IN THE SUPREME COURT
OF THE STATE OF VERMONT

DOCKET NO. 2018-222

JOHN SUMMA

v.

THE UNIVERSITY OF VERMONT
AND STATE AGRICULTURAL COLLEGE

APPEALED FOM THE VERMONT LABOR RELATIONS BOARD
GRIEVANCE OF JOHN SUMMA
DOCKET NO. 17-27

REPLY BRIEF OF APPELLANT, JOHN SUMMA, PH.D

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Table of Contents

1 The Chair wrote that the reason "really why" the Appellant was not allowed to continue, as opposed to other claims, was his "content." This reference to content cannot be dismissed as merely alluding to how the Appellant was teaching, which the Appellee would like this Court to believe, as the Chair clearly distinguishes matters of *how* the class was presented (time management, etc.) from the *content*, which is clear from her email obtained through a public records request. (See Appellant's Brief, p. 13 and p. 30.)

Summary: The Appellant asserted at every step in the grievance process that his academic freedom rights were breached. In UVM's Collective Bargaining Agreement (CBA) with its faculty (Article 6), "The 1940 AAUP Statement of Principles on Academic Freedom"[2] is cited. The AAUP Statement includes academic freedom principles that have been upheld by the Supreme Court of the United States. An academic freedom claim has been identified by the Supreme Court as a constitutional claim – the two are inseparable. The Appellant's constitutional claim is thus preserved and *de novo* review is required by this Court.

Summary: The Grievant (now Appellant) raised the issue of the Chair's failure to conduct appropriate interim peer reviews at every step of his grievance, and thus the argument of failure to conduct follow-up (ad-hoc, interim) peer reviews was not raised for the first time at the Labor Board. The Chair's failure to conduct follow-up reviews violates Article 14.3 and taints the entire review process contained in Article 14. Appellant thus never waived his right to make this argument and it was never his intention to do so. Board erred in finding that the Appellant was raising the issue for the first time by amending his grievance. The Appellant simply moves to amend his grievance by grounding the original argument in Article 14.3.

2 See. https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure for the 1940 "Statement." As the AAUP notes: "In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure."

Summary: An appearance of bias should have led to Chair Park's disqualification. The Board claims there was no actual bias, but the Appellant argued that an appearance of bias necessitated recusal. Actual bias, or not, is a secondary issue.

Table of Authorities

Federal Cases

Misc.

I. Introduction

The Appellee would like this Court to permit a selective application by UVM (Appellee) of its established rules, practices and guidelines for reviewing its faculty. The VLRB clearly erred in not finding that the Appellee decided for itself what rules, practices and guidelines it would follow and what those it would ignore. Some were followed by the Chair and Dean in the reappointment review process pursuant to the Collective Bargaining Agreement, but the Chair did not follow *her own department practices*[3] in the application of requirements for reviewing the Appellant's teaching *between* reappointment reviews - thus tainting the entire process.

The Appellee cannot choose when to apply practices and when it can flout them. Faculty success depends on practices consistently being followed at all times (not arbitrarily applied when it suits the Appellee) and at each step in the overall review process, which comprises a whole embodied in Article 14 of UVM's Collective Bargaining Agreement (CBA). The Board erred in finding the process not flawed. The process as a whole was made defective when request for help from the Chair, clearly made by the Appellant in the form of written and verbal requests for additional peer reviews, went unfulfilled. The Chair was obligated (required pursuant to admitted past practices) to arrange such reviews.

The record clearly shows that the Appellant engaged the Chair in 2012 and 2013, seeking help at improving, including what the Chair describes as the Appellant having "invited" the Chair to send more reviewers from among his colleagues, to which the Chair wrote elsewhere "we will do that," acknowledging her effort to help him improve. The Chair, as the record shows, was *required to send peers when they were requested* (*at the time* they were requested: "upon request") pursuant to past practices of the department, as she herself admits exist. Yet no peer reviews were ever arranged by the

3 The Chair admits in sworn testimony to past practices put into writing by orders of the Provost, which included frequency issues related to doing peer reviews. (See VLRB Hearing Transcripts, February 14, 2017, p. 196 at 21-22). The document she is referring to states explicitly: "Faculty will undergo peer evaluation (a) upon request...by...the faculty member" (See Appellant's PC, p.194). But the Chair claims no request was made (VLRB Hearing Transcripts, February 14, 2017, p. 219 at 14-18), contrary to her own admission in an email stating the Appellant had "invited" visits and affirming that "we will do that" [send peers} (See Appellant's Printed Case, p. 205). See Appellant's *Motion for Leave to Adduce Additional Evidence* and attached exhibits for more on frequency and requirements for sending peers. The Appellant asserts that the Board erred in not finding that the Chair, supervised by her Dean, breached the Appellant's contract rights by not helping the Appellant and not assessing progress toward improving. No evidence exists in the record of the Chair attempting to do what she said she would do, and instead unsubstantiated claims are made about the Appellant not making himself available.

Chair and no formative feedback given by his colleagues. Instead, the Appellant was rated by the Chair as "meeting" or "exceeding" expectations during each annual review based solely on student evaluations – sending a mistaken view of his teaching to the Appellant by relying on an admittedly defective methodology, using student evaluations she claims were biased, as argued in the Appellant's Brief[4].

The Appellee cannot claim, therefore, that the Appellant did not do what was required of him and that the Appellant never raised the issue at annual intervals or prior to his grievance. The very fact that he requested reviews is enough. The guidelines are clear: The word "upon" means *immediately*, and does not require any formal application, nor repeated efforts by the Appellant to get help he clearly articulated he wanted and needed. Failure to conduct these requested and agreed-to, ad-hoc (interim) peer reviews to provide necessary feedback, aimed at helping the Appellant improve for his next reappointment review, produced the main defect (noted by the FSC) contained in the subsequent peer letters, letters cited by the Dean to deny reappointment.

This sole reliance on tainted peer letters by the Dean stemmed from his need to acknowledge that the Appellant had actually made efforts to improve his teaching (following his 2013 reappointment), contrary to his initial assessment. This retreat to relying on one set of criteria (peer reviews) itself violated the CBA, which requires evaluation cannot be "prescribed" with one set of criteria (e.g., peer letters)[5]. Yet this is exactly what the Dean did and the reason why he needed to have two sets of criteria in his initial evaluation leading to denial of reappointment. Reduced from two factors to just one in defense of his denial of reappointment – he now is singularly dependent on the same peer letters that contained the defect noted above (where the Dean's concerns are sourced), thus compounding the breach of the Appellant's rights.

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4 The Appellant did repeatedly request that the Chair do more reviews, including at his Spring 2013 annual review. The Chair agreed again, but did not send peers. The Appellee would like this Court to believe that the Appellant did not pursue the matter sufficiently, but this diverts attention from the fact that the Chair is required to send peers to do reviews "upon request" and that these ad-hoc reviews "will" be done. There is no room for ambiguity here and fact that the Appellant did not keep persisting does not change the fact that the *Chair failed to do what is required of her pursuant to her department's own guidelines and past practices* - a breach of Appellant's right to receive reviews "upon" request following past practices that led to tainting of the Dean's sole source for denying reappointment – reappointment peer review letters.

5 This sole reliance cannot be twisted into an argument that the Appellee would have this Court believe, namely that the Dean "considered" other criteria, and these were all outweighed by the peer concerns. All the other criteria *were positive,* so the Dean relied on letters alone as the only negative factor, which were defective due to the Chair's failure to do her job.

II. Contrary to the Board's Findings, the Factual Record Establishes that the Dean Exclusively Relied on Tainted Peer Review Letters to Deny Grievant's Reappointment.

The Faculty Standards Committee (FSC), made up of distinguished and experienced UVM teachers, reviewed the Appellant's teaching record. The FSC concluded that the Appellant should be reappointed (a unanimous conclusion), and had concerns about the process of review conducted by the Chair[6]. The committee cited an absence of efforts by the Chair to conduct follow-up reviews of the Appellant's teaching between reappointment reviews despite the cautionary language contained in the Appellant's 2013 reappointment letter from the then-Dean Antonio Cepeda-Benito. The Appellee would like this Court to believe that the Chair had no obligation to conduct follow-up reviews, but the record is clear – the Chair was required to order peer assessments as soon as the Appellant requested them.

The Appellee cannot turn the responsibility back to the Appellant for failure of the Chair to arrange peer visits (she failed to do them upon request), nor claim that this has no connection to the reappointment review process. The Chair must organize peer reviews (assessments) "upon" request and this feedback is vital to successfully making the improvements asked of the Appellant in anticipation of his 2016 second reappointment review – without which the review process as a whole is defective. This is clearly the intent of Article 14 of the CBA, and is an ongoing responsibility of Chairs.

What's worse is that these tainted letters, singularly relied upon by the Dean, contain unsubstantiated claims about the Appellant's teaching by the Chair. The record clearly shows, which the Board clearly erred in not finding, that the Chair's "biggest" concern, deemed a "serious" one and sent to the Dean in her summary statement, *did not have any factual support and was contradicted by evidence in the record.* The Chair claimed that the Appellant had not taught the standard model "fully and fairly" first, before criticizing it.

This would require evidence that the Appellant (1) had not fully taught the model and (2) that he was criticizing it before fully teaching it. Yet the factual record shows just the contrary, and the Chair's two faculty review letters cited by her to support this claim do not provide any evidence of not

6 As is explained as part of the record in the Appellant's Brief, the FSC believed the Chair was "out to get" the Appellant. See Appellant's Brief and his *Motion for Leave to Adduce Additional Evidence*.

teaching a model "fully and fairly" before undertaking criticism, despite the Appellee's claim. There is no evidence that teaching was unfair or not full, notwithstanding any claims to not presenting slides effectively. Additionally, one of the sources for this claim was shown to have made exaggerated claims about slides used by the Appellant (as being "text heavy"), as the Appellant documented in his initial Brief. The purported text-heavy slides had *no text on 80% of them*, and only minimum text on the first and last slides.

The lack of credibility of this faculty member calls into question further the Chair's claims about not teaching a model fully and fairly. The only other faculty member cited by the Chair (Marc Law) for evidence of her claim admitted that *no model was even taught because the class was pre-designed to explore an affidavit that day on subprime lending* (in an empirical section of his seminar long before models were to be covered). Thus the Chair could not produce any evidence of her "biggest" and "serious" claim relied on by the Dean to deny the Appellant's reappointment. Furthermore, the record clearly shows a Chair willing to tamper with evidence and interfere with the rights of the Appellant to include support letters in his dossier.[7]

III. Contrary to the Board's Findings, the Appellant Engaged a Distinguished Scholar-Teacher in the Department of Economics to Review his Teaching.

The Appellee mistakenly asserts that the Appellant had a *de minimis* approach to seeking to improve his teaching and that his teaching did not improve. But he proactively engaged the late Dr. Ross Thomson, who UVM dismisses simply as a "late professor" (not even naming him), yet he was a distinguished faculty member who was considered by UVM to be a stellar member of the academic community: "Professor Thomson was that rare member of the academy who made a significant

7 Following 2018 commencement, Patty Corcoran, UVM's beloved Associate Dean of the College of Arts & Sciences (CAS), retired from UVM after 37 years of service. To honor her a new wooden bench was installed in front of 438 College Street, which has inscribed on it the following: "For Patty, who would always sit and listen." CAS Dean William Falls stated that Patty had "deep institutional knowledge" and possessed "incredible interpersonal skills." (See https://www.uvm.edu/cas/news/patty-corcoran-retires-after-37-year-career-cas). But a strong letter of support from Dean Corcoran for the Appellant's reappointment the Chair sought to "exclude" from the Appellant's dossier before his review, and without his knowledge. Dean Corcoran wrote that the Appellant was a "huge asset to UVM" and an "exceptional" lecturer in additional to making other positive statements. The Chair even emailed the department ahead of the vote for reappointment, and before review of the Appellant's dossier by faculty members, to let them know there was "no way to exclude the letter". (VLRB Hearing Transcripts, February 14, 2019, pp. 49-50 and pp. 47-48). See Appellant's Printed Case for the Corcoran letter.

contribution in all three areas that matter to an institution like ours: teaching, research and service," said Tom Sullivan, the former UVM president. "In his nearly 25 years at UVM, he has truly helped shape the course of the university. He will be dearly missed."

Professor Thomson was a senior member of the Department of Economics and the Appellant's mentor (his former teacher). Observing Dr. Thomson's class by no means was a *de minimis* effort as Dr. Thomson was considered an icon: "Ross brought penetrating insight, prodigious energy and a good sense of humor to every class session, every meeting and every presentation," wrote Economics Department chair Sara Solnick.[8]

The Appellant chose Dr. Thomson to observe and engage because he stood the tallest among the faculty in the Department of Economics, and was open to engagement.

IV. Appellee Mistakenly Claims that the Appellant Did Not Preserve Matters of Constitutional Facts and Thus is Not Entitled to a *De Novo* Review.

The Appellant has asserted at every step in the grievance process that his academic freedom was breached.[9] The Appellant cited Article 6 of UVM's Collective Bargaining Agreement as the basis for his claim. Article 6 is based on the "1940 Statement of Principles on Academic Freedom and Tenure," which UVM cites to recognize in the CBA (Article 6.2) that "Academic freedom is essential to these purposes and applies to both research and teaching. Freedom in research is fundamental to the search for truth, and academic freedom, in its teaching aspects, is fundamental for the protection of the rights of the faculty member in teaching and of the student to freedom in learning."

The Supreme Court of the United States has found that these rights are fundamental and

8 See UVM"s own dedicated page to Dr. Thomson. https://www.uvm.edu/uvmnews/news/longtime-uvm-economics-professor-dies

9 The Appellant asserted in his Step 2 grievance that he suffered from "retaliation" for what he was teaching and that his right to teaching freely was violated. He cited CBA Article 14.13.c (**"**violation of the candidate's Academic Freedom as defined in this Agreement" but did not cite Article 14.13.e. (**"**the decision was in violation of Constitutional rights") because he believed that 14.13 e. applied to *all other* protected areas (race, gender, etc.) since academic freedom rights are set apart in 14.13.c. Again, the Courts have identified these questions as one and the same --- academic freedom claims *are* constitutional claims, thus any academic freedom claim cannot be reduced to something less by omitting a reference to Article 14.13.e. (See PC, p. 13)

constitutionally protected. By citing Article 6 and Article 6.2 in his initial grievance at Step 2, therefore, (and at Step 3 and before the Labor Board), the Appellant preserved a constitutional claim, as an academic freedom claim has been recognized intrinsically (and identified) *as a constitutional first amendment claim*. The Supreme Court has identified academic freedom as a fundamental *right* of citizens (including teachers) protected by the First Amendment. As the Supreme Court's decided in *Keyishian v. Board of Regents*, 385 US 589 (1967). "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. *That freedom is therefore a special concern of the First Amendmen*t, which does not tolerate laws that cast a pall of orthodoxy over the classroom." [emphasis added]

However, assuming that this Court disagrees with the argument that an academic freedom claim is inseparable from a constitutional claim, the Appellant asserts that he still has preserved a constitutional claim because he *never waived his right to make such a claim*. By arguing that the Appellant did not preserve a constitutional claim the Appellee conflates two distinct concepts in law regarding preservation matters: forfeiture vs. waiver. Even though the Appellant argues intrinsically that an academic freedom claim *is* a constitutional claim, just for the sake of the argument, he would have merely forfeited his claim because he never intended for his claim to not be a constitutional one, and any omission of reference to constitutionality of the claim would have been inadvertent.

In *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist*, 877 F.3d 136 (3d Cir. 2017), the third circuit court ruled that the "effect of failing to preserve an argument will depend upon whether the argument has been forfeited or waived." The Court then decided that Barna's argument *was preserved* because there appeared to be merely "inadvertent omissions," thus "more properly characterized as forfeitures rather than as waivers." *Id.* Any omission by the Appellant to mention the First Amendment, or cite another section of the CBA, the Appellant asserts is purely an omission and not an intentional waiving of an argument, and thus his constitutional claim is preserved. To be sure, the Appellant does not agree that an academic freedom claim itself can be separated from a constitutional claim.

V. The Labor Board Abused Its Discretion by Denying Appellant's Motion to Amend his Grievance.

The Appellant has asserted at every step in the grievance process that the Dean relied solely on tainted peer letters for his denial of reappointment (irrespective of whether he "considered" other factors). The Appellant, furthermore, has cited at every step that these letters were tainted in line with the FSC's conclusion that the Chair failed to conduct any followup (ad-hoc) peer reviews between reappointment reviews.

The Board is mistaken in concluding that the issue of not conducting proper follow-up peer reviews, pursuant to Article 14.3 regulating Chair responsibilities, because it was never the intention of the Appellant to waive any right to make this argument explicitly linked to Article 14.3 regarding annual duties of the Chair. He simply did not know every corner of the CBA. The Chair did not conduct (requested) follow-up peer reviews, and his motion to amend was simply an attempt to ground the argument in a section of the CBA that pertained to that obligation he later became aware of as a *pro se* grievant.

Citing again *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist*, 877 F.3d 136 (3d Cir. 2017), the third circuit court ruled the "effect of failing to preserve an argument will depend upon whether the argument has been forfeited or waived." Any "inadvertent omissions" are "more properly characterized as forfeitures rather than as waivers." *Id.* Any omission by the Appellant to not cite an appropriate section of the CBA cannot be deemed not preserving the issue related to the Chair's duties. Finally, the Board did not dismiss the motion on the merits.

Furthermore, the Appellant is arguing that the Dean relied on a process that contained a defect in the form of the Chair's failure to do what she is bound by the CBA to do – timely inform a teacher of any areas in need of improvement at annual intervals (or at any time) – and if she is remiss in her duties the final review for reappointment is made defective. This is exactly the argument the FSC made, and one the Appellant has made. He thus never intentionally waived an argument, he argued it implicitly, and thus the Board abused its discretion by denying his motion to amend.[10]

10 In Appellant's *Motion for Leave to Adduce Additional Evidence* (to be decided by this Court with the merits), he provides evidence showing that the Chair defectively reviewed the Appellant at annual review intervals because she based these reviews solely on student evaluations, which was out of compliance with orders from the then-Provost David Rosowsky. Instead of using a "credible methodology" ordered by the Provost, the Chair repeatedly used one she

VI. The Labor Board Abused Its Discretion by Denying Appellant's Motion to Reconsider as the Facts Show That the VLRB's Chair, Mr. Richard Park, Has Deep Financial, Emotional and Social Ties to UVM and Thus a Reasonable Person Might View Him as a Biased Trier of Fact.

Mr. Park was found to have not disclosed deep ties to UVM through his paid participation as corporate secretary of Delta Dental of Vermont (DDV), whose largest client is UVM, as was argued in the Appellant's Brief. Mr. Park is immersed in a professional milieu– sitting next to him on the DDV Board is both the community relations director of UVM Medial Center and a top fundraiser for UVM's Grossman School of Business. And Mr. Park is an alum of the business school, as his VLRB bio states. Given these financial, social and emotional connections to UVM, any reasonable person would be led to question the objectivity of the process, and particularly of Mr. Park in shaping it, and most importantly, in his ability to remain unbiased in his judgement.

VII. Conclusion

The Appellant asks that this Court reverse the Labor Board's dismissal of his grievance because of UVM's clear violation of its own rules, practices and guidelines for reviewing faculty and breach of its written procedures contained in its contract with its faculty. This Court should disqualify the VLRB's Chair, Mr. Richard Park, from any involvement in the matter of the Grievance of John Summa.

herself believed was flawed. The Chair acknowledged during her sworn testimony that she was aware of the Provost's efforts to evaluate and revise review practices. She admits that "frequency" question of peer reviews were part of past practices and were incorporated into guidelines. (See VLRB Hearing Transcript, February 14, 2017, p. 196, at 23-25 and p. 197 at 1-2).

Certificate of Compliance

I, John Summa, *pro se* Appellant, hereby certify, pursuant to V.R.A.P. 32(a)(7), that this Reply Brief contains less than 4,500 words. I make this certification in reliance on the word count function of the word pressing software OpenOffice hat was used to prepare the Reply Brief, TextEdit Version 1.12 (329)

Dated at Burlington, Vermont this 11th day of March, 2019

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