VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 91-18
JEAN LOWELL	)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On February 25, 1991, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Jean Lowell ("Grievant) with the Vermont Labor Relations Board, alleging that the State of Vermont, Department of Personnel ("Employer") violated Article 5 of the collective bargaining agreement between the State and VSEA effective for the period July 1, 1990 to June 30, 1992 ("Contract"). Specifically, the grievance alleges that the Employer discriminated against Grievant on account of her sex by failure to reclassify her position to the same level that it reclassified positions in the same class occupied exclusively by males. As a remedy, Grievant requested that the Board order that the Department of Personnel conduct a full and non-discriminatory review of Grievant's classification and assignment to pay grade, and that Grievant be provided with a complete, written explanation of the results of that review and an opportunity to correct factual errors.

The Employer filed a Motion for Summary Judgment on October 11, 1991. The Employer contended that the grievance was untimely and that the subject matter of the grievance was not grievable. Grievant filed an answer in opposition to the State's motion on October 29, 1991.

Hearings were held on October 31, November 21, December 12, 1991, and January 16, 1992, before Board members Louis A. Toepfer, Acting Chairman, Catherine L. Frank, and Leslie G. Seaver. Heather Briggs, attorney with Downs Rachlin & Martin, represented the Employer. Jonathan Sokolow, VSEA Staff Attorney, represented Grievant. At the October 31 hearing, the Board reserved judgment on the summary judgment motion.

In the opening statement at the October 31 hearing in this matter, Grievant's attorney indicated that Grievant was requesting a different remedy than contained in her grievance filed with the Board. Grievant requested that the Board order that Grievant be assigned to the same pay grade as the male investigators in the Attorney General's office. Subsequent to the hearings, on January 24, 1992, Grievant followed up this request made in the opening statement by filing a Motion to Amend the Grievance. Therein, Grievant moved to amend to request as a remedy that the Board "order that the Department of Personnel upgrade the class of Civil Rights Investigators to pay grade 22, the same pay grade to which the State Criminal Investigators are assigned". The State responded on January 31, 1992, opposing Grievant's motion.

Both parties filed Proposed Findings of Fact with supporting Memoranda of Law on January 31, 1992.

FINDINGS OF FACT

1. The Vermont Attorney General's Office is organized into four divisions. Each division has a division Chief, Assistant Attorneys General, and support staff. The following three

divisions also have investigators: Public Protection, Criminal, and Medicaid Fraud.

2. Prior to August, 1990, the investigators at the Attorney General's Office had been in the same associated class, State Investigator, with the same pay grade, Pay Grade 19, since at least 1986. An associated class is one in which the positions in the class are sufficiently similar to place them in the same class. The following positions were within the State Investigator class: 1) two Medicaid Fraud Investigators in the Medicaid Fraud Unit of the Criminal Division; 2) two Criminal Investigators in the Criminal Division, 3) a Criminal Investigator in the Public Protection Division, Consumer Protection Unit; and 4) two to three Civil Rights Investigators in the Public Protection Division, Civil Rights Unit.

3. Males have exclusively occupied the five Medicaid Fraud and Criminal Investigator positions. Both females and males have historically occupied the position of Civil Rights Investigator, and at the time of the classification review in question herein a majority of the occupants were women. During 1989 and early 1990, there were two female Civil Rights Investigators, Grievant and Jean Cass, and one male Civil Rights Investigator, Seth Steinzor. Steinzor left his position early in 1990 to take a position as an Assistant Attorney General in the Medicaid Fraud Unit, and subsequently was replaced by a male, Jefferson Dorsey.

State Investigators - Civil Rights

4. The Civil Rights Unit primarily investigates and prosecutes alleged violations of the Vermont Fair Employment Practices Act, the Maternity Leave Act, and the Workers' Compensation Unlawful Discrimination statute. The Unit also has

a contract with the federal Equal Employment Opportunity Commission ("EEOC") to investigate allegations of employment discrimination arising under federal law, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act. The majority of cases that the Unit investigates are allegations of sex discrimination. This is followed by allegations of age discrimination, with the rest of the protected categories (e.g. race, national origin, handicap) representing a smaller portion of the cases. The Unit also has the authority to investigate and prosecute alleged violations of Vermont's Drug Testing Act and the Polygraph Testing Act.

5. Wallace Malley is Chief of the Public Protection Division, which division is responsible for Consumer Protection, Environmental Protection, and Civil Rights. Assistant Attorney General Robert Appel reports to Malley and is the only attorney assigned to the Civil Rights Unit in the Public Protection Division. The Civil Rights Investigators report to both Malley and Appel, but primarily to Appel. Appel also administers the federal EEOC contract and litigates alleged violations of state law that have been investigated by the Unit.

6. Civil Rights Investigators are required to be thoroughly familiar with the various laws within the Civil Rights Unit's jurisdiction and to keep current with developing employment discrimination law. The Unit's contract with EEOC requires that investigators also be familiar with a two volume set of federal regulations, the EEOC Compliance Manual and EEOC

Guidelines. Appel expects the Civil Rights Investigators to perform as autonomously as possible. Each investigator manages a caseload in excess of 40 cases at all times (Joint Exhibit 1).

7. Complaints filed with the Unit are initially assessed by a Civil Rights Investigator through the intake duty process. Investigators share intake duty on a rotating basis. Intake duty involves reviewing letters that have come into the Unit, or interviewing individuals who have called or arrived at the Attorney General's Office with a complaint. The investigator assesses the complaint to determine whether it is within the Unit's jurisdiction. If the complaining party has not stated a complaint that is within the Unit's jurisdiction, the investigator then attempts to make a proper referral, if possible (Joint Exhibit 1).

8. Occasionally, but not regularly, the Unit employs a law clerk or student intern to assist in intake duties. This intake worker is directly supervised by an investigator. However, the investigator is generally the only person with whom a complaining party speaks. In a particularly complicated case, the investigator will confer with other Civil Rights Unit staff, including Appel and Malley.

9. On at least one occasion, Malley and Appel initially rejected an initial assessment by Grievant that a handicap complaint was within its jurisdiction. However, Grievant ultimately convinced the attorneys that the case was within the Unit's jurisdiction.

10. After the investigator assesses a complaint as within the Unit's jurisdiction, he or she drafts a "charge of discrimination" and sends it to the complaining party for his or her notarized signature. The charge is an affidavit setting forth the theory of law and the facts of the individual's case. Appel reviews all charges of discrimination before they are sent to the complainant.

11. Any charge of discrimination returned to the Attorney General's Office is then sent to the involved employer, who is requested to submit a point-by-point response to the charge. The case is then assigned to an investigator. At the time of the hearings before the Board in this grievance, there were approximately 200 pending cases in the Unit.

12. Once a case is assigned to an investigator, the investigator conducts additional interviews with the complainant. The investigator also constructs an investigative plan, identifying pertinent documents and witnesses. The plan is initially effectuated by sending the employer a written request for information ("RFI"), similar to interrogatories in a civil proceeding. The investigator may seek advice from Appel on a RFI, particularly if it is an employer with whom Appel is familiar, but Appel is generally not involved in the investigator's plan or RFI unless the investigator has serious problems with a recalcitrant employer. Appel or Malley may become actively involved in such a case by issuing a subpoena which the investigator generally drafts.

13. The investigator interviews witnesses of both parties during the investigation. Frequently, the employer will be represented by an attorney or a company executive or human resources manager. The complainant may also be represented by an attorney (Joint Exhibit 1).

14. Throughout the investigation, the investigator is required under both EEOC contract and office policy to attempt to settle cases. This remains an ongoing responsibility of the investigator throughout the investigation. In their efforts to settle or mediate a resolution to a case, investigators must understand what damages or remedies would potentially be available under both state and federal law. All settlements require the approval of the Unit attorney. If a settlement is reached prior to completion of the investigation, it is called a predetermination settlement ("PDS"). The investigator generally drafts the PDS. Approximately 25% of the cases settle by a PDS.

15. If a case does not settle, the investigator completes the investigation and determines whether there is sufficient evidence to support the charge of discrimination. The investigator weighs the facts, oral statements and credibility of witnesses and analyzes the applicable legal standards. The investigator then prepares a letter of determination ("LOD"), which the investigator sends to both parties. The LOD is a comprehensive summary of the investigation and the pertinent case law, setting forth the investigator's findings of fact and conclusions of law. LOD's are single spaced documents, from 4 - 20 pages in length, approved by a Unit attorney, who signs below

the investigator's signature. The LOD is either a "no probable cause" or "probable cause" determination, based on the sufficiency of the evidence. The legal standard is the preponderance of the evidence.

16. If a "no probable cause" LOD is issued, the investigation is considered closed. Approximately three out of four cases that go to final determination are found to have insufficient evidence to support the claim. In "no probable cause" cases arising under federal law handled by the Unit, the Unit transmits the completed case to EEOC for contract credit, and the LOD must survive federal scrutiny. EEOC generally accepts the Unit's work without further involvement (Joint Exhibit 1).

17. If a "probable cause" LOD is issued, the investigator initiates further conciliation efforts, giving the parties a further opportunity to settle the case or face possible litigation. If a case settles after a "probable cause" determination, the written settlement - called an Assurance of Discontinuance - is a public document and is filed in a Vermont Superior Court. The Attorney General's Office charges the employer for the Unit's investigative costs in such a case. The investigator drafts the Assurance of Discontinuance. The investigator is also responsible for monitoring the employer for compliance (Joint Exhibit 1).

18. If a "probable cause" case is not settled, and the case arises under federal law, the Unit sends the case to EEOC for contract credit and possible federal litigation. The Unit

receives the same amount of money for all cases sent to EEOC, whether or not there is a "probable cause" determination.

19. Any "probable cause" case arising under state law is considered for litigation by the Unit attorney. Investigators are expected to assist the unit attorney in litigation. At the time of this grievance, Grievant had not personally been involved in any litigation.

20. Investigators generally conduct their own legal research on cases, if required. A primary resource is the Fair Employment Practice ("FEP") Reporter, but frequently a case will have a unique aspect to it that will require the investigator to conduct further research beyond the FEP reporter. Investigators also seek legal guidance from Appel.

21. Each type of employment discrimination (i.e., sex, race, age, religion, handicap, etc.) has its own distinct elements, together with extensive compliance standards and interpretive caselaw. Legal research and analysis required of Civil Rights Investigators for each type of discrimination is complex and detailed. The investigator needs to be aware of applicable legal standards during the investigative process and settlement discussions with charging parties, employers, and their respective attorneys.

22. It is not unusual for employers to believe that Civil Rights Investigators are biased against employers. Employers have called the Attorney General's Office to complain after a charge has been filed against them and they are being investigated.

23. In addition to their investigative duties, Civil Rights Investigators also provide education in civil rights laws for public and private organizations, including sexual harassment and employer liability training for law enforcement personnel at the Vermont Police Academy (Joint Exhibit 1).

24. The requirements for eligibility for a Civil Rights Investigator include a Bachelor's degree, two years of relevant experience, which can be substituted on a semester for six months basis. A law degree is automatically qualifying. Two attorneys have worked as Civil Rights Investigators. Grievant is eligible to sit for the Vermont Bar Exam.

State Investigators - Criminal Justice (Consumer Protection)

25. One Criminal Investigator at the Attorney General's Office, Armand LaCount, works as a Consumer Fraud Investigator in the Public Protection Division, Consumer Protection Unit. LaCount generally reports to the two Assistant Attorneys General assigned to the Consumer Protection Unit. Although LaCount is in a position entitled Criminal Investigator, LaCount works approximately 5% of the time with an attorney in the Criminal Division. He is not expected generally to deal with criminal activity, and thus the title "Criminal Investigator" inaccurately reflects LaCount's duties.

26. The Consumer Protection Unit investigates and prosecutes allegations of deceptive advertising, mail fraud, consumer warranty, and credit reporting agency violations. The Consumer Fraud Investigator is required to be generally knowledgeable of current consumer law, but there is no expectation

that he have a detailed knowledge of the law. A Unit attorney directs the investigation of alleged violations of consumer law. Generally the attorney writes a memorandum identifying the information the investigator is to gather. The investigator acts within the bounds of the attorney's memorandum.

27. If an attorney decides to pursue a Temporary Restraining Order, the Consumer Fraud Investigator prepares an accompanying affidavit. LaCount is not required to write documents that analyze applicable legal standards with reference to facts which he has gathered.

28. LaCount serves many subpoenas and judgment orders for the Attorney General's Office.

29. Only an Assistant Attorney General has the authority to pursue settlement of cases in the Consumer Protection Unit. Cases often settle with an Assurance of Discontinuance, which the attorney prepares. Although LaCount is not generally involved in the resolution or settling of cases, he may on occasion receive a complaint first hand and attempt to resolve the issue.

State Investigators - Criminal Justice (Criminal Division)

30. The Criminal Division investigates and prosecutes alleged violations of criminal law, including murder, child abuse, white collar corruption, embezzlement, and fraud. There are two Criminal Investigators in the Criminal Division. The Criminal Investigators attend police training and hold criminal law enforcement certificates.

31. The Criminal Investigators perform the Division's field work. They independently interview witnesses. They formulate

investigative plans, which includes identifying and obtaining documents for the attorney's review and analysis. At the outset of a case, Criminal Investigators may have to do some legal analysis and have to be aware of certain aspects of criminal procedure such as Miranda rights and search warrants.

32. Criminal Investigators prepare written documents, including "contact sheets", which are reports of interviews with witnesses. They also write generalized investigative reports for the attorneys, prepare spread sheets and prepare affidavits of probable cause. The affidavits primarily consist of factual recitations of information gathered in the investigation.

33. Criminal Investigators are not required to write documents which apply applicable legal standards to information which they have gathered. Criminal Investigators also do not perform a conciliation function in seeking to informally resolve cases.

State Investigators - Medicaid Fraud Unit

34. The Medicaid Fraud Unit is within the Criminal Division. The Unit investigates and prosecutes allegations of patient abuse exploitation and/or neglect and allegations of fraud against the medicaid system by health care providers. There are two Medicaid Fraud Investigators. They work under the direction of two Assistant Attorneys General. Medicaid Fraud Investigators are required to be generally conversant with the relevant portions of the criminal code with which they work.

35. Medicaid Fraud Investigators draft affidavits of probable cause. Medicaid Fraud Investigators are not required to

write documents which apply applicable legal standards to information which they have gathered.

36. Medicaid Fraud Investigators do not attempt to settle cases. An Assistant Attorney General has exclusive authority for settlement of cases. Medicaid Fraud Investigators are not responsible for managing a caseload.

General Procedure With Respect to Reclassification of Positions

37. Article 16 of the Contract provides a procedure for the Department of Personnel to review the classification of positions in state government. A request for a classification review may be initiated by either incumbent employees or by their supervisors or managers. The incumbent of the involved position or management submits to the Department of Personnel a "Request for Classification Action", and the incumbent employee submits a detailed "Position Description". The request must state with particularity the change(s) in duties or other circumstances which have prompted the request, and the request also provides an opportunity for incumbent employees to propose other state service positions which they believe more accurately reflect their current responsibilities. The incumbents' supervisor reviews the information and submits additional information or comments. The department head reviews the Position Description for accuracy and forwards the request to the Department of Personnel with additional comments, if appropriate (State's Exhibit 2).

38. The head of the classification section of the Department of Personnel assigns an analyst to perform the

classification review. The analyst reviews the request and Position Description, compares it to the existing job specification, and notes any areas he or she may wish to examine more closely in a subsequent "desk audit". Typically, a desk audit, which is discretionary with the Department of Personnel, includes an interview with the incumbent employees and their supervisor (State's Exhibit 2).

39. The analyst then sorts through the information, compares similar positions, either those proposed by the incumbents, or positions with which the analyst is familiar. The analyst assigns a tentative rating using a job classification system, the Willis point factor system ("Willis"). The Department of Personnel has used the Willis system since 1986 when Norman D. Willis & Associates analyzed and classified every position in the state classified service. The Willis system breaks down each position into categories and component subcategories. The four major categories are Knowledge and Skills, Mental Demands, Accountability and Working Conditions (State's Exhibit 9).

40. The analyst, trained in the Willis system, selects appropriate letter and numerical ratings in each category and subcategory, which may include comparing the position under review with existing ratings of comparable positions. These numerical ratings are totaled. This final sum is then plotted on a chart which has numerical ranges with corresponding pay grades. For example, a Willis rating of 322 falls within the numerical range of a Pay Grade 20 (State's Exhibit 9).

41. Generally, after the analyst recommends a tentative rating, it is reviewed by the head of the classification section. The analyst and head of the classification section reach consensus on an appropriate rating before the employee(s) and/or department seeking review are contacted.

42. An analyst performing a classification review presumes that a prior rating of the position under the Willis system is presumptively correct.

43. Within ten days of notification by the Department of Personnel, an employee may request an informal meeting with a member of the classification section. Article 16 of the Contract also provides for filing of a grievance with respect to the Department of Personnel's action on classification reviews. However, an employee may not grieve a classification decision pursuant to Article 16 if the position submitted for review is changed to a higher pay grade (State's Exhibit 2).

State Investigators' classification review

44. During 1989, the Department of Personnel conducted a classification review of State Police Sergeants, which resulted in an upgrade from Pay Grade 20 to Pay Grade 22. Classification Analyst Joseph Benner conducted the review.

45. The Criminal and Medicaid Fraud Investigators at the Attorney General's Office subsequently discovered that the State Police Sergeants, as well as investigators in the State's Attorney and Public Defender's Office, had been reclassified to a Pay Grade 22. They requested to have their positions also reviewed. Attorney General Amestoy agreed and on December 8,

1989, Deputy Attorney General Brian Burgess sent a request for classification review to the Department of Personnel. This review also was assigned to Benner.

46. Although the Civil Rights Investigators in the Attorney General's Office were in the same class and pay grade as the Criminal Investigators, the Attorney General's Office did not request a classification review of the entire class. At the time, Burgess was unaware that all the Investigators were part of the same class.

47. Benner discovered during his review of the Criminal and Medicaid Investigators that the Civil Rights Investigators were in the same class. He informed Burgess and suggested that he review the Civil Rights Investigator positions at the same time. Burgess agreed and notified the Civil Rights Investigators.

48. At this time, Seth Steinzor, the only male Civil Rights Investigator, had left the Civil Rights Unit and was working as an Assistant Attorney General in the Medicaid Fraud Unit. This left the Civil Rights Investigator positions occupied exclusively by females, Grievant and Jean Cass (Joint Exhibit 1).

49. Both Cass and Grievant completed the detailed request and position description. They highlighted the additional duties that Civil Rights Investigators had assumed since the position had been reviewed in 1986. These additional duties included: the authority for the Civil Rights Unit to investigate five new laws (retaliation for filing a workers' compensation claim, polygraph testing, drug testing, HIV-AIDS testing, and a maternity leave law), supervision of law clerks and student interns for intake

duties, case conferences on legal issues, peer review, responsibility for an EEOC computer, and additional administrative responsibilities (Joint Exhibit 1).

50. During the Spring of 1990, Grievant independently discovered that there were several positions in state service that she believed were comparable to her position, all at higher pay grades than Pay Grade 19. Grievant and Cass identified those positions in their classification request. Grievant stated, in pertinent part:

> The duties, responsibilities and job skill requirements are comparable to, if not more demanding than, those associated with the position of Hearing Examiner: Associated Class, Disability Determination. In addition, the scope and complexity of duties and responsibilities of the Civil Rights Investigator position exceed that which is required of positions presently classified at Pay Grade 20 (Appeals Referee, DET; Environmental Enforcement Officer) (Joint Exhibit 1).

51. Grievant did not identify the Criminal Investigator positions as comparable. She did not contemplate that any classification review would separate the Civil Rights Investigators from the other State Investigators in the Attorney General's Office, and believed that it was accepted that the Civil Rights Investigators and the Criminal Investigators were comparable positions.

52. Grievant, Cass, Assistant Attorney General Appel, Public Protection Chief Malley, and Deputy Attorney General Burgess completed the classification request and position description and forwarded it to the Department of Personnel on May 21, 1990. Malley commented:

> ... a critical difference between this position and other "investigator" positions is that this job also requires the

incumbent to be a mediator and an adjudicator. In each case the incumbent must offer to mediate the dispute, and if the parties are willing, actively to pursue a settlement. If no resolution can be reached, the final "letter of determination" is more than an investigative report. It is closer to an adjudication document, which a judge or hearing officer would write, because it contains analysis of the applicable legal standards and reaches legal conclusions based on both fact and law (Joint Exhibit 1).

53. Burgess' cover memorandum, which was attached to the classification request, stated in part:

> ...(The) request for re-classification is prompted by increased responsibilities assigned to these positions over the past several years, coupled with a perception that similarly responsible investigative/adjudicative positions have been pegged at higher pay grades (e.g., State's Attorney's Investigators, Public Defender's Investigators, State Police Detectives, Appeals Referees and Environmental Officers).
>
> ...(T)he Civil Rights Investigators are responsible for fact finding, mediation and legal determinations. They are expected to investigate like cops, reconciliate like counselors, think and write like lawyers, and reach conclusions like a magistrate. While their final written product is subject to attorney review, the investigators operate independently in the field and in the office . . .(Joint Exhibit 1).

54. Benner reviewed the detailed Position Descriptions and accompanying comments and noted certain areas he wished to cover in detail during a subsequent desk audit. Benner's notes indicate he had concerns with the impartiality of Civil Rights Investigators. His notes state, in pertinent part:

> Overall impression from reading [Position Descriptions] is that there is a presumption of guilt against employer. Is that accurate? If so, is it statutory or procedural?
>
> ...
>
> Federal funding - to what extent does it depend on the finding of discrimination? If a case is dismissed as groundless, do the feds still pay? Are a certain number of cases required annually to maintain funding and what happens if you don't get that many complaints? (Joint Exhibit 5).

55. There is nothing in the position descriptions completed by Grievant and Cass by which one could fairly conclude that there is a presumption of guilt against employers by Civil Rights Investigators in employment discrimination cases.

56. Benner uses the desk audit as an opportunity to "blow the smoke away." He believes that employees at times exaggerate their job duties when they are attempting to obtain a classification upgrade.

57. Benner conducted a desk audit with the Civil Rights Investigators on June 12, 1990. At the desk audit, Benner discovered that the Attorney General's Office had hired another investigator, Jefferson Dorsey, to replace Steinzor. Dorsey had only been working in the position for approximately two weeks. He had not submitted any written documents with respect to the classification review and he attended the audit primarily as an observer, using the audit as an opportunity to learn more about his job.

58. At the June 12 desk audit, Benner focused on the alleged preconceived bias of Civil Rights Investigators towards employers. He spent very little time asking questions concerning the skills and responsibilities of the position. Benner was confrontational and he minimized the significance of the Civil Rights Investigator positions. Benner also focused on what he perceived as the insignificance of LOD's prepared by Civil Rights Investigators. The investigators asserted during the desk audit that they did not have preconceived beliefs, and that this perceived bias is something they frequently face, making their jobs more difficult. Benner challenged their assertions.

59. Benner learned at the desk audit that the majority of cases that the Civil Rights Unit investigates are allegations of sex discrimination. The investigators also told Benner that they investigated all types of businesses, large and small, and they had to be familiar with a wide range of business practices.

60. After the desk audit, Benner concluded that Cass did not have a bias against employers, but still thought that Grievant may have such a bias.

61. Benner met with Appel on June 22, 1990. Benner also questioned Appel about this presumption of an employer's guilt. Benner and Appel discussed monetary issues, including the EEOC contract, and the amount the Civil Rights Unit had recovered the previous year, which was approximately $800,000. Appel and Benner also discussed Appel's supervision of the investigators and their autonomy in the Unit. Appel did not believe that Benner understood the degree of independence that is required of Civil Rights Investigators and he sent Benner a letter on June 27, 1990, which stated, in pertinent part:

> ...
>
> My concern focuses on the degree of supervision which I exercise over our three investigators. I perform perfunctory review of work product merely to avoid potential ethical problems with allowing the unauthorized practice of law by persons not admitted to practice. Due to the nature of our informal, administrative quasi-judicial process, the investigators routinely make legal determinations and perform legal functions more generally performed by attorneys . . .
>
> In no way do I believe that this on-going review reduces the high degree of autonomous responsibility which must be continuously shouldered by our investigative staff. It is only because our investigators deal on a daily basis with sophisticated corporate and privately retained counsel . . . that I feel it is necessary to perform this general oversight function.

> ...I do not believe that our investigators should be in any way held back or degraded because they frequently go toe to toe with opposing counsel (Grievant's Exhibit 5).

62. By the end of June, 1990, Benner had reviewed all the documents pertinent to reclassification requests for the Criminal, Medicaid Fraud and Civil Rights Investigators and had conducted all his interviews for both positions.

63. Benner had interviewed the Criminal Investigators at the same time. Benner did not discover in this interview that one of the Criminal Investigators, LaCount, does not work in the Criminal Division. One Criminal Investigator primarily responded to Benner's questions regarding their duties and one Medicaid Fraud Investigator primarily responded to questions regarding the Medicaid Investigators' duties. Benner did not interview LaCount's supervising attorneys. Benner did not question the Criminal Investigators regarding any bias they may have in investigating cases. In evaluating the Criminal Investigators, Benner compared them primarily to State Police Detective Sergeants, and not to Civil Rights Investigators.

64. During his classification review, Benner was aware that, in 1986, Willis & Associates ultimately had rated the Civil Rights Investigators at the same pay grade as Medicaid and Criminal Investigators, and had placed all the positions in the same associated class. Benner did not work for the Department of Personnel at the time of this 1986 rating. He believed that the Willis rating was incorrect. Benner concluded that the Civil Rights Investigators had been incorrectly placed in the same

class and at the same pay grade with the Criminal Investigators. At the time Benner reached this conclusion, the only materials he had pertinent to the Willis rating were the job descriptions submitted by employees.

65. Benner applied the Willis points in the various categories for the Civil Rights Investigators. He initially determined that the Civil Rights Investigators should remain in their present pay grade, Pay Grade 19. Benner applied the Willis points in the various categories for the Criminal and Medicaid Fraud Investigators, now collectively referred to as Criminal Investigators, and determined that they should be reclassified three pay grades higher to Pay Grade 22. Rose reviewed these ratings and agreed with Benner's determination.

66. Shortly before August 22, 1990, Benner called Burgess regarding his conclusions. Burgess indicated a desire to talk with Benner before any notices were issued. Benner met with Burgess, who indicated to Benner that he was pleased with the reclassification of the Criminal Investigators, but concerned about the Civil Rights Investigators. Burgess feared that this disparity in classification would cause a problem in the office. There had recently been a case involving disparity in pay between female victim advocates and male investigators in the State's Attorneys' offices. Burgess discussed this case with Benner.

67. Burgess urged Benner not to issue anything immediately. He indicated that he would provide additional information that would improve the ratings of the Civil Rights Investigators. He subsequently suggested that Benner compare several positions in

the workers compensation division at the Department of Labor and Industry and he also suggested that Benner look at an abolished class of legal assistants. Benner reviewed these positions, but did not alter his initial ratings. Prior to Benner making his decision, while Burgess did not explicitly recommend that Benner compare Civil Rights Investigators with Criminal Investigators, Benner and Burgess had discussions concerning the comparability between those positions. Burgess assumed that Benner would make a comparison between the positions.

68. Burgess suggested a further meeting among Appel, Benner, and himself, which meeting occurred on August 22, 1990. At this meeting, Benner stated that the legal knowledge required of the Civil Rights Investigators was at a paraprofessional level, and that the knowledge of the law which was required was very narrow. Appel and Burgess mentioned to Benner that the duties of the Civil Rights Investigators had been expanded with respect to areas such as handicap discrimination and "hate crimes". Subsequent to this meeting, Benner improved the Civil Rights Investigator's rating in the Knowledge and Skills category, boosting the pay grade to Pay Grade 20.

69. Rose agreed with Benner's final determinations and Benner issued his decisions on or about August 29, 1990. Benner's decisions were that Criminal Investigators would receive an increase of three pay grades to Pay Grade 22 (having received a total numerical rating in the Willis point factor system of 395), and that Civil Rights Investigators would receive an increase of one pay grade to Pay Grade 20 (having received a

total numerical rating of 322). The primary comparison for Criminal Investigators was State Police Sergeants (Detective Sergeants); the primary comparisons for Civil Rights Investigators were Appeals Referees (Pay Grade 20), Environmental Enforcement Officers (Pay Grade 20) and Hearings Examiner A, Disability Determinations (Pay Grade 21) (Joint Exhibit 4, State's Exhibit 9, Grievant's Exhibits 1-4).

70. On August 29, 1990, Benner sent a memorandum to Grievant containing an explanation of the point factor rating assigned to her position (State's Exhibit 9).

71. The first category in the Willis rating system is Knowledge and Skills, which has three components: "job knowledge", "managerial skills", and "interpersonal skills" (State's Exhibit 9).

72. The Civil Rights Investigators received 184 total points in Knowledge and Skills and the Criminal Investigators received 212. This represented an improvement over the 1986 rating for Civil Rights Investigators who had received a numerical rating of 160 in Knowledge and Skills (Joint Exhibit 4; State's Exhibit 9).

73. The "job knowledge" component in the category of Knowledge and Skills ranges from a low of "A" to the highest level of job knowledge, "F". Benner assigned the Civil Rights Investigators a rating of "D" and the Criminal Investigators a higher rating of "E". A "D" rating requires a beginning measure of knowledge in a specialized or technological field. An "E" rating requires full competence in a technological or specialized field (Joint Exhibit 4; State's Exhibit 9).

74. Benner believed that Civil Rights Investigators did not require "full competence" in their positions for two reasons: 1) they function on a paraprofessional level, and 2) Civil Rights Investigators are confined to investigating discrimination in employment, which Benner did not believe requires a full range of investigative skills. Benner believed that Criminal Investigators, on the other hand, are responsible for investigating a wider scope of activities (i.e., criminal activities) which have more statutory provisions than employment law.

75. Benner assigned Criminal and Civil Rights Investigators identical ratings in the second and third components of the Knowledge and Skills category, "managerial skills" and "interpersonal skills". Willis & Associates had assigned the Civil Rights Investigators a lower rating in "interpersonal skills" in 1986 (Joint Exhibit 4; State's Exhibit 9).

76. Although the "managerial" and "interpersonal skills" components were identical for Civil Rights and Criminal Investigators, their total Knowledge and Skills numerical ratings differed by 28 points because Civil Rights Investigators had received a lower rating in "job knowledge". The final numerical rating is determined by all three components.

77. The second Willis category of Mental Demands has two components: "independent judgment" and "problem solving" (State's Exhibit 9).

78. The Mental Demands numerical rating is partially dependent on the final numerical rating in Knowledge and Skills;

a higher Knowledge and Skills' rating in a position will improve the Mental Demands' rating in that same position.

79. Benner assigned the Criminal and Civil Rights Investigators an identical rating in the "independent judgment" component of Mental Demands.

80. Civil Rights Investigators had received a Mental Demands numerical rating of 61 in the 1986 classification review. Benner assigned a similar numerical rating of 61, but lowered the second component, "problem solving", from a "4" to a "3", basing this analysis on the comparative "problem solving" component of Appeals Referees. Although existing ratings are considered presumptively correct in classification reviews, Benner believed that the 1986 rating was the result of incorrectly comparing Civil Rights Investigators to Criminal Investigators. Benner perceived the problems facing Civil Rights Investigators as recurring, although not routine. This lower rating in "problem solving", when computed with the Knowledge and Skills numerical rating, determined the total numerical rating of 61 (Joint Exhibit 4; State's Exhibit 9).

81. Benner assigned the Criminal Investigators a higher rating of "4" in the second component of Mental Demands, "problem solving". He determined that their problems are nonrecurring because they handle a number of different types of problems (e.g., murder, public corruption, child abuse). This, combined with the Criminal Investigators' higher rating in Knowledge and Skills, provided a numerical rating of 92 (Joint Exhibit 4).

82. The third Willis category of Accountability has three components: "freedom to take action", "size of impact", and "nature of impact" (State's Exhibit 9).

83. Benner gave the Civil Rights Investigators and Criminal Investigators identical component ratings in Accountability, but assigned the Criminal Investigators a slightly higher overall numerical rating of 80 and the Civil Rights Investigators a 70 (Joint Exhibit 4; State's Exhibit 9).

84. The last Willis category of Working Conditions has three components: "physical efforts", "hazards", and "discomfort" (State's Exhibit 9).

85. Civil Rights Investigators had received a numerical rating of 10 in the Working Conditions category in 1986. Benner lowered this by reducing the "hazards" component one level, resulting in a numerical rating of 7. Again, Benner believed his rating was correct and the 1986 rating stemmed from Willis incorrectly placing the Civil Rights Investigators with the Criminal Investigators. The higher rating in Working Conditions which Benner gave Criminal Investigators (i.e., 23) resulted primarily from the higher degree of danger to which Criminal Investigators are exposed (Joint Exhibit 4; State's Exhibit 9).

86. If Benner assigned the same "job knowledge" rating to Civil Rights Investigators as he had assigned to Criminal Investigators, the numerical rating in Knowledge and Skills for Civil Rights Investigators would have totaled 212. Also, if Benner had retained the 1986 "4" "independent judgment" component rating in Mental Demands, the Civil Rights Investigators, at a

minimum, would have received an improved numerical rating in Mental Demands of "80". A combination of these two increased ratings, irrespective of any changes from Benner's ratings in the other two categories (i.e., Accountability and Working Conditions), would have given the Civil Rights Investigators a total numerical rating of 369, which is within the numerical range of Pay Grade 22.

87. It is possible to "stretch" a rating if a particular portion of a job is more difficult and it is a significant part of the job. Benner "stretched" ratings for Criminal Investigators because of their involvement in political corruption trials, among other factors. However, Benner had no knowledge as to the extent with which the Criminal Investigators were ever involved in political corruption trials. In contrast, Grievant had told Benner that switching roles in an investigation, from fact finder to mediator to decision maker, is one of the most difficult functions of Civil Rights Investigators. Benner did not believe that this warranted "stretching" their rating, as it is just one function of their jobs.

88. Appel and the Civil Rights Investigators did not understand how the Civil Rights positions could be rated two pay grades below their Criminal counterparts in the Attorney General's Office. Burgess and the Civil Rights staff believed the ratings by Benner were inequitable.

89. Subsequent to Benner issuing his decision, Burgess called Rose and requested a meeting so that Rose could explain the ratings given the Civil Rights Investigators. Rose asked Benner to accompany him. It was Rose and Benner's understanding that the sole purpose of the meeting was to explain the ratings, and that they would be meeting only with Burgess, Grievant and VSEA representative Gail Rushford. Rose and Benner did not understand that a purpose of the meeting was for them to reconsider the rating.

90. The meeting was held on September 21, 1990. Benner and Rose arrived at Burgess' office and were met by Grievant, Dorsey, Malley, Appel Burgess and Rushford. (Cass had left employment with the Attorney General's Office by this time.) Burgess made introductory remarks and left. Rose and Benner had not expected the additional attendees at the meeting, nor that Burgess would leave the meeting and not participate.

91. It was the Civil Rights Unit's understanding that the purpose of the September 21 meeting was for Benner to explain how he reached his conclusion, for Rose to do an independent review of the decision and for the Unit to provide additional information so that Benner and Rose fully understood the complexity and autonomy of the Civil Rights Investigator's job. Neither Rose nor Benner took notes during the meeting.

92. During the meeting, Appel attempted to equate the importance of investigating sex harassment charges with murder and criminal investigations. Benner jumped up at one point and said, "You've got to be kidding!" Benner was defensive over his

rating and analysis at this meeting, and Appel responded by heatedly attacking Benner's rating. After Appel had compared the Civil Rights Investigators to the Criminal Investigators, Benner stated that the Criminal Investigators investigate a broader range of cases. Benner explained that the Criminal statues comprise all of Title 13 of Vermont Statutes Annotated, while the Civil Rights Investigators only investigated the Fair Employment Practices Act, which is much less thick. The meeting was not productive in resolving differences.

93. Subsequent to this September 21, 1990, meeting, Grievant sent an eight page letter to Rose. Grievant requested that the position of Civil Rights Investigators not be separated from the Criminal Investigators' class at the Attorney General's Office. She requested to know the basis for the present disassociation, and she further requested an opportunity to submit information which would support the Civil Rights Investigators remaining with the class. Alternatively, Grievant requested that if Rose believed there was justification for the disassociation, that he rate the Civil Rights Investigators comparably with the Criminal Investigators. Grievant provided a lengthy analysis of comparability, emphasizing the Knowledge and Skills and Mental Demands portions of their respective ratings. Rose did not respond to this letter (Joint Exhibit 2).

94. Appel sent a letter to Rose on October 2, 1990, with a copy of the earlier June 27, 1990, letter which he had sent to Benner, emphasizing the limited supervision which he had over the Civil Rights Investigators (Grievant's Exhibit 6).

95. On or about October 25, 1990, VSEA filed at the Step III level a classification grievance on behalf of Grievant and Jefferson Dorsey. The Department of Personnel thereafter refused to consider the grievance on the grounds that it was untimely.

96. Burgess sent a letter to Department of Personnel Deputy Commissioner Brian Kelly on October 18, 1990, in which he stated:

> The Attorney General's Office, which is the immediate employer of [Criminal and Civil Rights Investigators], recognizes no qualitative distinction between the two types of investigators in areas of job knowledge and interpersonal skills ("knowledge and skills"), independent judgment and problem solving ("mental demands"), freedom to take action and the size or nature of impact ("accountability")....from our perspective, the essential demands and abilities to perform investigations are the same (Grievant's Exhibit 7).

97. Burgess and Kelly discussed the possibility of an independent audit. It was agreed that Director of Personnel Operations Claude Magnant, who was ill and not working in the office at the time, would conduct an independent analysis.

98. Part of this independent review by Magnant included a letter and summary comparing Criminal Investigators and Civil Rights Investigators sent by Burgess to Magnant on October 29, 1990, in which he challenged Benner's rationale for distinguishing between the Criminal Investigator and Civil Rights Investigator positions. At one point in the summary, Burgess responded to the following comment by Benner:

> The amount of obvious exaggeration that has characterized all of the communication I have had with the Attorney General's Office since I told them my initial recommendation has made it particularly difficult to base my conclusions on anything beyond the original audit.
>
> I have recently re-read all of the position descriptions and my notes on both the Criminal and Civil Rights Investigators. If I feel any doubts as to the appropriateness of the relative pay grades, it is to question whether the Civil Rights Investigators' rating should have changed at all.

In response to this comment, Burgess stated that "there has been no exaggeration" and "overall, we believe the two positions are more the same than dissimilar, and we certainly do not recognize or understand a two grade difference" (Joint Exhibit 4).

99. Burgess also stated in the October 29, 1990, letter:

> ...
>
> Essentially, we believe the job functions to be substantially the same in areas of "skills", "mental demands", and "accountability". There are some obvious differences between the two jobs, none of which justify, in our opinion, a distinction between the positions of two pay grades. Certainly the diversity and complexity of legal knowledge required of the [Civil Rights Investigators] in an operational sense is equal to, if not greater than, the legal skills required of Criminal Investigators. Many other variety of factors shared between the positions operate overall to equal each other out (Joint Exhibit 4).

100. Magnant reviewed the submitted information. He conducted no interviews with the incumbent employees or their supervisors. At some point in the last half of December, Magnant concurred with the Department of Personnel's rating, thereby leaving the Civil Rights Investigators two pay grades below the Criminal Investigators.

101. On January 14, 1991, the Department of Personnel received a Step III grievance filed by VSEA, on behalf of Grievant. The grievance was dated January 10, 1991. Therein, Grievant alleged that the Department of Personnel had violated the Contract by the discriminatory treatment of Grievant in carrying out its obligations regarding the classification of her position, and by the arbitrary and capricious review and application of the classification point factor analysis system under the classification review process. Grievant alleged that

the following contract articles were violated: Article 5 - No Discrimination or Harassment and Affirmative Action; and Article 16 - Classification Review and Classification Grievance. Grievant requested, as remedial action, that Grievant be afforded full and impartial review of her position's classification and assignment to paygrade and that Grievant be afforded a complete written explanation of the findings of such a review and the opportunity to redress factual errors (State's Exhibit 16).

102. On January 25, 1991, Thomas Ball, Director of Employee Relations, denied the grievance as untimely filed (State's Exhibit 17).

OPINION

Procedural Issues

The State contends that this grievance should be dismissed due to several procedural flaws. We will discuss each of the procedural issues raised by the State in turn.

First, the State contends that Grievant, by claiming that she was discriminated against on the basis of sex during the classification review of her position, has done an "end run" around the Contract's prohibition against grieving an upward classification change. The State contends that the Board should not allow Grievant to do such an "end run" given the provisions of Article 16 of the Contract, entitled Classification Review and Classification Grievance.

Article 16, Section 4 (a) provides that "a classification grievance may be filed only if the position submitted for review was not changed to a higher pay grade." Article 16, Section 6

provides that the "grievance and appeal procedures provided herein for classification disputes shall be the exclusive procedures for seeking review of the classification status of a position or group of positions."

We conclude that these provisions do not preclude the grievance which was filed in this matter. First, Grievant did not file a classification grievance pursuant to Article 16, so the prohibition against classification grievances in cases where the position was changed to a higher pay grade is not applicable. Second, the exclusivity provision of Article 16 must be considered in conjunction with the the provisions of Article 5, Section 1, under which provision this grievance was filed. Article 5, Section 1, provides in pertinent part as follows:

> In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against . . . any employee because of . . . sex . . .

A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980). In construing the Contract as a whole here, we conclude that the parties did not intend to prohibit employees from filing a grievance with respect to sex discrimination which occurs in the course of a classification review. Otherwise, the expressed purpose of the parties to "achieve work relationships . . . at every level which are free of any form of discrimination"

would be frustrated. Thus, while generally it is true that the grievance and appeal procedures under the classification article are the exclusive procedures for seeking review of the classification status of positions, this does not preclude employees from grieving alleged sex discrimination which occurs during the course of a classification review.

The State also contends that the grievance is procedurally flawed because it was untimely filed. The State contends that the grievance was untimely pursuant to Article 15, Section 4, of the Contract because it was not initially filed, at the Step III level, until January 14, 1991, some four and one-half months after the final notice of classification action was issued and received by Grievant. Article 15, Section 4 (b), provides that "(g)rievances . . . initially filed at . . . Step III shall be submitted within fifteen (15) workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to the grievance."

The State contends that the clock for filing a grievance began running on August 29, 1990, the date that Joe Benner, the classification analyst for the Department of Personnel, issued his decision providing that Grievant's position of Civil Rights Investigator would be changed from Pay Grade 19 to Pay Grade 20. We disagree. Grievant's employer, the Attorney General's Office, informally attempted to convince the Department of Personnel to revise Bennner's decision from the time of his decision until the Department of Personnel agreed in October 1990 that the Director of Personnel Operations, Claude Magnant, would conduct an

independent analysis. It was not until Grievant was notified during the last half of December 1990 that Magnant concurred with the Department of Personnel's rating that the clock for submitting a grievance began running.

In her response to the State's Motion for Summary Judgment, Grievant indicated that she was notified of Magnant's agreement with the rating on December 19, 1990. The State has presented no evidence to contradict this assertion. Thus, the grievance was timely pursuant to Article 15, Section 4 (b), if it was submitted within 15 workdays of this date, or by January 11, 1991. A grievance is timely "submitted" if it is post-marked or hand-delivered within the specified time period. Grievance of Amidon, 6 VLRB 83, 86 (1983). The Step III grievance here was dated January 10, 1991, and we presume, absent evidence to the contrary, that it was post-marked on either that day (a Thursday) or the following day (a Friday) to be received by the Department of Personnel on January 14 (the following Monday). Thus, the Step III grievance was submitted in a timely manner pursuant to the Contract.

In any event, even assuming that the grievance was not initially filed within specified contractual timeframes, Grievant contends that the discrimination resulting from the Department of Personnel's action continues, and thus the Board should accept this as a continuing grievance. The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the

alleged violations during the period they were still occurring. Grievance of Cole, 6 VLRB 204, 209-210 (1983). Employees are permitted to institute grievances over the matter at any time during the period in which the alleged violations are occurring, since there is a new occurrence of the alleged violation every time a paycheck was issued, with the restriction that the employees waive their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievance. Id.

Discriminatory action which occurs during a classification review can affect the rate at which an employee is paid on a continuing basis since an inherent part of a classification review is assigning positions to pay grades. The direct impact of classification reviews on pay practices results in this grievance being a valid continuing grievance.

The final procedural issue which the State raises is that the grievance is flawed because it was initially filed at Step III of the grievance procedure, the Department of Personnel level, rather than at Step II, with the Department with which Grievant is employed. We conclude that Grievant was not required to initiate this grievance at Step II. Article 15, Section 4 (a), provides that grievances may be initiated at Step III "if the subject matter of the grievance is clearly beyond the control of the agency, department or institution head." The issue of whether the Department of Personnel discriminated on the basis of sex in the classification review, the subject matter of this grievance, clearly is beyond the control of the Attorney General's Office.

Thus, there are no fatal procedural flaws in this grievance preventing us from reaching the merits of Grievant's sex discrimination claim.

Sex Discrimination Claim

Grievant contends that the classification decisions which created the two pay grade disparity between her position, Civil Rights Investigator, and the Criminal and Medicaid Fraud Investigators was the result of discrimination against Grievant due to her gender. Prior to the classification decisions, the Civil Rights Investigators were assigned to the same associated class and paid at the same pay grade as the Criminal and Medicaid Fraud Investigators. The Criminal and Medicaid Fraud Investigator positions have been occupied exclusively by men historically, while, during the classification review at issue herein, the majority of Civil Rights Investigators were women. Grievant specifically contends that she has been subject to disparate treatment and a higher level of scrutiny than similarly situated males.

In disparate treatment cases, we have previously adopted the analysis developed by the U.S. Supreme Court in determining whether an employee was discriminated against on account of gender. Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988). The central focus of the inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their . . . sex". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination. Price Waterhouse v. Hopkins, 490 US 228 (1989). Grievant contends that this is a "pretext" case; that the legitimate business reason offered by the Employer for the classification decision is just a pretext for the real reason of sex discrimination. Id. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id. In pretext cases, the analysis used is that which is set forth in Texas Department of Community Affairs v. Burdine, 450 US 248 (1981).

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Id. at 252-253. Second, if the complainant succeeds in proving the prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action against the employee. Id. Third, should the employer carry this burden, the employee must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we first determine whether Grievant has established a prima facie case of discrimination based on gender. The burden of establishing a prima facie case of disparate treatment is not onerous. Id. at 253. The complainant must prove by a preponderance of the evidence that she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination. Id. The Burdine Court stated:

> As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. Id. at 254.

In cases where there is an allegation of sex discrimination regarding compensation, a complainant may establish a prima facie case of discrimination by proving that she is a member of a protected class, and that she is paid less than a non-member for work requiring substantially equal levels of skill, effort and responsibility. Marcoux v. State of Maine, 797 F.2d 1100, 1106 (1986). Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1431 (1984).

However, claims of intentional sex-based wage discrimination can also be brought even though no member of the opposite sex holds an equal but higher paying job. County of Washington v. Gunther, 452 U.S. 161 (1981). Otherwise, if an employer used a transparently sex-biased system for wage determination, women

holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Id. at 179. What must be shown in such cases to support an inference that the complainant was discriminated against depends on the facts of each case, but the complainant must present evidence creating an inference that the wage disparity she points to was more likely than not the result of intentional sex discrimination. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir. 1984). Cert. denied, 105 S.Ct 511 (1984). A comparable work standard cannot be substituted for an equal work standard; thus evidence of comparable work will not alone be sufficient to establish a prima facie case. Id. Discriminatory intent will not be inferred merely from the existence of wage differentials between jobs that are only similar. Id. However, the comparability of the jobs can be relevant to determining whether discriminatory animus can be inferred. Id. at 700-701. Comparability, along with other evidence of discriminatory animus, supports an inference of illegally discriminatory motive. Id. at 704.

In applying that analysis to this case, we conclude that Grievant has not established by a preponderance of the evidence that her position was placed at a lower pay grade than positions held by males for work requiring substantially equal levels of skill, effort and responsibility. The duties performed by Grievant as a Civil Rights Investigator are sufficiently distinct from those performed by the Criminal and Medicaid Fraud Investigators so that they are not substantially equal. The fact

finding, mediation and legal writing functions of a Civil Rights Investigator in handling employment discrimination cases constitute sufficiently different tasks than the investigative tasks performed by the Criminal and Medicaid Fraud Investigators in addressing criminal, medicaid fraud and consumer fraud cases so that the skills, effort and responsibilities of the positions are not substantially equal. The subject matters of investigation are not only different but, also, the mediation and legal writing functions performed by Civil Rights Investigators are not performed by the other investigators. Thus, Grievant cannot make out a prima facie case of discrimination based on the theory of substantial equality to the positions held by males. Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409, 1413-1418 (9th Cir. 1988).

Thus, Grievant's prima facie case must rest on evidence creating an inference that the difference in pay grades she points to resulting from the classification review was more likely than not the result of intentional sex discrimination. In this regard, we consider the comparability of Grievant's position to the other Investigator positions, along with whether there is other evidence of discriminatory animus, to determine whether an inference of discriminatory motive can be supported.

We conclude that Grievant has presented evidence creating an inference of discrimination based on sex. The fact that, as a result of the comprehensive Willis classification review in 1986, the Civil Rights Investigator position was placed in the same associated class and at the same pay grade as the Investigator

positions in the Attorney General's office occupied by males supports the conclusion that the work performed by the different positions was at least generally comparable. This alone is not sufficient to demonstrate discriminatory intent on the part of the Department of Personnel when the positions were placed in different classes at different pay grades in 1990. However, it is relevant to such a determination, particularly given a lack of evidence that the relative functions of the job changed significantly in the interim four years.

Other evidence of discriminatory animus does exist in this case. It is apparent that Joe Benner, the classification analyst performing the classification reviews, scrutinized the Civil Rights Investigator positions, occupied in two of three cases by women, much more closely and much more critically than the other Investigator positions occupied exclusively by males. This is indicated by Benner's overall impression, after reading the position descriptions prepared by Grievant and the other female occupant of the Civil Rights Investigator position, that there was a presumption of guilt against employers by the Investigators in employment discrimination cases even though there was nothing in the position descriptions by which one could fairly reach such a conclusion. He then focused on this alleged preconceived bias at the subsequent desk audit. Yet, when he reviewed the Investigator positions occupied exclusively by males, he did not question them with respect to any bias they may have in investigating cases. Also, he did not even discover that one of the Criminal Investigators worked in the Consumer Protection Unit, not the Criminal Division. This difference in scrutiny

between positions occupied by a majority by women and those occupied exclusively by men, absent any valid reason, is relevant evidence supporting an inference of discriminatory intent based on gender.

Benner's unwarranted impression and preoccupation with the notion that Civil Rights investigators presume employers are guilty also constitutes relevant evidence on gender bias due to the nature of the work of Civil Rights Investigators. Benner was aware that a major area of work for Civil Rights Investigators involved handling claims of sex discrimination against employers. By expressing concerns with the impartiality of the Investigators for no valid reason, Benner demonstrated his own lack of impartiality towards the sex discrimination work with which the Civil Rights Investigators were involved.

Relevant evidence on gender bias also exists with respect to Benner concluding that the Civil Rights Investigators worked at a paraprofessional level, even though it is clear that the fact finding, mediation and legal writing duties they performed constituted professional level duties. The professional responsibilities, independence and autonomy were made clear to Benner by the Investigators and their superiors, yet Benner did not change his views in this regard. We conclude that this is evidence of a form of sex stereotyping questioning the ability of female employees to independently engage in complex intellectual and investigative work. Employment decisions must not be predicated on stereotypical impressions concerning the characteristics of males and females. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978). Price Waterhouse, 490 U.S. at 251-58.

In sum, this evidence of discriminatory animus on the part of Benner, together with the comparability of all of the Investigator positions recognized under the Willis study, creates an inference that the the two pay grade disparity between the Civil Rights Investigator position and the other Investigator positions occupied exclusively by men was more likely than not the result of intentional sex discrimination. Thus, Grievant has established a prima facie case.

The fact that, during the classification review process, one of the three occupants of the Civil Rights Investigator positions was a male, Jefferson Dorsey, does not defeat Grievant's prima facie case. It is of greater significance to us that, during the classifciation review process, a majority of occupants of the Civil Rights Investigator position were female, while males have exclusively occupied the Medicaid Fraud and Criminal Investigator positions, than it is that a male occupied a Civil Rights Investigator position at the time of the classification review. This is particularly so when the evidence indicates that Dorsey played only a minor role in the review process.

Once the complainant establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action. Burdine, 450 US at 253. In putting forth its non-discriminatory reasons, the employer need not persuade the reviewing body that it was actually motivated by the proffered reasons. Id. at 254. It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the complainant. Id.

The Employer has met this burden. The Employer contends that Benner reviewed all materials submitted to him, considered all

arguments, and then applied the Willis point factor system in a non-arbitrary and non-capricious way to arrive at his classification ratings. This resulted in the Criminal and Medicaid Fraud Investigators receiving higher ratings than the Civil Rights Investigators in the four major categories rated under the Willis system (i.e., knowledge and skills, mental demands, accountability, and working conditions). This constitutes a legitimate, non-discriminatory reason for the two pay grade disparity between the positions, and the Employer's evidence with respect to this raises a genuine issue of fact as to whether it discriminated against Grievant.

The Employer having carried its burden of production, Grievant must have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination. Burdine, 450 US at 253. McDonnell Douglas, 411 US at 804. Rogers, 11 VLRB at 126. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant. Burdine, 450 US at 253. Rogers, 11 VLRB at 125-26. In Burdine, the Supreme Court indicated what needs to be shown to prove pretext:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. 450 US at 256.

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and

inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case. Id. at 255, n.10.

We conclude that Grievant has met her burden of proving by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination. We have closely examined the evidence relating to Benner's application of the Willis point factor system to the respective classification reviews. We have concluded that Benner's explanation for the disparities in ratings, when considered with the evidence previously discussed with respect to Grievant establishing a prima facie case, is unworthy of credence. His reliance on the thickness of criminal statutes relative to employment discrimination statutes to compare the knowledge and skills of the respective Investigator positions indicates that he was not approaching his review in a neutral, unbiased way. His conclusion that Civil Rights Investigators operated at a paraprofessional level, which affected his ratings in the categories of job knowledge and skills and mental demands, reflected the introduction of sex stereotypes into his review and ultimate rating. His conclusion that the previous Willis review comparing the Civil Rights Investigator position with the Criminal and Medicaid Fraud Investigator positions was simply wrong, despite his responsibility to consider past Willis ratings as presumptively correct, again demonstrates that he was not approaching his review in a neutral, unbiased way.

In determining that Grievant established a prima facie case of discrimination, we concluded that Benner's more critical and closer scrutiny of Civil Rights Investigators than the other

Investigators, his lack of impartiality towards the sex discrimination work of Civil Rights Investigators and his sex stereotyping of their work created an inference of discrimination, when considered together with the previously recognized comparability of all the Investigator positions and the gender breakdown of the positions. When this evidence is considered together with Benner's explanation of the disparities in ratings between the positions, we conclude that the proffered reasons are not worthy of credence and constitute a pretext for discrimination against Grievant based on gender.

Claim of Political Discrimination

In her Memorandum of Law filed in this matter, Grievant contends that the Employer's actions also constituted political discrimination against her pursuant to Article 5 of the Contract. This claim is untimely raised. The Board, with the approval of the Vermont Supreme Court, has refused to consider issues which were not raised at earlier steps of the grievance procedure. Grievance of Ulrich, 12 VLRB 230, 239 (1989). Affirmed, ___ Vt ___ (Slip Opinion, August 23, 1991). Similarly, the Board has declined to resolve issues which were not raised in the grievance filed with the Board pursuant to the Board Rules of Practice, which requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent section of the collective bargaining agreement and/or the rules and regulations. Grievance of Regan, 8 VLRB 340, 364 (1985). Affirmed, 153 Vt. 333 (1989). Neither the Step III grievance nor the grievance filed with the Board contained a claim of political discrimination, and thus we decline to consider that issue.

Remedy

We turn to determining what remedy to grant Grievant due to the discrimination against her due to gender during the classification review process. Grievant has moved to amend her grievance to request as a remedy that the Board order that the Department of Personnel upgrade the Civil Rights Investigators to the same pay grade to which the Criminal Investigators are assigned. We grant the motion to amend. The Employer has been on notice since Grievant's opening statement at the outset of the hearings in this matter that Grievant was requesting such a remedy. We see no prejudice to the Employer under the circumstances to allow such an amendment.

However, we decline to grant the remedy requested. Grievant is asking the Board to finally determine the appropriate classification of her position. We do not believe that the VSEA and the State intended the Board to have such remedial powers. In classification appeals to the Board, the Board must remand to the Commissioner of Personnel if the Board determines that a classification decision was arbitrary and capricious. Article 16, Section 7, Contract. Thus, in this grievance involving sex discrimination during the classification review process, Grievant asserts that we have substantially broader remedial powers than we do with respect to classification appeals. We believe such a result would subvert the intent of the Contract.

Further, such a remedy would go beyond making Grievant whole for damages which she suffered as a result of the discrimination. To make Grievant whole is to place her in the

position which she would have been in had the discrimination not occurred. Rogers, 11 VLRB at 132-33. If the discrimination had not occurred, Grievant would have been in the position of receiving a non-discriminatory classification review of her position pursuant to the Contract, but her position would not necessarily have been placed at Pay Grade 22. It is true that the Civil Rights Investigator position and the Criminal Investigator positions are at least generally comparable, but this does not necessarily mean a non-discriminatory application of the Willis point factor system will result in identical pay grades.

Instead, we conclude that the appropriate remedy in this case generally is the remedy initially requested by Grievant prior to amending her grievance, to wit: 1) that the Board order the Department of Personnel to conduct a full and non-discriminatory review of the classification and assignment to pay grade of Grievant's position, and 2) that Grievant be provided with a complete, written explanation of the results of that review and an opportunity to correct factual errors. The only alteration we would make to this is to specify that, in the event this review results in Grievant's position being rated at a pay grade which is higher than her present pay grade, Grievant should receive back pay, plus interest, from the date that the initial classification decision was effective (i.e., May 27, 1990). Grievant should not be harmed by the delay in this matter. This remedy will serve to make Grievant whole.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED:

1. The Grievance of Jean Lowell is SUSTAINED;

2. The Department of Personnel shall conduct a full and non-discriminatory review of the classification and assignment to pay grade of Grievant's position;

3) Grievant shall be provided with a complete, written explanation of the results of that review and an opportunity to correct factual errors; and

4) In the event that this review results in Grievant's position being rated at a pay grade which is higher than her present pay grade, Grievant shall receive back pay, plus interest at the rate of 12 percent per annum computed on gross pay, from the date that the initial classification decision in this matter was effective (i.e., May 27, 1990) and ending on the date she receives such monies.

Dated this 20th day of August, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chairman

/s/ Catherine L. Frank

Catherine L. Frank

Leslie G. Seaver