 2004-2005 year (Federation Exhibit 1, Employer Exhibit 2).

6. Eicks accepted the visiting ranked appointment. Pursuant to this appointment, she receives the same salary and benefits that she would have received had she been reappointed as a tenure track assistant professor. In addition, Eicks is receiving a supplemental amount of \$2000 as program coordinator for the Website Development and Internet Management program (Federation Exhibits 1 & 2, Employer Exhibits 2 and 9).

7. This was the first time in President Rodgers's four years as College President that he had not reappointed a tenure track faculty member but instead gave that person a visiting ranked appointment for a year.

8. In mid to late March of 2004, President Rodgers decided that the College would accept first-year students for the Website Development and Internet Management program. There are a total of 18 first-year and second-year students enrolled in the program during the 2004-2005 academic year. President Rodgers is continuing to review the program for whether it will continue (Colleges Exhibit 10).

OPINION

At issue is whether the Employer violated Article 21 of the Contract by issuing a letter of non-reappointment to tenure track faculty member Jeannette Eicks, and instead offering her a one-year contract as a visiting faculty member for the 2004-2005 academic year.

The Federation contends that, although the Contract has some poor wording, its terms are clear and consistent in providing for an orderly process of faculty reappointment, one which provides administrative flexibility without unduly restricting the job security of faculty. The Federation contends that the Employer acted contrary to the orderly process of reappointment here by disregarding the reappointment provisions of Article 21 of the Contract and instead unilaterally following a different process of its own devising. The Federation maintains that Article 21 only permits non-reappointment of a second year tenure track faculty member based on faculty staffing needs or the performance of the faculty member, and neither reason existed in not reappointing Jeannette Eicks to her tenure track Assistant Professor position.

The Employer contends that President Rodgers acted consistent with Article 21 of the Contract here by not reappointing Professor Eicks based on faculty staffing needs, and that the Contract does not permit the Federation to challenge the President's decision based on this reason. The Employer contends that the Contract permits a grievance to the non-reappointment of a second-year faculty member only if there is a claimed violation of the anti-discrimination or academic freedom articles of the Contract, or a claimed violation of the procedures for reappointment set forth in the Contract. The Employer contends that the grievance should be dismissed because the Federation is not alleging violations of the anti-discrimination or academic freedom articles, and is not really claiming a violation of reappointment procedures.

In determining whether the Employer violated the Contract, we follow the rules of contract construction developed by the Vermont Supreme Court. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a

harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980). We will not read terms into the contract unless they arise by necessary implication. Id. at 71. It is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

In viewing the Contract in its entirety, we also have to be careful to examine the non-reappointment decision in the entire context in which it occurred. Such decision cannot be viewed in a vacuum. This is not a case where a faculty member simply was not reappointed to a third and fourth year of service. The non-reappointment to a tenure track position was simultaneously accompanied by the faculty member receiving a one-year contract as a non-tenure track visiting faculty member.

The Contract provides limited grounds for challenging the non-reappointment of a second-year tenure track faculty member. Article 21, Section J(4) provides that such non-reappointment decision “shall not be subject to the grievance and arbitration provisions of this Agreement unless the faculty member or the Federation claims the decision violates Article 7 (Academic Freedom), Article 8 (Anti-Discrimination), or the procedure for reappointment set forth in this Agreement.” The Federation alleges no violations of Article 7 or 8, but instead contends that the Employer’s actions violated the reappointment procedure set forth in the Contract.

In determining whether the Employer violated the Contract’s reappointment procedure here, we examine all Contract provisions relating to reappointment or

termination of tenure track faculty, and appointment of visiting faculty, to ascertain the intent of the parties in addressing situations such as here where there is a question as to the ongoing viability of a College program. Article 21, Section J(2) provides that, in making reappointment decisions concerning tenure track faculty members, the President “shall consider only the performance of the faculty member and the faculty staffing needs at the College”. President Rodgers had no issue with the performance of Professor Eicks and instead relies on “faculty staffing needs at the College” to justify her non-reappointment. This presents the question of whether he violated the Contract’s reappointment procedure by not reappointing Professor Eicks based on faculty staffing needs and instead appointing her as a visiting faculty member.

President Rodgers had concerns about the ongoing viability of the E-Commerce program when he took the actions he did concerning Professor Eicks. The E-Commerce program was under review due to declining enrollment and President Rodgers was not sure that the program would continue into the 2004-2005 academic year. If the program was to be discontinued, first year students would not be admitted for the 2004-2005 academic year, but there would be a need to offer courses to second-year students returning to complete the program during the year. This indicated there was a need for faculty staffing of the program for one year, with staffing beyond the year being uncertain.

Under these circumstances, President Rodgers had viable options absent providing Professor Eicks with a visiting ranked appointment. We concur with the Federation that, although the wording of the Contract has problems, the Contract provisions reflect the intent of the parties to provide for an orderly process of faculty

reappointment that provides administrative flexibility without unduly restricting the job security of faculty. If President Rodgers had reappointed Professor Eicks to her tenure track position for a third and fourth year, he would not have been guaranteeing her two years of continued service. We agree with the Federation that Article 17 provides that non-tenured faculty on continuing appointments may be terminated in the event of financial exigency, program curtailment or declining enrollment in a program. This means that, if the President decided in Professor Eicks's third year of tenure track employment to discontinue the website design and Internet management program for the following year due to declining enrollment, then he could terminate Professor Eicks's employment for the fourth year.

We recognize that Article 17 provides that a non-tenured faculty member shall not be eligible for layoff, and the termination of non-tenured faculty under Article 17 has the characteristics of a layoff in providing that "(n)on-tenured faculty terminated under these terms shall retain recall rights for the duration of the period covered by the continuing appointment". Nonetheless, the problematic wording used in this article cannot override the clearly expressed intent of the parties that the employment of non-tenured faculty can be terminated during the term of a continuing appointment conditioned on retaining of recall rights during the period of the continuing appointment.

Further, the parties' use in Article 17 of the term "layoff" for tenured faculty, and "terminated" for non-tenured faculty, can be explained by the article granting tenured faculty greater protection against job loss, and greater right to recall to their positions, than non-tenured faculty. In viewing the Contract in its entirety, the termination provision fits into a general scheme in which tenured faculty enjoy the greatest degree of job

security, and non-tenured faculty enjoy less than tenured faculty but more than temporary and part-time faculty.

Thus, the reappointment procedure of the Contract addressed the circumstances present here of the need for faculty staffing of the program for one year, with staffing beyond the year being uncertain. President Rodgers could have met this staffing need through reappointing Professor Eicks to her tenure track position for a third and fourth year, with the option of terminating her employment after the third year if circumstances warranted. President Rodgers violated the reappointment procedure by not reappointing Professor Eicks to a third and fourth year and instead providing her with a visiting ranked appointment. He acted contrary to the specific steps and manner established in the Contract by which a second-year tenure-track member should be reviewed. Grievance of United Academics, AAUP-AFT and Broughton, 27 VLRB 249, 262 (2004).

If we were to rule otherwise, we would be allowing the Employer to weaken tenure track employment contrary to the parties' intent. We recognize that this was the first time in President Rodgers's four years as College President that he had not reappointed a tenure track faculty member but instead gave that person a visiting ranked appointment for a year. Nonetheless, the circumstances of this case indicate the Employer used the visiting ranked appointment when he had a different method that retained the flexibility that the Employer needed without unnecessarily weakening the job security of a tenure-track faculty member. If we were to sanction such use, a precedent would be created for eroding the system of tenure track employment negotiated by the parties.

The Federation having established that the Employer violated the Contract, we need to determine the appropriate remedy. The appropriate remedy is to make Professor

Eicks whole by placing her in the position that she would have been in had the violation of the Contract not occurred. Grievance of VSEA and Hooper, 27 VLRB 167, 190 (2004). The Federation requests that Professor Eicks be restored to her tenure-track status, and that she be treated as a third-year faculty member in the 2004-2005 academic year.

We conclude that this requested remedy generally is an appropriate remedy to place Eicks in the position that she would have been in had the violation of the Contract not occurred. President Rodgers had no issue with the performance of Eicks, and a faculty staffing need existed for at least one year in the program in which Eicks taught. Under these circumstances, President Rodgers would have proceeded most consistently with the Contract's reappointment procedure through reappointing Professor Eicks to her tenure track position for a third and fourth year, with the option of terminating her employment after the third year if circumstances warranted.

There is one part of the remedy that we need to defer. Some of the scheduled dates for the third-year review of Professor Eicks have passed by the time of this decision. We will provide the parties with an opportunity to develop a timetable to extend the dates of the third-year review of Professor Eicks.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of the Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO is sustained;
2. The actions of non-reappointment of Jeannette Eicks to a tenure-track Assistant Professor position, and her appointment as a visiting ranked faculty member, by the Vermont State Colleges are rescinded;

3. Eicks shall be considered reappointed to a third and fourth year of service as a tenure-track Assistant Professor as of the Fall of 2004 consistent with the Opinion in this matter;
4. The 2004-2005 academic year shall be considered her third year of service as a full-time tenure-track faculty member and she shall be entitled to all the rights and benefits of a full-time tenure-track faculty member in her third year of service; and
5. Eicks shall be reviewed during the 2004-2005 academic year as a tenure-track faculty member in her third year of service. The parties shall submit to the Labor Relations Board by February 10, 2005, a proposed timetable establishing the deadlines for completion of the stages of the third-year review of Eicks; and if the parties are unable to agree on a proposed timetable, they shall notify the Board in writing by February 10 of the specific areas of disagreement.

Dated this 20th day of January, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

Carroll P. Comstock