

VERMONT LABOR RELATIONS BOARD

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|---------------|---|------------------|
| GRIEVANCE OF: | ) |                  |
|               | ) | DOCKET NO. 12-34 |
| JOHN ALEONG   | ) |                  |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is a dispute over any back pay and benefits due John Aleong (“Grievant”) as a result of the improper disciplinary action imposed on him by the University of Vermont (“Employer”) on May 10, 2012, of making him ineligible for assignments yielding supplemental or additional compensation until the end of the Spring 2015 semester. On April 30, 2013, the Vermont Labor Relations Board issued Findings of Fact, Opinion and Order, rescinding this disciplinary action. 32 VLRB 218. The Board ordered the Employer to remove the disciplinary action from Grievant’s personnel file and give it no further force or effect. Id. at 254. The Board also ordered the Employer to “provide Grievant with any back pay and benefits he would have received if this improper disciplinary action had not occurred.” Id. The Board left the case open for the purpose of issuing an order determining “the specific amount of any back pay and other benefits due Grievant”.

The parties were unable to reach agreement on this issue, and an evidentiary hearing was held on October 10, 2013, in the Labor Relations Board hearing room in Montpelier before Board Members Linda McIntire, Acting Chairperson; James Kiehle and Alan Willard. Attorney Pietro Lynn represented Grievant. Attorney Jeffrey Nolan represented the Employer. Grievant and the Employer filed post-hearing briefs on October 24 and 25, 2013, respectively.

## FINDINGS OF FACT

1. Article 19 of the collective bargaining agreement between the Employer and United Academics, effective December 5, 2011 – June 30, 2014, provides in pertinent part:

...

### **19.1**

Supplemental Compensation: For purposes of this Article, “supplemental compensation” is defined as compensation paid by and through the University during the regular appointment period of a faculty member in excess of his or her base salary. Supplemental compensation received during a nine-, ten- or twelve-month appointment period may not exceed 25% of the base salary without advance written approval by the Provost, in consultation with the Dean. . .

### **19.2**

A nine-, ten- or twelve month faculty member may, under certain circumstances, receive “supplemental compensation”:

...

**b.** For work performed for Continuing Education (CE) as described in Section 4 of this Article.

...

### **19.3**

... **c.** ... (T)he Department Chair, with the input of the Dean as documented by an approved “Part B” workload plan, may approve “supplemental compensation” as follows:

...

**iii.** Sponsored Activities: A faculty member is eligible to receive supplemental compensation funded by a grant or contract only upon the prior written approval of the Chair and Dean as documented by an approved “Part B” workload plan and when allowed by the grant or contract sponsor(s). . .

### **19.4**

Subsequent to obtaining approval through the process outlined in Section 8 of this Article, faculty who teach credit bearing courses or who perform non-credit work for CE during their appointment period will separately contract with CE for such approved supplemental work and compensation. Evening Division course rates shall be the same as the supplemental rates, specified in Section 3.c.i of this Article. If a faculty member on a ten- or twelve-month appointment teaches summer session courses during his or her appointment period, evening division

rates apply. Approval of such supplemental work and compensation will follow the procedures outlined in Sections 3 and 8 of this Article.

...

#### **19.6**

**Additional Compensation:** For purposes of this Article, “additional compensation” is defined as compensation paid by and through the University to a faculty member outside of the regular nine- or ten-month appointment period for additional work that has been accepted and performed for his or her home department or another academic department or CE and which is not included in the faculty member’s workload plan.

Additional compensation will generally not exceed 3/9 of the base salary for the preceding academic year for nine-month faculty and 2/10/ of the base salary for the preceding fiscal year for ten-month faculty. A faculty member may receive “additional compensation” as follows:

**a. Sponsored Activities:** Faculty members shall be eligible for compensation as expressly provided in a University-approved grant or contract, and subject to any limitations imposed by the grantor or contractors, at the following rates:

- i.** Monthly – 1/9 of the prior academic year base salary for nine-month faculty or 1/10/ of the prior FY base salary for ten-month faculty.
- ii.** Weekly – 1/39 of the prior academic base salary for nine-month faculty or 1/43 of the prior FY base salary for ten-month faculty.

...

#### **19.8**

**Supplemental and Additional Compensation Procedures**

- a.** The faculty member must request approval through the customary workload plan approval process prior to accepting or performing any supplemental and/or additional work that is outside his or her home department. Such request will be processed via submission of the workload plan “Part B” to the Department Chair.
- b.** The Department Chair and Dean shall review all workload plan – “Part B” submissions for supplemental or additional work subject to the parameters set forth in this Article and shall provide a written response reasonably in advance of a faculty member’s acceptance of such work.
- c.** The hiring (academic or non-academic) department upon receiving from the faculty member a written evidence of approval by his or her Chair and Dean is authorized to retain a faculty member to perform supplemental or additional work. . .

...

(University Exhibit 1)

2. Grievant has held a .8 FTE tenured position in the Department of Plant and Soil Sciences in the College of Agricultural and Life Sciences (“CALs”) since 1994.
3. Deborah Neher, Chair of the Department of Plant and Soil Science, is Grievant’s direct supervisor. Neher sets Grievant’s annual workload.
4. Grievant has never taught a Continuing Education course through the Plant and Social Science Department, in either the Evening Division or the Summer Session.
5. Grievant also held a non-tenured .2 FTE assignment in the College of Engineering and Mathematical Sciences (“CEMS”) from 1994 through May 31, 2012. The Employer terminated this assignment on May 31, 2012, and Grievant has not had this assignment since then.
6. At all times relevant, James Burgmeier has been the Chair of the Department of Mathematics and Statistics, which is part of CEMS.
7. Grievant has not taught a Continuing Education course in statistics since 2002.
8. Grievant has not taught a Summer Session course in any subject for the Continuing Education program since 2002.
9. Burgmeier has followed a similar process for many years for the selection of faculty to teach Continuing Education Evening Division and Summer Session mathematics courses. He distributes a list of Continuing Education courses that will be offered to faculty, solicits volunteers to teach the listed courses, then selects a faculty member for each course from those who express an interest in teaching the course. He circulates the list for summer and fall courses during early February of the year the

courses will be offered. He circulates the spring semester courses during early September of the year before the courses will be offered.

10. There used to be more interest by faculty in requesting to teach Continuing Education courses than available courses. In recent years, interest has declined. Sometimes, courses are filled quickly. At other times, courses are not filled until three to four weeks before courses start.

11. Burgmeier generally selects faculty for Continuing Education Evening Division courses offered during fall and spring semester courses based on a hierarchy that was agreed upon by Mathematics Department faculty many years ago. First preference is given to lecturers and junior faculty in the Department of Mathematics and Statistics. This is because they are paid less than tenured faculty in the department, and teaching Continuing Education courses allows them to supplement their incomes. Second preference is given to tenured faculty in the department. Burgmeier does not consider Grievant for teaching these courses unless the faculty in the department have declined interest in teaching them and he expresses interest.

12. Since 1995, Grievant has taught a total of three Continuing Education mathematics courses. He taught Math 009, College Algebra, in the Spring 2011 semester. He taught Math 009 again in the Fall 2011 semester. He taught Math 017, Applications of Finite Math, in the Spring 2012 semester. Burgmeier assigned these courses to Grievant after Grievant expressed interest in teaching them, and after none of the faculty who would be given preference over Grievant would have expressed interest (University Exhibit 19).

13. Burgmeier generally selects faculty for Continuing Education Summer Session courses based on a different hierarchy. The Department of Mathematics and Statistics seeks to provide additional income to mathematics graduate students by assigning them to teach Summer Session courses, and gives them preference in Summer Session courses along with lecturers in the department. The selection process typically does not go beyond graduate students and lecturers. If it does, preference then is given to tenure-track and tenured faculty in the department. Burgmeier does not consider Grievant for teaching these courses unless the faculty in the department have declined interest in teaching them and he expresses interest.

14. Prior to February 22, 2012, Burgmeier sent an email to prospective instructors of math courses informing them that there were still a few sections of Summer 2012 Math classes without anyone assigned to teach them, and instructing them to reply if they were interested. The sections listed by Burgmeier were: 1) Math 001, Elementary College; 2) Math 009, College Algebra; 3) Math 017, Applications of Finite Math; 4) Math 020, Fundamentals of Calculus II; and 5) Math 052, Fundamentals of Mathematics. On February 22, 2012, Grievant sent an email to Burgmeier, stating: "I would appreciate if I can get the opportunity to teach at least one course during the summer." Burgmeier did not offer Grievant any courses for the Summer of 2012 (Grievant's Exhibit II)

15. On March 14, 2012, Grievant informed Burgmeier by email that he would like to be considered to teach Math 017, Applications of Finite Math, for the Fall 2012 semester. Burgmeier did not offer Grievant any courses for the Fall 2012 semester (Grievant's Exhibit JJ).

16. On May 10, 2012, the Employer imposed disciplinary action on Grievant of making him ineligible for assignments yielding supplemental or additional compensation until the end of the Spring 2015 semester. Burgmeier was aware of this disciplinary action. There is no evidence that this disciplinary action affected Burgmeier's considerations whether to select Grievant to teach Continuing Education mathematics course during the 2012 Summer Session and the Fall 2012 semester.

17. One section of Math 009, College Algebra, a Continuing Education course previously taught by Grievant during the Spring 2011 and Fall 2011 semesters, was offered during the 2012 Summer Session. Burgmeier assigned Graduate Student Williams, a Mathematics doctoral candidate, to teach Math 009 during the 2012 Summer Session. Williams had taught this course during a previous summer session. Burgmeier made the assignment consistent with the selection hierarchy under which graduate students were given preference for teaching Summer Session courses (University Exhibit 28).

18. Three sections of Math 017, Applications of Finite Math, a Continuing Education course previously taught by Grievant during the Spring 2012 semester, were offered during the 2012 Summer Session. Burgmeier assigned Mathematics Department Senior Lecturer Karla Karstens to teach the sections, one of which was a classroom course and the other two were online offerings. Karstens had developed the on-line version of the course. Burgmeier considered Karstens the "guru" of Math 017. He assigned her to teach the course whenever she was available and expressed interest in teaching it (University Exhibit 28).

19. There is no evidence that Grievant has taught any on-line courses during his employment with the University.

20. Two Continuing Education sections of Math 009 were offered during the Fall 2012 semester. Burgmeier assigned Mathematics Department Senior Lecturer Tony Julianelle and Mathematics Department Adjunct Lecturer Susan McAuliffe to teach these sections. Burgmeier made the assignments consistent with the selection hierarchy which gave lecturers interested in teaching a Continuing Education course preference in being selected (University Exhibit 29).

21. Two Continuing Education sections of Math 017, one classroom and the other on-line, were offered during the Fall 2012 semester. Karstens expressed interest in teaching these two sections. Burgmeier assigned Karstens to teach both sections (University Exhibit 29).

22. One Continuing Education section of Math 009 was offered during the Spring 2013 semester. Burgmeier selected mathematics graduate student Melanie Brown to teach this course. Her husband was a teacher at Mount Mansfield Union High School. They were committed to remaining in the area rather than moving to seek another career opportunity for her. Burgmeier assigned the course to Brown to provide her with additional income given the circumstances. Grievant did not express interest in teaching this course during the Spring 2013 semester (University Exhibit 30).

23. Two Continuing Education sections of Math 017, one classroom and the other on-line, were offered during the Spring 2013 semester. Karstens expressed interest in teaching the on-line section of the course. Burgmeier assigned her to teach it. Adjunct



Lecturer Susan McAuliffe expressed interest in teaching the classroom section of the course. Burgmeier assigned her to teach it (University Exhibit 30).

24. One Continuing Education section of Math 009 was offered during the 2013 Summer Session. Burgmeier assigned Graduate Student Williams to teach Math 009 during the 2013 Summer Session. As discussed above, Williams had taught this course during two previous summer sessions (University Exhibit 31).

25. Two sections of Math 017, both on-line, were offered during the 2013 Summer Session. Burgmeier assigned Karstens to teach the on-line courses once she expressed interest in teaching them (University Exhibit 31).

26. Three Continuing Education sections of Math 009, two classroom and one on-line, were offered during the Fall 2013 semester. Burgmeier assigned Mathematics Department Adjunct Lecturer Mary Cox to teach the two classroom sections, and assigned Mathematics Department Senior Lecturer Joseph Kudrle to teach the on-line section. Burgmeier made these assignments consistent with the selection hierarchy under which lecturers were given preference for teaching Continuing Education courses during semesters. Also, Burgmeier considered that Cox recently had been laid off from her full-time position at the University for budgetary reasons, and she was left without full-time employment or health insurance (University Exhibit 32).

27. Two Continuing Education sections of Math 017, one classroom and the other on-line, were offered during the Fall 2013 semester. Burgmeier again assigned Karstens to teach the on-line section of the course, and again selected McAuliffe to teach the classroom section (University Exhibit 32).

28. At all times relevant, Deborah Neher, as Chair of the Plant and Soil Department and Grievant's supervisor, had to approve any grant-related work which Grievant wished to perform and for which he received funding. Neher approved three grants under which Grievant performed work in 2008 and 2009. Neher has never denied a request by Grievant to do grant-related work (University Exhibits 34, 35).

29. Julie Smith, an Associate Professor of Animal Science at the University, prepared a grant application which may involve work by Grievant during a time period beginning after the Labor Relations Board's April 30, 2013, Order on the merits in this matter. There is no evidence that the application by Smith has been funded. There also is no evidence as to the specific compensation, if any, which Grievant would receive if the grant application is approved and funded.

### OPINION

At issue is a dispute over any back pay and benefits due Grievant as a result of the improper disciplinary action imposed on him on May 10, 2012, by the Employer of making him ineligible for assignments yielding supplemental or additional compensation until the end of the Spring 2015 semester. The Board has rescinded this disciplinary action, and ordered the Employer to provide Grievant with any back pay and benefits he would have received if this improper disciplinary action had not occurred.

In calculating a back pay award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the

amount necessary to make the employee "whole".<sup>1</sup> To make employees whole is to place them in the position they would have been in had they not been improperly disciplined.<sup>2</sup> In the context of this case, this means determining the assignments yielding supplemental or additional compensation which Grievant would have received if he had not been improperly disciplined.

Grievant contends that, due to the lost income and additional time resulting from the elimination of his .2 FTE position in May 2012, he would have taught two Summer Continuing Education courses in addition to one Continuing Education course per semester during each academic year. Grievant limits his back pay claim to the contention that he would have been assigned to teach Math courses during the summer sessions and the fall and spring semesters. Specifically, Grievant asserts that he would have been assigned to teach two Math courses during the 2012 Summer session, one Math course during the Fall 2012 semester, one Math course during the Spring 2013 semester, two Math courses during the 2013 Summer session, and one Math course during the Fall 2013 semester.

We first discuss the summer session courses. Grievant did not present any evidence demonstrating a history of being assigned to teach Continuing Education Math courses during summer sessions. Grievant has not taught a summer session course in any subject for the Continuing Education program since 2002.

Moreover, despite the lost income and additional time resulting from the elimination of his .2 FTE position, the evidence does not indicate that Grievant would

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<sup>1</sup> Grievance of Goddard, 4 VLRB 189, at 190-191 (1981). c.f., Kelley v. Day Care Center, Inc., 141 Vt. 608, at 615-616 (1982).

<sup>2</sup> Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591, 593 (2002). Grievance of Benoit, 8 VLRB 165, 168 (1985).

have been assigned to teach a Continuing Education Math course during the summer sessions if he had not been improperly disciplined. First, the Math course assignments made by Mathematics Department Chair James Burgmeier for the 2012 summer session generally would have been made before the May 2012 disciplinary action was imposed on Grievant. Also, Grievant has not presented evidence on any Math courses for the 2012 summer session which he was suited to teach and which were assigned after the imposition of this disciplinary action. Thus, we cannot conclude Grievant would have been assigned to teach a Math course during this summer session if he had not been disciplined.

Further, the Math course assignments made by Burgmeier for this summer session were made pursuant to a long-standing course assignment hierarchy used by him. This hierarchy is characterized by giving preference to graduate students and lecturers in the Mathematics Department to teach these courses. The selection process typically does not go beyond graduate students and lecturers. The assignments made during the 2012 Summer session for Math courses previously taught by Grievant were consistent with this course selection process as the courses were assigned by Burgmeier to a graduate student and senior lecturer in the Mathematics Department who previously had taught the courses. There is no evidence that the May 2012 disciplinary action imposed on Grievant affected Burgmeier's considerations in making these assignments.

We reach the same conclusion with respect to the 2013 Summer session assignments made by Burgmeier. The assignments for Math courses previously taught by Grievant went to the same graduate student and senior lecturer who previously had taught the courses during the 2012 Summer session, and to a Mathematics Department adjunct

lecturer. Again, this was consistent with the long-standing course selection process and there is no evidence that Grievant's disciplinary action affected Burgmeier's considerations in making these assignments.

We turn to discussing the Continuing Education Math courses offered during fall and spring semesters. Contrary to the evidence relating to the summer session, there is a history of Grievant teaching Continuing Education Math courses during fall and spring semesters. Since 1995, Grievant has taught a total of three Continuing Education mathematics courses during these semesters. He taught Math 009, College Algebra, in the Spring 2011 semester. He taught Math 009 again in the Fall 2011 semester. He taught Math 017, Applications of Finite Math, in the Spring 2012 semester.

Nonetheless, the evidence does not indicate that Grievant would have been assigned to teach a Continuing Education Math course during the Fall 2012 semester if he had not been improperly disciplined. The Math course assignments made by Burgmeier for this semester generally would have been made before the May 2012 disciplinary action was imposed on Grievant. Also, Grievant has not presented evidence on any Math courses for the Fall 2012 semester which he was suited to teach and which were assigned after the imposition of this disciplinary action. Thus, we cannot conclude Grievant would have been assigned to teach a Math course during this semester if he had not been disciplined.

Also, Math course assignments made by Burgmeier for this and other semesters have to be considered in light of a long-standing course assignment hierarchy used by Burgmeier. This hierarchy is characterized by giving first preference to lecturers and junior faculty in the Mathematics Department to teach these courses, and providing

second preference to tenured Mathematics Department faculty. Grievant is a faculty member in the Department of Plant and Soil Sciences, not the Mathematics Department. Burgmeier does not consider Grievant for teaching these courses unless the faculty in the department have declined interest in teaching them and he expresses interest. Burgmeier assigned Grievant to the Continuing Education Mathematics Department courses during the previous semesters discussed above after he expressed interest in teaching them, and after none of the faculty who would be given preference over Grievant would have expressed interest.

The assignments Burgmeier made for the Fall 2012 semester for Math courses previously taught by Grievant were consistent with the longstanding course selection process followed by Burgmeier as the courses were assigned by Burgmeier to Mathematics Department lecturers. There is no evidence that the May 2012 disciplinary action imposed on Grievant affected Burgmeier's considerations in making these assignments.

We make a similar determination with respect to the Math course assignments made by Burgmeier for the Spring 2013 semester. Assignments for two sections of a course previously taught by Grievant were consistent with the established course selection process as they were assigned by Burgmeier to Mathematics Department lecturers. Burgmeier selected a mathematics graduate student to teach another course previously taught by Grievant. We cannot conclude that Grievant would have been selected to teach this course if he had not been improperly disciplined given that he expressed no interest to Burgmeier in teaching this course this semester and the evidence

does not indicate that the disciplinary action affected Burgmeier's considerations in making this course assignment.

The assignments made by Burgmeier for the Fall 2013 semester for Continuing Education Math courses previously taught by Grievant also were consistent with the selection hierarchy under which Mathematics Department lecturers were given preference for teaching Continuing Education courses during semesters. All the assignments were provided to department lecturers. Further, there is no evidence that the disciplinary action imposed on Grievant affected Burgmeier's considerations in making these assignments.

In sum, the evidence does not indicate that Grievant would have been assigned to teach any Continuing Education Math courses during the 2012 Summer session, the Fall 2012 semester, the Spring 2013 semester, the 2013 Summer session, or the Fall 2013 semester if he had not been improperly disciplined.

Finally, we address whether Grievant would have received supplemental or additional compensation in the form of a grant or grants if he had not been improperly disciplined. Grants are a form of supplemental or additional compensation requiring department chairperson approval pursuant to Article 19 of the applicable collective bargaining agreement. As such, Grievant would be entitled to back pay if he would have received a grant or grants if he had not been improperly disciplined.

Grievant contends that he lost \$60,000 of grants income due to the improper discipline. Grievant's claim is unsupported by the evidence. Grievant's department chairperson never denied a request by Grievant to perform grant-related work. Further, Grievant has not presented evidence on any funded grant for which he would have done

work. Another faculty member prepared a recent grant application which may involve work by Grievant. However, there is no evidence that the application has been funded. There also is no evidence as to the specific compensation, if any, which Grievant would receive if the grant application is approved and funded. There is no basis to award Grievant any grant-related back pay under these circumstances.

### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that Grievant John Aleong is awarded no back pay and benefits in this matter.

Dated this 19th day of November, 2013, at Montpelier, Vermont.

#### VERMONT LABOR RELATIONS BOARD

/s/ Linda P. McIntire

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Linda P. McIntire, Acting Chairperson

/s/ James C. Kiehle

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James C. Kiehle

/s/ Alan Willard

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Alan Willard