VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	
DEBBIE DAMERON, MARY ALICE GOWER and VERMONT STATE EMPLOYEES' ASSOCIATION	)	DOCKET NO. 88-61

MEMORANDUM AND ORDER

This matter is before the Labor Relations Board as a consolidated appeal from a classification decision of the Commissioner of Personnel pursuant to Article 19 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit, effective for the period July 1, 1988 to June 30, 1990 ("Contract").

In September 1987, Debbie Dameron and Mary Alice Gower, both Public Health Program Coordinators (Pay Grade 19) for the Vermont Department of Health, filed classification grievances pursuant to Article 19 of the Contract. In their classification grievances, Dameron and Gower contended that their positions should be assigned to Pay Grade 21, rather than Pay Grade 19 as determined by the Department of Personnel.

VSEA filed the classification grievance on behalf of Dameron. Gower filed the classification grievance on her own behalf. While Gower sought and received the assistance of VSEA beginning in February, 1988 with respect to her classification grievance, VSEA's involvement on her behalf was never communicated to the Commissioner of Personnel by VSEA or Gower.

Pursuant to the Contract, the classification grievances were heard by a classification panel. Prior to the hearings before the

classification panel, Claude Magnant, Director of Personnel Operations for the Department of Personnel, submitted a memorandum to the panel in each matter. In each memorandum, Magnant contended that "(w)e do not believe that the Grievant has met the burden of proof necessary to find the Personnel Department decision as without a rational basis" (Dameron Exhibit 2, page 6; Gower Exhibit 2, page 6).

The hearings before the classification panel occurred on May 26, 1988. At the hearings, both Dameron and Gower appeared without a VSEA representative. Bill Rose represented the Department of Personnel. At the Dameron hearing, Rose said that "(t)he basis for appealing our action is to show that our evaluation was clearly erroneous, and that we did not seem to be based on a rational basis" (Dameron Transcript, page 15). In the Gower hearing, Rose stated that "the purpose of a grievance of our action is to show that our...rating under the contract is clearly erroneous, and that we obviously did not have a basis in fact" (Gower Transcript, page 14).

In recommendations dated August 12, 1988, the classification panel, after what the panel termed an "independent rating", recommended that Dameron's and Gower's positions be upgraded from Pay Grade 19 to Pay Grade 20 (Dameron Exhibit 5, Gower Exhibit 6). The panel sent copies of the decisions to VSEA.

Article 19, Section 7 of the Contract, relating to classification grievances, provides:

> In any stage of proceeding under this article the burden shall be on the grievant to establish that the present classification, pay grade assignment, or any subsequent classification decision arising from the application of these procedures, is clearly erroneous under the standards provided by the point factor analysis system utilized by the Department of Personnel.

In letters dated August 22, 1988, to the classification panel, David Moers, Commissioner of Personnel, requested that the panel reconsider its decisions. In his letters, Moers stated in pertinent part:

> The panel, in its opinion, does not reach a conclusion as to whether the Department's use of the point factor system, and its conclusions as to points assigned, were clearly erroneous. The Department believes that such a step is the key part of the panel's role as defined by the contract.
>
> This Department has provided each panel chair under cover dated July 21, 1988, an analysis by legal counsel of the application of the "clearly erroneous" test. It is noted therein that, in order for the decision to be found clearly erroneous, "the reviewing body must conclude that, "considering the record as a whole, a reasonable mind would necessarily come to a different conclusion..."
>
> I am returning this matter to your panel, and request the panel to apply the "clearly erroneous" test and identify its conclusion under that standard.
>
> (Dameron Exhibit 6, Gower Exhibit 7)

The "analysis by legal counsel" referred to by Moers in his letters was a July 20, 1988, memorandum written by Assistant Attorney General Michael Seibert which explained his view of the meaning of the "clearly erroneous" test. Therein, Seibert stated in pertinent part:

> . The "clearly erroneous" standard of proof has been likened by the Vermont Supreme Court to the "substantial evidence" test, See In re Muzzy, 141 Vt. 463, 470 (1982), and it operates in such a way that it
>
> > sanctions rejection of administrative findings only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion. The rule does not permit the rejection of agency findings simply because a reasonable mind might have arrived at a contrary conclusion (emphasis added).
>
> What all of this means, in relation to the classification boards, is that such boards are essentially bound by the collective bargaining agreement to sustain the

> decision of the Department of Personnel unless they found that no reasonable decision-maker, basing his/her decision on the record as a whole, could have come to the conclusion reached by the Department... It is not enough that the board may disagree with the decision in some respect - it must conclude that the decision lacked any reasonable basis for there to be grounds to recommend a change.
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> (Dameron Exhibit 4, Gower Exhibit 5)

VSEA, Dameron and Gower were not provided with copies of Moers' letters or with Seibert's memorandum.

In response to Moers' letters, the panel reconsidered its recommendation for Dameron and Gower and decided on October 3, 1988, that the Department of Personnel's assignments of their positions to Pay Grade 19 was not "clearly erroneous" and, thus, was proper. The panel sent copies of the revised recommendations to VSEA (Dameron Exhibit 7, Gower Exhibit 8).

On October 17, 1988, Moers notified Dameron and Gower by letters that he concurred in the panel's recommendations that the assignment of their positions to Pay Grade 19 was proper. Moers did not send copies of these letters to VSEA (Dameron Exhibit 8, page 3; Gower Exhibit 9, page 3).

On November 10, 1988, VSEA filed an appeal with the Board, contending that the decisions of the Commissioner of Personnel were arbitrary and capricious in violation of Article 19 of the Contract. On March 3, VSEA filed the whole record of the proceeding before the classification panel, the decision of the Commissioner of Personnel and a brief in support of Appellants' position. The State filed a brief in support of its position on March 17, 1989. Oral argument occurred before Board Members Louis Toepfer, Acting Chairman; William Kemsley, Sr. and Catherine Frank on April 13, 1989. VSEA Staff

Attorney Michael Zimmerman represented Appellants. Assistant Attorney General Michael Seibert represented the State.

Appellants contend that the Commissioner of Personnel's decision was arbitrary and capricious in violation of Article 19 of the Contract in that 1) he encouraged and condoned the application of the wrong test by the classification panel; and 2) VSEA and the involved employees were not given notice of the Commissioner's actions.

The Board's review of the Commissioner's decision is limited by Article 19, Section 9 of the Contract to determining "whether the decision was arbitrary and capricious in applying the point factor system utilized by the State to the facts established by the entire record".

The "arbitrary and capricious" standard for the Board's scope of review implies that the Board is expected to give substantial deference to the Commissioner's decision. An "arbitrary" decision is one fixed or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance. Lewandoski and the VSCFF v. Vermont State Colleges, 142 Vt. 446 (1983). "Capricious" is an action characterized by or subject to whim (The American Heritage Dictionary, New College Edition, Houghton Mifflin Co., 1979).

Appellants contend that the Commissioner of Personnel, by remanding to the panel with instructions to reconsider their recommendations in these matters in light of Seibert's July 20 memorandum, directed the panel in essence to apply a "rational basis" test, rather than the contractually-required "clearly erroneous" test,

thereby encouraging and condoning the application of the wrong test by the panel.

We disagree with Appellants that the Commissioner of Personnel directed the classification panel to apply a "rational basis" test, rather than the "clearly erroneous" test. The Commissioner specifically instructed the panel to apply the "clearly erroneous" test and cited language from the Vermont Supreme Court decision, In re Muzzy, 141 Vt. 463, 470 (1982), explaining the "clearly erroneous" test. In so doing, the Commissioner acted consistent with what the Board found to be the Commissioner's responsibility in Appeal of Cram, 11 VLRB 245, at 249 (1989).

This served to eliminate any confusion which Department of Personnel representatives may have caused in earlier proceedings before the panel by not clearly informing the panel as to the correct test they were to apply. Further, we do not believe that Seibert's July 20 memorandum, referred to by the Commissioner in his remand to the panel, resulted in the Commissioner encouraging and condoning the application of the wrong test by the panel. When read as a whole, the memorandum is designed to explain the "clearly erroneous" test and does not equate the "clearly erroneous" test with a "rational basis" test.

We now turn to determining whether the Commissioner of Personnel's "decision was arbitrary and capricious in applying the point factor system", in violation of Article 19 of the Contract, because the Commissioner did not provide notice to the involved employees or their VSEA representatives of his actions. Appellants' claim has two aspects. The first is that the affected employees were

entitled to contemporaneous notice of the Commissioner's remand to the classification panel. The other aspect is VSEA's entitlement, as the employees' representative, to notice of the remand and to notice of the Commissioner's final decisions.

While the classification article of the Contract does not explicitly address the situation present here, where the Commissioner remanded to the panel prior to taking final action, we interpret the Contract to provide for notice to affected employees in such situations. The classification article makes it clear that the employee involved in a classification grievance is entitled to notice at every step of the way. The employee is entitled to notice of the Department of Personnel's decision on the employee's classification review request, any defects in the classification grievance, any hearing by the classification panel, the panel's recommendation and the Commissioner's final action (Article 19 of the Contract). We will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. 68, 71 (1980). A necessary implication from the provisions of the classification article is that the affected employee receives notice of all correspondence between the Department of Personnel and the classification panel. Accordingly, Dameron and Gower were entitled to contemporaneous notice of the Commissioner's remand to the classification panel. The Commissioner inappropriately neglected to provide such notice.

It also is necessarily implied by the Contract that VSEA, as exclusive bargaining representative of employees, is entitled to receive notice of all correspondence between the classification panel, the Department of Personnel and the affected employee in situations

where VSEA is representing the employee with respect to the classification grievance. In this case, the Department of Personnel was on notice that VSEA was representing Dameron and, thus, should have provided notice to VSEA of the Commissioner's remand to the panel and the Commissioner's final action with respect to Dameron absent any clear notification by VSEA that it was no longer representing Dameron.

The failure to provide notice to VSEA and affected employees was inappropriate. However, this does not result in the Commissioner's decision being "arbitrary and capricious in applying the point factor system". Our jurisdiction under this language is limited to determining whether the Commissioner's decision in applying the point factor system was made at least partially without consideration or reference to applicable contractual classification principles. Cram, supra, at 247-251. Failure to provide timely notice of actions, while contrary to the Contract, did not affect the Commissioner's decision in applying applicable classification principles. Thus, while the Commissioner acted inappropriately by violating his contractual responsibility to provide timely notice to VSEA and the affected employees, his final decision was not arbitrary and capricious in violation of Article 19 of the Contract.

ORDER

Now therefore, based on the foregoing reasons, it is hereby ORDERED that the Appeal of Debbie Dameron, Mary Alice Gower and the Vermont State Employees' Association is DISMISSED.

Dated this 26th of April, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chair

William G. Kemsley, Sr.

Catherine L. Frank