

VERMONT LABOR RELATIONS BOARD

IN RE:)	
)	
ROBERTA J. HACKEL)	DOCKET NO. 79-34S
v.)	
VERMONT STATE COLLEGES)	
and		
LOUISE ESIASON)	DOCKET NO. 79-36S
v.)	
VERMONT STATE COLLEGES)	
and		
STEPHEN BUTTERFIELD)	DOCKET NO. 79-41S
v.)	
VERMONT STATE COLLEGES)	
and		
JOSEPH WHELAN)	DOCKET NO. 79-39S
v.)	
VERMONT STATE COLLEGES)	
and		
JAMES VIZE)	DOCKET NO. 79-40S
v.)	
VERMONT STATE COLLEGES)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

These matters are grievances brought by members of the Vermont State Colleges faculty contesting a disapproval by the Board of Trustees of the Vermont State Colleges of each grievant's promotion in rank for the 1979-80 academic year or grant of tenure. The grievance of Roberta J. Hackel was filed May 31, 1979, the grievance of Louise Esiason was filed June 6, 1979, and the grievances of Stephen Butterfield, James Vize, and Joseph Whelan were filed on June 18, 1979.

A motion for summary judgment accompanied the filing of the notice of grievance in the Hackel and Esiason grievances. Because of the similarity in issues presented, these matters were combined for joint consideration with the understanding that the Butterfield, Whelan and Vize matters were also under consideration for summary judgment. Affidavits submitted in connection with the motions for summary judgment revealed a dispute as to the past practice of the Colleges in implementing the faculty evaluation provisions of the collective bargaining agreement. Hearings on the limited issues of this past practice were held on March 13, 1980, before the Vermont Labor Relations Board; present for the Board were Kimberly B. Cheney, Chairman, William G. Kemsley, Sr., and Robert H. Brown. At this hearing, the grievants Hackel and Esiason were represented by Donald H. Hackel, Esq., of Hackel & Hull, the grievants Butterfield, Whelan, and Vize were represented by Stephen Butterfield of the Vermont State Colleges Faculty Federation, and the Vermont State Colleges were represented by Nicholas DiGiovanni, Esq. of Morgan, Brown, Kearns & Joy.

For the reasons set forth below, a majority of the Vermont Labor Relations Board has decided these matters in favor of the grievants and the Board has ordered that the grievants Hackel, Esiason and Butterfield each be awarded retroactively the promotion in rank sought and the the grievants Vize and Whelan be awarded tenure.

FINDINGS OF FACT

1. Roberta J. Hackel received a BA at Oakland University in 1964, an MA at the University of Wisconsin in 1966, and a PhD at the University of North Carolina in 1970. She taught as an instructor of French at Middlebury College for one year, and as full-time Assistant Professor of French at St. Michaels College for three years, at the end of which time she married and

moved to Castleton. She taught at Castleton State College on a part-time basis for several years, and was appointed full-time Assistant Professor of Modern Foreign Language at Castleton State College, effective the fall semester 1977, and was reappointed for the 1978-79 and currently for the 1979-80 academic year. Her publications and ongoing research are set forth in her complete personnel file.

2. On October 24, 1978, Roberta J. Hackel requested early consideration for promotion pursuant to ARTICLE XXV (Promotion) of the collective bargaining agreement. The Faculty Committee on Reappointment, Promotion and Tenure and William Feaster, Academic Dean, on behalf of the College, mutually approved this request for early consideration, the only such request approved out of six applications by other faculty.

3. Thereafter, evaluation went forward in accordance with ARTICLE XXII (Faculty Evaluation) of the collective bargaining agreement. On January 28, 1978, the academic dean recommended that Roberta J. Hackel receive early promotion to the rank of Associate Professor. On March 1, 1979, the Faculty Committee made a like recommendation, and on March 7, 1979, Donald W. Wilson, President, gave his signed approval.

4. Louise Esiason received a BS, RN at the University of Maryland in 1952, and an MA, Nursing Education at Teachers College, Columbia University in 1970. For many years, she was variously employed in nursing, including seven years as a school nurse, and also was supervisor and director of nursing at a nursing home and at a children's orthopedic hospital. She was an Instructor of Nursing for two years at the University of Maryland. She came to Castleton State College in January of 1973 as an Instructor of Nursing and was promoted to Assistant Professor of Nursing in July of 1975. Louise Esiason's MA in nursing is a terminal degree in nursing and is so

recognized in Part IV B of the Vermont State Colleges Administrative Policy and Criteria on Promotion.

5. Louise Esiason came up in 1978 for automatic evaluation for promotion during her fourth year at the rank of Assistant Professor.

6. The evaluation went forward in accordance with ARTICLE XXII (Faculty Evaluation) of the collective bargaining agreement. On January 19, 1978, the Faculty Committee recommended that Louise Esiason be promoted to the rank of Associate Professor. On January 28, 1979, the academic dean made a like recommendation, and on March 7, 1979, Donald W. Wilson, President, gave his signed approval.

7. Notwithstanding the action of the College President, the Chancellor and the Personnel Committee of the Vermont State Colleges Trustees decided not to recommend Roberta Hackel's or Louise Esiason's promotion to the Board of Trustees. In the absence of such recommendations, no action was taken by the Board of Trustees. In effect, this inaction denied these grievants the promotion they sought. The Chancellor instructed the President to so notify Roberta Hackel and Louise Esiason, which the President did by separate letters dated March 28, 1979.

8. The parties have stipulated that the essential facts of the Butterfield, Whelan, and Vize grievances are the same as in the Hackel and Esiason grievances. Butterfield made timely application for promotion in rank as a faculty member at Castleton State College and Whelan and Vize, members of faculty at Vermont Technical College, made timely application for tenure. Each grievant met all relevant criteria to satisfy their applications and each received the approval of the faculty committee, academic dean, and finally of their College President under ARTICLE XXII. Notwithstanding these approvals, and because of the intervention of the Chancellor and

Trustees of the Colleges, Butterfield, Whelan, and Vize were notified by letter of their College President dated March 31, 1979, that their respective promotion or tenure would not be granted.

9. Since at least 1973 when the faculty unionized, the Board of Trustees, as a matter of practice, has taken action on approval of promotions in rank and tenure. However, since that time, the Board of Trustees has always approved prior recommendations for promotion or tenure from the presidents.

10. Grievants are faculty of the Vermont State Colleges and members of the Vermont State Colleges Faculty Federation, AFT, Local 3180, AFL-CIO. Grievants are covered by the collective bargaining agreement between the Faculty Federation and the Vermont State Colleges for the period May 1, 1979, through September, 1980. The terms of that collective bargaining agreement are incorporated herein by this reference.

11. While the grievances giving rise to this matter were filed under the previous collective bargaining agreement between the parties, the parties have stipulated that the pertinent provisions in the current collective bargaining agreement are unchanged from the former agreement. The provisions which are the subject of this stipulation are:

ARTICLE XXI	(Section 4) Personnel Files;
ARTICLE XXII	Faculty Evaluation;
ARTICLE XXIII	Appointment, Reappointment and Review;
ARTICLE XXIV	Tenure; and
ARTICLE XXV	Promotion

12. The purpose of these Articles is to provide a structure at each individual college in the State Colleges system to determine whether a faculty member shall be promoted, reappointed, non-reappointed, or tenured.

13. The evaluation process at the Colleges involves three reviews: one by a faculty committee established by each college's Faculty Assembly;

an independent review by the college administration, usually the academic dean; and then a "final determination" by the college president. The faculty committee and the college administration are required to publish a criteria for their evaluations and guidelines for the criteria are established by the collective bargaining agreement. The collective bargaining agreement specifically confines the evaluation conducted at each step to material placed in the particular faculty member's personnel file and student evaluations (which also become a part of the personnel file).

14. Dr. Edward Elmendorf, president since 1974 of Johnson State College, a member of the Vermont State Colleges system, has participated in the faculty evaluation and review process of 1975, 1976, 1977, 1978, and 1979. It is President Elmendorf's practice, once he has made a determination based on his review of the personnel file and the recommendations of the Johnson State academic dean and faculty committee, to initiate a meeting with the Chancellor for the purpose of communicating to the Chancellor the determinative factors of his recommendations for promotion and tenure.

15. Dr. Donald Wilson, former president of Castleton State College, a member of the Vermont State Colleges system, during the period of June, 1976, through June, 1979, participated in the faculty evaluation and review process of 1977, 1978 and 1979. It was President Wilson's practice in 1977 and 1978 to make faculty career determinations during this process without further consultation regarding his recommendations with the Chancellor. In the spring of 1979, Chancellor Bjork met with President Wilson at the Castleton campus for the purpose of reviewing the files of those faculty members being recommended by President Wilson for promotion or tenure. The meeting was at the initiative of Chancellor Bjork and this was the first time President Wilson had met with the Vermont State Colleges Chancellor

regarding faculty evaluation decisions. At this time, Chancellor Bjork asked Dr. Wilson to change some of his favorable determinations because the promotion and tenure process had become "too accelerated" and thus, too costly to the Vermont State Colleges system. President Wilson declined to change his decisions as the faculty members being considered met the criteria for tenure and promotion set forth in the contract and by the college.

16. Chancellor Bjork, at the meeting with President Wilson, reviewed the personnel files of the candidates for promotion and tenure in a cursory manner, discussing the merits of only one candidate who was being recommended for early promotion but had not yet attained a terminal degree.

17. In reviewing the personnel file and recommendations of the academic dean and faculty committee, both President Elmendorf and President Wilson required one to two hours time per candidate. The academic deans and faculty committees required several hours per candidate in this review process before making their recommendations to the president.

18. In the spring of each academic year, after the faculty evaluation process is completed at each of the colleges within the Vermont State Colleges system, the Board of Trustees acts upon the tenure and promotion recommendations of each college.

19. Prior to 1979, no presidential recommendation regarding faculty tenure or promotion was denied by action either by the full Board of Trustees or a Board personnel subcommittee. Chairman of the Board Marshall Witten, President Elmendorf and President Wilson testified that the practice of the Board was briefly to discuss the candidates, occasionally question the presidents to ascertain that in fact the candidate met the criteria for the proposed appointment, and then approved the recommendations. A brief summary sheet on each candidate was prepared for the Trustees as an aid in

taking these personnel actions. While the entire personnel files may or may not have been available at this time, no witness could recall any extensive review of any faculty files.

20. During the 1978 Board of Trustees meeting for personnel actions (and on several occasions prior and subsequent to that time), there was discussion regarding the financial implications of the tenure and promotion system as it then existed in the collective bargaining agreement. Essentially, the Trustees questioned the system's financial ability to assume the high cost of each decision to tenure faculty and whether, as a policy matter, the Trustees should consider themselves bound by the presidents' recommendations. Despite these discussions about slowing down the promotion and tenure process, no action was taken by the Trustees. Language regarding faculty evaluation and review, appointment, reappointment, tenure and promotion identical to that of the expired collective bargaining agreement was incorporated into the current agreement between the faculty and the Colleges.

21. At the 1979 Board of Trustees meeting for personnel actions, the full Board, upon the recommendations of a Board personnel subcommittee, effectively rejected the presidential recommendations for tenure or promotion for the faculty members subject to these grievances: Hackel, Esiason, Butterfield, Whelan, and Vize.

22. Chancellor Bjork had not recommended favorable Trustee action in the case of Hackel, Esiason, Butterfield, Whelan, and Vize. While the personnel files of Whelan and Vize were opened and reviewed by the Trustee's personnel subcommittee, the files of Hackel and Esiason were not reviewed at that time. Chairman Witten had no recollection of Butterfield's file being examined or even discussion on the merits of his proposed promotion.

A summary sheet on all the candidates for promotion or tenure was prepared in advance of the meeting by Chancellor Bjork indicating the recommendation of each decision-making committee or person throughout the entire review process.

23. In those instances where the Trustee's personnel subcommittee recommended denial of tenure or promotion to the full Board, no specific merit reasons for departing from the presidential recommendations were given.

OPINION

Grievants each satisfied all criteria applicable to faculty evaluations as set forth in the collective bargaining agreement and each received approval at all three levels of evaluations provided for in the collective bargaining agreement, including favorable approval of their applications for promotion or tenure by the presidents of their respective college. Yet, by the actions of the Chancellor and Trustees of the Vermont State Colleges, each grievant was denied the promotion or tenure so approved. The apparent reason for this action of the Chancellor and Trustees was that in their judgment, the promotion and tenure process had become too accelerated and too costly to the Colleges. These concerns regarding speed and cost apparently were not particularized as to any of the grievants, except that the grievants represented a continuation of the trend as perceived by the Chancellor and Trustees.

The grievants contend that the collective bargaining agreement is specific and determines in grievants' favor the issues in this proceeding. Grievants rest their argument on the collective bargaining agreement and its specific and detailed provisions culminating in "final determination"

by the President of each college of questions concerning the career advancement of faculty at each college.

Vermont State Colleges dispute that the collective bargaining agreement is dispositive of the issues in grievants' favor. The Colleges assert that the Trustees are vested by statute with final decision-making authority over faculty promotion and tenure and urge that the collective bargaining agreement does not and cannot delegate this authority to college presidents.

A majority of this Board agrees with the grievants' interpretation of the collective bargaining agreement: The agreement sets forth a three-step procedure which at the first two steps limits and defines the matters which may be considered in determining faculty career advancement, and this procedure vests final decision-making authority in the college president. Under the collective bargaining agreement the function of the Chancellor and Board of Trustees in the faculty promotion and tenure process is pro forma only and is merely to implement the decisions made by the presidents.

The Board notes that Articles XXII(2) and (3) describe the product of the faculty committee's and academic dean's involvement in the process as the preparation of "written evaluations and recommendations" and that in paragraph 4 of this Article, the role of the president is to make a "final determination". This Board views as significant the difference in language employed. This difference justifies the inference that the action of the president, as contrasted with the actions of the faculty committee and academic dean, was meant to be determinative.

The Board must give full effect to the obvious meaning of the words used in these provisions and concludes that the function of the college presidents is different from the recommending function assigned by the collective bargaining agreement to the faculty committee and to the academic

dean; the president's function is to make the final decision which determines the career issue at hand.

The past practice of the parties confirms this interpretation. The collective bargaining agreement cannot be read with understanding in a vacuum. It is a practical document addressed to practical concerns which arise out of the common experience of the parties.

It is clear to a majority of this Board that past practice of Vermont State Colleges in dealing with questions of faculty promotion or tenure vested final decision-making authority on these questions in the president and relegated the Chancellor and Trustees to a pro forma role in carrying out the presidents' final determinations. The Board finds no basis to conclude that the parties intended by the collective bargaining agreement to modify the established procedure on a matter of such obvious, fundamental importance to union members. To the contrary, a majority of the Board views the applicable agreement provisions to be a formal recitation and continuation of this established practice.

The Vermont State Colleges urge the Board to interpret the collective bargaining agreement to vest final decision-making authority in the Trustees. The Colleges rely upon the management rights article of the collective bargaining agreement (Specifically, ARTICLE VI(1)(B)) to support the College's position.

But a majority of the Board finds nothing in ARTICLE VI to refute that each College president is vested with final decision-making authority as regards career decisions for faculty in his college. ARTICLE VI, paragraph 1(B), does not by its terms reserve to the Trustees and Chancellor a function beyond the pro forma implementation of promotion and tenure decisions made elsewhere, and Section 1(B) of ARTICLE VI expressly provides that the

reservation to the Chancellor and Trustees of management rights is limited by specific provisions of the collective bargaining agreement.

Considering the collective bargaining agreement as a whole, and mindful of the past practices of the parties which both shaped the agreement and reflected the parties' own interpretation, a majority of the Board concludes that the Trustees and Chancellor, by the collective bargaining agreement, have delegated to the president of each college final decision-making authority as regards promotion and tenure for faculty.

The Vermont State Colleges argue that any delegation of this authority is not binding on the Colleges because the delegation is unlawful under 16 V.S.A. §§ 2174 and 2175. The Board rejects this argument and concludes that the delegation of decision-making authority to the College presidents is lawful and binding upon the Vermont State Colleges. Danville School Directors v. Fiffield, 132 Vt. 271 (1974) holds that a public employer has the burden to demonstrate the existence of specific statutory provisions which limit the employer's ability to delegate by a collective bargaining agreement its management rights, and that statutory provisions closely analogous to 16 V.S.A. §§ 2174 and 2175 were not sufficient for this purpose. Relying on Danville School Directors, this Board held in Burrill v. Vermont State College, 2 VLRB 211 (1979), that notwithstanding 16 V.S.A. §§ 2174 and 2175 the Vermont State Colleges had authority properly to enter into a collective bargaining agreement which delegates final tenure determinations. Our holding and reasoning in Burrill apply to this matter and lead to the same conclusion here; the delegation of authority regarding promotion and tenure decisions made by the Board of Trustees in the collective bargaining agreement is lawful and binding.

By majority vote, the Board holds that grievants have established their entitlement to the relief they seek. The grievants have satisfied all requirements under the collective bargaining agreement for promotion or tenure, and each received the approval of their respective College presidents. The denial of their promotion or tenure by the Trustees is contrary to the agreement.

The foregoing discussion is adequate to dispose of the issues raised by these grievances. The Board, therefore, finds it unnecessary to consider the grievants' objections pertaining to the handling of their grievances before the proceedings reached this Board.

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. The Trustees of the Vermont State Colleges grant to grievants Roberta J. Hackel, Louise Esiason and Stephen Butterfield promotion to the rank approved by the President of their College as stated above, and the Trustees of the Vermont State Colleges grant tenure to Joseph Whelan and James Vize.

2. Grievants' promotion in rank and tenure so ordered shall be made retroactive to the time such promotions or tenure would have been given effect if approved by the Trustees at the 1979 spring Trustees' meeting for personnel actions. The Vermont State Colleges shall give the grievants back pay and benefits accordingly.

DATED at the City of Montpelier, County of Washington, and State of Vermont this 9th day of May, 1980.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

*Before \$10.
Decision Affirmed*

Dissent

I must dissent from my colleagues in this matter. I agree with my colleagues that the Trustees can delegate their authority or responsibility under the contract with respect to tenure and promotions. However, I do not think the contract requires that it be interpreted in derogation the statute giving the Trustees such authority. The words "final determination" can, as well, be interpreted to relate to "evaluation" as to promotion.

With respect to "past practice," the evidence shows the personnel files were brought to the meetings of the Trustees; a personnel sheet was supplied to the Trustees and promotions were discussed; albeit primarily relating to financial grounds rather than merits. A majority of the Board interprets the evidence as showing "past practices" as affirming that Trustees had bargained away their prerogatives as to promotion and tenure. Yet the above evidence reinforces the Trustees' position that they had not done so.

The only years involved are from 1976 to 1979. In 1979 the Trustees clearly asserted their position through the actions of their personnel committee and its recommendations and then acceptance of these recommendations by the full Board, contrary to the recommendations of the Presidents.

Grievant's Exhibit No. 3 (??), Vermont State Colleges Administrative Policy and Criteria on Tenure and Promotion fails to indicate that financial considerations of the State College system would be a consideration regarding either tenure or early promotion. These criteria were published 23 January 1976 and are evidence that Trustees considered that and were saying to the faculty that the ultimate decision process would rest with the Trustees.

It could be that the grievants might claim that this exhibit was a representation or promise to grievants that outstanding achievement would merit early promotion or tenure, and that on this basis grievants were entitled to the relief they seek. However, the recent hearing was not directed to this point.

Accordingly, I would deny judgment in favor of the grievants on these issues raised at the recent hearing and set the cases for further hearing on the other issues raised in the cases.

Dated this 9th day of May, 1980.


Robert H. Brown, Board member