

## Reappointment and Tenure of Faculty

Under the contracts between the Vermont State Colleges and the State Colleges Faculty Federation, the VLRB and the Supreme Court have issued many decisions concerning the reappointment and tenure of State Colleges faculty. The protection offered faculty members under the contract with respect to VLRB and Court review of reappointment and tenure decisions extends more towards ensuring defined procedures are followed than substantive review of the merits of a decision.

Defined dismissal procedures, although generous beyond the due process requirements that bind an agency, are binding and must be scrupulously observed.<sup>1</sup> This principle has been applied specifically in State Colleges faculty reappointment and tenure decisions.<sup>2</sup>

If procedural shortcomings exist in a case where a faculty member is grieving non-reappointment or denial of tenure, the VLRB will determine if the shortcomings had a significant effect on the president's ultimate decision.<sup>3</sup> If so, backpay and/or reconsideration of the reappointment or tenure decision, or other remedies, may be appropriate.<sup>4</sup> If not, monetary damages and other remedies may still be appropriate if procedural violations carried negative consequences for the grievant.<sup>5</sup>

However, in the absence of procedural violations, the scope of review of the VLRB and the Supreme Court is extremely limited. Under an early 1980's contract between the State Colleges and the Faculty Federation, it was clearly intended that the president be allowed full discretion in reappointment decisions of first and

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<sup>1</sup> Nzomo v. Vermont State Colleges, 136 Vt. 97, 100 (1978).

<sup>2</sup> Id. Grievance of Burrill, 1 VLRB 386, 398 (1978); 2 VLRB 211 (1979).

<sup>3</sup> Nzomo v. Vermont State Colleges, 138 Vt. 73 (1980). Grievance of McDonald and VSCFF, 4 VLRB 42, 4 VLRB 280 (1981).

<sup>4</sup> VSCFF and Peck v. Vermont State Colleges, 139 Vt. 329 (1981). *On remand*, 4 VLRB 334 (1981). McDonald, 4 VLRB at 280-283. Burrill, *supra*.

<sup>5</sup> Nzomo, *supra*, 138 Vt. at 75-76. Peck, 139 Vt. at 133; 4 VLRB at 341-42. Grievance of Sypher and VSCFF, 5 VLRB 102 (1982).

second-year faculty, as the president was not even required to give written reasons for the decision.<sup>6</sup> The presumption of renewal for faculty with less than three years was terminated upon proper written notification and nothing more.<sup>7</sup> As long as notice was properly given, the president had total discretion.<sup>8</sup>

Under that contract, written notice of dismissal was required to be given after the third full year of service. In one case, the VLRB determined that the non-reappointment of a faculty member for a fourth year would be upheld as long as there was a rational basis for the president's decision.<sup>9</sup> The VLRB applied this same rule when a non-tenured faculty member was timely notified prior to his sixth year that his sixth year of employment would be his last.<sup>10</sup>

The early 1980's contract further provided that faculty members would be reviewed for tenure during their sixth year of full-time faculty service, and that the VLRB's scope of review was limited to determining that "the reasons (for denial of tenure) are erroneous or that they constitute an arbitrary or discriminatory application of the (tenure) criteria". The VLRB interpreted the "erroneous" standard to apply to those cases where the stated reasons are plainly contrary to established fact or based on incorrect information.<sup>11</sup>

An "arbitrary" decision is one "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance".<sup>12</sup> The VLRB indicated that it would find the Colleges applied the tenure criteria in an arbitrary manner if it was determined that

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<sup>6</sup> Grievance of Swett, 4 VLRB 98, 106 (1981); *Affirmed*, 141 Vt. 275, 277 (1982).

<sup>7</sup> Swett, 141 Vt. at 277.

<sup>8</sup> Id.

<sup>9</sup> Grievance of Shockley, 5 VLRB 192, 208-209 (1982).

<sup>10</sup> Grievance of Sweetland and VSCFF, 6 VLRB 396, 404 (1983); *Affirmed*, (Unpublished decision, Vermont Supreme Court, October 18, 1985).

<sup>11</sup> Grievance of Fairchild, 4 VLRB 164 (1981); *Affirmed*, 141 Vt. 362 (1982).

<sup>12</sup> Grievance of Lewandoski, 142 Vt. 446, 453-454 (1983).

the faculty member had insufficient notice in which to comply with the tenure criteria, or that the decision to deny tenure constituted a capricious or unprincipled determination that departed from the established criteria.<sup>13</sup>

In determining whether a discriminatory application of the tenure criteria occurred, the VLRB and the Court interpreted discriminatory treatment as the "unequal treatment of individuals in the same circumstances under the applicable rule".<sup>14</sup> Thus, an examination was made as to how the tenure criteria were applied to faculty members similarly situated to the grievant.<sup>15</sup>

Accordingly, the scope of review of tenure decisions by the VLRB and Court was extremely limited under this contract. As the Court stated:

It is irrelevant whether we would or would not choose to grant tenure to grievant. That decision has not been left to this Court or the Board, but is instead vested in the College. The (collective bargaining) agreement itself expressly mandates that the Board is to dismiss any grievance involving the denial of tenure unless the reasons offered in support thereof represent an "arbitrary or discriminatory" application of tenure criteria.<sup>16</sup>

In exercising this limited scope of review, the VLRB and the Court usually dismissed the grievances and upheld the tenure denials.<sup>17</sup> In only one case did the VLRB sustain the grievance on the ground that the tenure decision was arbitrary, discriminatory or based on erroneous reasons. The VLRB determined that the denial of tenure was arbitrary since the grievant was caught in a major policy shift with regard to tenure requirements. He was given only 15 months to obtain a terminal degree and conform to the new tenure criteria.<sup>18</sup>

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<sup>13</sup> Grievance of D'Aleo, 4 VLRB 192, 203 (1981); *Affirmed*, 141 Vt. 534 (1982).

<sup>14</sup> Fairchild, 4 VLRB at 178; 141 Vt. at 367.

<sup>15</sup> Id.

<sup>16</sup> Fairchild, 141 Vt. at 365.

<sup>17</sup> Fairchild, *supra*. D'Aleo, *supra*. Grievance of Lewandoski and VSCFF, 4 VLRB 347 (1981); *Affirmed*, 142 Vt. 466 (1983).

<sup>18</sup> Grievance of Burrill, *supra*.

The Colleges and the Faculty Federation subsequently negotiated changes in the reappointment and tenure provisions of the contract, and the Board had to construe those provisions in two 1995 decisions. In one grievance, involving a non-reappointment of a faculty member to a third year of employment, the contract provided that the College President was not required to give any written reasons for nonreappointment until deciding not to reappoint a faculty member to a fifth year of service. The Board construed this contract language to mean that the President has total discretion in pre-fifth year reappointment decisions, provided there is no violation of academic freedom or anti-discrimination provisions, or the procedures for reappointment.<sup>19</sup>

In a case involving denial of tenure to a faculty member, the Board examined whether the tenure denial was unreasonable, arbitrary or based on erroneous reasons in violation of the provisions of the contract.<sup>20</sup> The Board's scope of review was expanded by allowing the Board to consider whether the tenure decision was "unreasonable", but the Board stated that "it is irrelevant whether the Board would choose to grant tenure to a faculty member; that decision has not been left to this Board but is instead vested in the Colleges".<sup>21</sup>

The Board has issued two grievance decisions concerning the denial of tenure to University of Vermont faculty members. In a case which predated the first collective bargaining agreement negotiated by the University and the union representing faculty, the Board upheld the denial of tenure, concluding that the University did not violate any procedural and substantive rights of the faculty

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<sup>19</sup> Grievances of Murray and VSCFF, 18 VLRB 232, 256 (1995); *Affirmed*, 166 Vt. 198 (1997).

<sup>20</sup> Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261 (1995).

<sup>21</sup> Id. at 310.

member pursuant to the Officers' Handbook or other binding rules and regulations of the University.<sup>22</sup>

In the second case, decided under the collective bargaining agreement, the Board also upheld the denial of tenure. The Board concluded that the grievants had not demonstrated that the employer committed procedural violations in the tenure review process that materially and adversely affected the outcome of the faculty member's application for tenure. The Board further determined that the grievants did not establish that the denial of tenure was arbitrary and capricious.<sup>23</sup>

The Board also has issued several grievance decisions in which UVM faculty members have contested their non-reappointment by alleging that the University has committed procedural violations in the review process that materially and adversely affected the outcome of his reappointment case. This protection afforded faculty members under the Contract with respect to Board review of reappointment decisions concerns ensuring defined procedures are followed rather than substantive review of the merits of a decision.<sup>24</sup> "Procedures" refers to the specific steps and manner by which a faculty member will be reviewed.<sup>25</sup>

The grievant must demonstrate that there was a violation of a collective bargaining contract provision, or violation of a rule or regulation, relating to faculty review procedures for the Board to conclude that there was a procedural violation.<sup>26</sup> If standards for reappointment are applied that differ from standards for reappointment set forth in the collective bargaining contract or department

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<sup>22</sup> Grievance of McIsaac, 26 VLRB 24 (2003); *Affirmed*, 177 Vt. 16 (2004).

<sup>23</sup> Grievance of United Academics, AAUP/AFT and Campo, 29 VLRB 263 (2007).

<sup>24</sup> Grievance of Summa, 34 VLRB 249, 268 (2018). Grievance of United Academics, AAUP/AFT and Branch, 28 VLRB 325, 339 (2006). Grievance of United Academics, AAUP/AFT and Broughton, 27 VLRB 249, 262 (2004).

<sup>25</sup> Id.

<sup>26</sup> Summa, 34 VLRB at 268-69. Branch, 28 VLRB at 340-41.

guidelines, there may be a procedural violation in the review process that materially and adversely affects the outcome of the case.<sup>27</sup>

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<sup>27</sup> Id.