

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-222

APRIL TERM, 2019

In re Grievance of John Summa*	}	APPEALED FROM:
	}	
	}	Labor Relations Board
	}	
	}	DOCKET NO. 17-27

In the above-entitled cause, the Clerk will enter:

Grievant John Summa appeals the Vermont Labor Relations Board’s dismissal of his grievance challenging employer University of Vermont’s (UVM) decision not to reappoint him as a lecturer in the Department of Economics. We affirm.

The terms and conditions of grievant’s employment were governed by the December 2014 to June 2017 Collective Bargaining Agreement (CBA) negotiated between UVM and the full-time faculty bargaining unit for United Academics, as well as by department, college, and university policies and procedures. Lecturers in the Department of Economics undergo two types of review processes: less formal annual performance reviews based primarily on student evaluations and more formal reappointment reviews every four years that require peer evaluations.

In 2009, UVM hired grievant as a lecturer in the Department of Economics. He was reappointed in 2010 under a one-year contract and again in 2011 under a two-year contract. Grievant was reappointed following his first reappointment review in 2012-2013, but he was not reappointed following his second four-year review that commenced in the fall of 2016.

Under the governing contract and guidelines, the formal reappointment review process in the Department of Economics involves several steps. The Department Chair organizes class observations by tenured and tenure-tracked faculty members, who evaluate the teaching in written summaries. These peer evaluations become part of the reappointment review dossier, which also includes a self-summary by the faculty member under review. The Chair adds quantitative student course evaluation data to the dossier. Once the dossier is complete, it is available to eligible Department faculty members, who vote on whether to recommend reappointment. The Chair summarizes the faculty discussion and vote and then makes a recommendation to the Dean of the College of Arts and Sciences. The faculty member under review is given the dossier and has an opportunity to submit a written rebuttal. The Faculty Standards Committee (FSC) for the College of Arts and Sciences, which advises the Dean on matters of faculty reappointment and promotion, reviews the written record, votes on its own recommendation, and prepares a written summary for the Dean’s consideration. The Dean reviews the record, including the recommendations, and makes a final decision on reappointment. Under the CBA, a lecturer with at least four years of service may grieve a non-reappointment decision only on the following grounds: (1) procedural violations in the review process that materially affected the outcome of the case; (2) violations of

anti-discrimination provisions in the contract; (3) violations of academic freedom, as defined in the contract; (4) arbitrary and capricious decision-making, and (5) violations of constitutional rights.

Regarding grievant's 2012-2013 reappointment review, three Department professors, including the Chair, attended grievant's classes to evaluate his teaching effectiveness. The peer evaluators noted some areas of concern in their summaries of the class observations. The Chair noted that grievant needed to plan courses and lessons within those courses so that students received better guidance in understanding models, concepts, and techniques within the discipline. The Chair's summary stated that grievant had agreed to make an effort to improve his teaching by working with the Center for Teaching and Learning (CTL), observing classes taught by highly regarded colleagues, and by inviting senior faculty to observe more of his classes. The Chair stated that grievant was expected to continue to receive solid student evaluations and to work towards revising his teaching style to improve future peer observations. The faculty voted 6-2 to recommend grievant's reappointment, and the Chair joined this recommendation, while noting the faculty's concern regarding peer evaluations. The FSC voted 5-0 in favor of reappointment and recommended that grievant confer with the Chair to work out a plan for improving his teaching. While noting that there were issues with grievant's teaching, the Dean reappointed grievant, but stated that he would be looking for evidence of improvement following grievant's next review. Two years after this reappointment review, grievant was given a new two-year contract.

The second four-year reappointment review—which resulted in a decision not to reappoint grievant—commenced in the fall of 2016. The review also concerned grievant's application to be promoted to the rank of senior lecturer. During the fall 2016 semester, grievant was teaching three classes. One of seven peer reviewers, among whom was the Chair, visited each class three times on three different days, for a total of nine peer reviews. In her summary, the Chair noted that the student evaluations were within the desired range but that the peer evaluations revealed a number of serious concerns, including a lack of student engagement. The faculty voted 11-0 against grievant's promotion and 10-1 against his reappointment. The Chair concurred with the faculty vote and recommended that grievant not be reappointed. Grievant submitted a written rebuttal of the Chair's recommendation to the Dean. In its written summary, the FSC concluded that grievant had not demonstrated he had met the standard of consistently high-quality teaching to warrant a promotion to senior lecturer but that he had demonstrated he met the standard for reappointment as a lecturer. The FSC recognized the concerns raised in the peer evaluations but stated that those concerns had to be "discounted" because, notwithstanding the concerns raised in the 2012-2013 reappointment review, there had been no peer evaluations from the time of that review until shortly before his second reappointment review. Accordingly, the FSC voted 5-0 against promotion but 5-0 for reappointment. The Dean decided not to reappoint grievant, noting that the peer evaluations indicated shortcomings in lecture content, approach, organization, delivery, and student engagement, and that, based on grievant's self-evaluation, it did not appear that grievant had taken the expected steps to improve his teaching. Following this decision, grievant asked the Dean to review some additional information indicating that he had taken steps to improve his teaching. The Dean agreed to do so. Nevertheless, while acknowledging that grievant had consulted on occasion with colleagues about his teaching and had taken advantage of some CTL workshops, the Dean determined that significant weaknesses in grievant's teaching had persisted. The Dean stated that even if he had been made aware of grievant's efforts to improve his teaching, the decision would have been the same.

Pursuant to the CBA, grievant filed a step 2 grievance with the Dean. The Dean rejected grievant's assertion that his decision was procedurally flawed because it was based solely on peer evaluations, stating that he gave significant weight to those evaluations but made an overall

assessment of grievant's teaching record. The Dean also rejected the FSC's reasoning for recommending reappointment, stating that there was no requirement that peer evaluations be carried out with any specific regularity or timing outside of the reappointment process. Further, the Dean rejected grievant's suggestion that reappointment was not recommended because of grievant's critique of classical economic theory, stating that the faculty praised grievant's willingness to criticize the standard model, but were concerned that he did not do so in a pedagogically sound manner.

Grievant then moved on to step 3 of the formal CBA grievance procedure by taking his grievance to the Provost, who convened an ad hoc committee. The committee rejected each of the asserted bases for challenging the decision not to reappoint grievant, and the Provost denied the grievance, concluding that the record did not support grievant's allegations of material procedural violations, arbitrary decision-making, and a violation of academic freedom.

Step 4 under the formal CBA grievance procedure is an appeal to the Labor Relations Board. Here the Board dismissed grievant's appeal, concluding that: (1) there was no material procedural violation in the review process because Department guidelines required, rather permitted, peer evaluations only during four-year reappointment reviews; (2) the decision-making was not arbitrary or capricious; and (3) grievant's contractual academic-freedom rights were not violated.

Grievant now appeals to this Court, raising seven claims of error, which we consider in turn. "When reviewing a decision by the Board, we presume it is valid and reasonable, and give the Board substantial deference." McIsaac v. Univ. of Vt., 2004 VT 50, ¶ 26, 177 Vt. 16 (citation omitted). "Even if we would not have reached the same conclusion as the Board, we uphold its findings if they are supported by credible evidence." Id. "Therefore, we will overturn a Board decision only if it is shown to be clearly erroneous." Id.

As an initial matter, we deny grievant's motion to consider several exhibits that were not admitted into the record before the Board. Pursuant to Board rules, the parties exchanged pre-filed exhibits and submitted copies of those exhibits to the Board. Among the pre-filed exhibits submitted by grievant were three of the exhibits that he asks us to consider here. But at the pre-hearing conferences in which the pre-filed exhibits were reviewed to determine whether the parties were willing to stipulate to their admission, UVM objected to admission of those three exhibits, and grievant did not later offer them for admission into evidence. Moreover, following the two-day Board hearing, grievant did not cite to the three exhibits in his proposed findings and conclusions, and the Board's executive director confirmed that the exhibits had not been admitted for consideration. The other four exhibits that grievant asks us to consider were neither pre-filed nor admitted into evidence at the Board hearing. With the possible exception of an exhibit containing emails between grievant and a professor in the Department, none of these exhibits appear to provide relevant evidence with respect to the issues in this appeal. Most of them concern a project initiated by the Provost in 2014 to improve teaching evaluation across the entire university; there is no indication that whatever resulted from the project altered the governing contract provisions concerning grievant's reappointment. In any event, we decline to consider exhibits that were not in the record and not considered by the Board. As to the first three exhibits, Board rules plainly state that the pre-filing of exhibits does not constitute their admission into evidence. Grievant did not offer them into admission after UVM refused to stipulate to their admission. Grievant cannot litigate their admission in the first instance before this Court on appeal. Nor can grievant litigate here in the first instance the discoverability or relevance of the other four exhibits, and he has failed to demonstrate a meritorious basis for a remand for the Board to consider the additional exhibits.

Grievant's first claim of error concerns how he or the Chair addressed his teaching shortcomings that were highlighted in the 2012-2013 reappointment review. Grievant challenges the Board's findings that, following his 2013 reappointment, he did not ask the Chair or other faculty to review his classes nor did he ask to visit their classes. He cites an email exchange in which he and an Economics professor discuss grievant observing a lecture.* He also cites a December 2012 email exchange between him and the Chair, in which grievant indicated he would benefit from observing other professors' lectures and being observed by the Chair or other professors. In that exchange, the Chair responded by saying that the best way to talk to others about teaching would be on an "ad hoc basis" and that she could arrange more visits if they were "clear on the purpose." Grievant contends that this email exchange constituted a request for help and that there is no evidence in the record of the Chair providing that help.

We conclude that the record supports the Board's finding that, after the Chair's visit to one of grievant's classes in February 2013, no other professor observed or evaluated his classes before the reappointment review in 2016. As for the Board's finding that grievant did not ask other professors if he could attend their classes, three Economics professors testified at the hearing that they were unaware of grievant visiting another professor's class during that period. Grievant testified that he visited a now-deceased's professor's lecture on one occasion. To the extent that undercuts this one Board finding, which stated that grievant did not ask "other professors" if he could attend their classes to "learn by observing," this does not undercut the Board's other findings and conclusions supporting the dismissal of his grievance. See Abbiati v. Buttura & Sons, Inc., 161 Vt. 314, 320 (1994) ("A nonessential erroneous finding is not . . . grounds for reversal."); In re Merrill, 151 Vt. 270, 275 (1989) (stating that Board's findings must stand if supported by any evidence, "even is there exists substantial evidence contrary").

Grievant argues, however, that the failure to conduct any peer assessments of his teaching between reappointment periods is a procedural defect supporting his grievance. He claims that there were later discontinued past practices of conducting formal reviews when concerns arose about a faculty member's teaching but that this was not done in his case despite his reaching out to the Chair. He argues that the CBA implies a right to faculty in need of improvement to obtain peer assessment. The Board rejected this "procedural defect" argument, noting that the Department guidelines plainly stated that annual evaluations "may" include peer observations but that reappointment reviews "must" include peer observations. We agree with the Board's assessment. Grievant has failed to show a procedural defect under the applicable contract and guidelines. Grievant's argument that past practices created an implied contractual obligation lacks support in the record, relies in part on exhibits that were not part of the record or on provisions in the CBA not concerning reappointment reviews, and, in any event, is raised for the first time in this appeal. See Progressive Ins. Co. v. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388 (stating that arguments are not preserved on appeal unless presented with specificity and clarity in original forum to give that forum opportunity to rule on them prior to review).

For similar reasons, we reject grievant's argument that the Board erred by denying his motion to amend his grievance to allege a violation of a CBA article concerning annual performance reviews. The Board denied the motion based on grievant's failure to allege a violation of that article during any of the earlier steps of the grievance procedure. The Board relied on (1) a CBA provision requiring a grievant to cite at every step of the grievance process the provisions alleged to have been violated, and (2) its past decisions requiring the specific and timely raising of issues at earlier steps of the grievance procedure—both of which are aimed at furthering the policy of early and in-house resolution of grievances. Grievant argues that the failure to provide him with

* The email exchange was not part of the record but grievant testified to that exchange.

interim peer assessments was at the heart of his grievance from the beginning, but he fails to rebut the Board's determination that he never alleged a violation of the CBA article concerning annual performance evaluations. Accordingly, we discern no basis to overturn the Board's denial of his motion to amend.

Grievant also argues that the Board erred by failing to find that the Dean relied on a single criterion in denying his reappointment, which he claims is a violation of a sentence in a CBA provision stating that "no single set of measures and methods can be prescribed to evaluate the quality of teaching or advising." The Board's finding that the Dean did not rely solely on peer evaluations in its non-reappointment decision is supported by the Dean's explanation that, based on his review of all of the information contained in the dossier, he decided not to reappoint grievant due to the continuing deficiencies in grievant's teaching. As the Board concluded, the CBA did not require the Dean to give equal weight to the various measures of teacher effectiveness. The CBA provision cited by grievant merely notes that no single set of criteria is used to evaluate the quality of teaching and then sets forth a non-exclusive list of criteria. It does not prohibit the Dean from relying heavily on one particular criteria in a particular case.

In a related argument, grievant contends that the Dean's decision was arbitrary and capricious because his initial decision was based on grievant not actively doing things to improve his teaching, but then after the Dean agreed to review grievant's further submissions on what grievant had done in that regard, the Dean focused exclusively on peer evaluations. Again, we disagree. As the Board found, the Dean simply considered more information that grievant had not provided earlier and then concluded, notwithstanding the new information, that the evidence demonstrated the persistent weaknesses in grievant's teaching, which warranted his non-reappointment. Adjusting the stated bases for a decision when presented with new information is not arbitrary and capricious.

As for grievant's academic-freedom argument, like the Board, we find virtually no evidence in the record to support grievant's assertion that the real reason for his non-reappointment was the Chair's disapproval of his provocative teaching and criticism of standard economic models. Indeed, grievant does not challenge the Board's finding, which is supported by evidence in the record, that the Department supported teaching a broad range of schools of economic thought and that grievant's non-reappointment stemmed primarily from the manner in which he presented topics to his students.

Finally, grievant argues that the Board erred by denying his motion to reconsider its decision, in which he claimed that he should get a new hearing because the Board chairperson had a conflict of interest as the corporate secretary of the Delta Dental board, given that UVM is a client of Delta Dental. In response to grievant's motion, the Board stated that the chairperson did not disclose his Delta Dental board membership because he saw no connection between such service and the case at hand, that he would not have recused himself even if grievant had sought his recusal prior to the hearing, that he is not involved in any sales efforts by Delta Dental in connection with the company's numerous clients, including UVM, and that he did not know any of the witnesses at the hearing or any of the UVM decision-makers in the case. In denying grievant's motion, the Board stated that there was no opportunity for the chairperson to derive any financial or other private gain from his involvement in the case and that grievant had not articulated any plausible connection between the chairperson's Delta Dental service and the decision on grievant's reappointment.

On appeal, in addition to the Delta Dental connection he brought before the Board after the hearing, grievant states for the first time on appeal that the chairperson graduated from UVM's

business school. For the reasons stated by the Board, we discern no basis to order a rehearing on the claimed conflict of interest. Even assuming grievant's statements are accurate, they would not compel the chairperson's recusal. Cf. McIsaac, 2004 VT 50, ¶¶ 22-24 (stating that party seeking recusal has burden of establishing grounds for recusal, and ruling that Board acted within its discretion in denying prehearing motion by professor grieving UVM tenure decision, who was seeking recusal of Board hearing panel member who had been on UVM's board of trustees during professor's first tenure review and who had a passing acquaintance with UVM decisionmakers in case).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice