

VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	
THOMAS HOWELL, VIRGINIA	)	
MERRIAM, JEFFERSON KRAUS,	)	DOCKET NO. 08-38
DARIN BARBER AND	)	
STEVE MERCHANT	)	

MEMORANDUM AND ORDER

This matter is before the Labor Relations Board as an appeal from a classification decision of the Commissioner of Human Resources pursuant to Article 16, Section 7, 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, 2007 to June 30, 2008 ("Contract").

In June 2007, the Investigators for the Criminal Division of the Vermont Attorney General's Office submitted a request for classification review to the Department of Human Resources, requesting that their positions be changed from Pay Grade 22 to a higher pay grade. On November 16, 2007, Tammie Ellison of the Department of Human Resources Classification Section notified the employees that their positions were properly classified and the request for upgrade was denied. The employees requested an informal meeting with Ellison to discuss the classification action. The meeting was held on November 29, 2007. On January 29, 2008, Ellis informed the employees that their positions were properly classified because the duties and performance expectations for the positions were consistent with those of an Attorney General's Investigator, pay grade 22.

On February 14, 2008, the employees filed a classification grievance with the Commissioner of Human Resources over the denial of the upgrade request. On July 23,

2008, Human Resources Commissioner David Herlihy denied the grievance. On August 21, 2008, the Vermont State Employees' Association filed an appeal of the Commissioner's decision with the Labor Relations Board on behalf of the Investigators ("Appellants"). Appellants contend that the Commissioner's decision violated Article 16, Section 7, of the Contract in that it was arbitrary and capricious in the application of the point factor system to the facts established by the record.

Appellants filed with the Board the whole record of the proceedings below, and the decision of the Commissioner of Human Resources. Appellants filed a brief in support of their position on December 30, 2008. The State filed a brief in support of its position on January 9, 2009. Oral argument was held before Board Members Edward Zuccaro, Chairperson; Richard Park and James Kiehle on January 15, 2009, in the Labor Relations Board hearing room in Montpelier. VSEA Staff Attorney Abigail Doolittle represented Appellants. William Reynolds, Department of Human Resources Chief Counsel, represented the State. Appellants orally amended their classification appeal at the January 15 oral argument without objection from the State, and filed the amended appeal in writing on January 16.

Article 16, Section 7, of the Contract provides in pertinent part as follows with respect to appeals of classification decisions:

An employee aggrieved by an adverse decision of the Commissioner of Human Resources may have that decision reviewed by the Vermont Labor Relations Board on the basis of 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 Board shall not conduct a de novo hearing, but shall base its decision on the whole record of the proceeding before, and the decision of, the Commissioner of Human Resources (or designee). The VLRB's authority hereunder shall be to review the decision(s) of the Commissioner of Human Resources, and nothing herein empowers the Board to substitute its own judgment regarding the proper classification or assignment of position(s) to a pay grade. If

the VLRB determines that the decision of the Commissioner of Personnel is arbitrary and capricious, it shall state the reason for that finding and remand to the Commissioner for appropriate action . . .

The arbitrary and capricious standard means that the Board's scope of review in classification cases is extremely limited and that the Board is contractually obligated to give substantial deference to the Commissioner's decision. Appeal of Berlin, 15 VLRB 245, 246 (1992). Appeal of Cram, 11 VLRB 245, 246-47 (1988). Appeal of DeGreenia and Lewis, 11 VLRB 227, 229 (1988). 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. Id. "Capricious" is an action characterized by or subject to whim. Id. Rational disagreement with an appellant's position, based on applicable classification principles, does not indicate arbitrary and capricious action. Appeal of Smith, 17 VLRB 145, 149 (1994). Appeal of Berlin, 15 VLRB at 247.

Given the statutory responsibility of the Commissioner of Human Resources, pursuant to 3 V.S.A. §310, to ensure that State service has a uniform and equitable plan of compensation for each position based upon a point factor method of job evaluation, the Commissioner is obligated to ensure that contractual provisions relating to application of the point factor system to a position are carried out throughout the classification review process. Cram, 11 VLRB at 247. The Board has jurisdiction to review the Commissioner's actions in this regard because a decision reached in at least partial reliance on inappropriate considerations would be arrived at without consideration or reference to applicable classification principles. Id.

Appellants contend that the decision of the Commissioner of Human Resources is arbitrary and capricious because: 1) the Department of Human Resources failed to

provide Appellant with a written report explaining the classification decision in violation of the requirement of Article 16, Section 3, of the Contract that the Department of Human Resources “will respond directly and pointedly to the specific reasons listed in the request for review”; and 2) the Commissioner of Human Resources arbitrarily and capriciously disregarded the distinct differences between the work of the Investigator assigned to the Criminal Division and the Civil Investigators of the Attorney General’s Office.

We first address Appellants’ claim that the Department of Human Resources failed to provide Appellant with a written report explaining the classification decision in violation of Article 16, Section 3, of the Contract. Article 16, Section 3, provides in pertinent part as follows:

...

(b) Employee and management requests for classification review shall be made on a form provided by the Commissioner of Human Resources. . . The form shall be fully completed by the employee or management as appropriate. . . The Request for Review shall state with particularity the change(s) in duties or other circumstances which prompt the Request for Review. . .

(c) An incomplete Request for Review shall be returned for completion to the originator by the Department of Human Resources. . . In its discretion, the Department may complete field audits as necessary. Normally within 60 days for a single position and 90 days for a multiple position class, the Department of Human Resources . . . will review and respond to complete requests for review. Such written report will respond directly and pointedly to the specific reasons listed in the request for review and will specify any change in the point factor rating for that position. The definitions of the sub-factors used in the point factor ratings will be provided as a guide to interpreting the point factor rating.

The November 16, 2007, Notice of Classification Action from Tammie Ellison to the employees indicated that there were no changes in the classification of the positions occupied by Appellants. It otherwise provided in its entirety:

Summary of Classification Review & Decision:

A review of the Request for Review submitted for this position has resulted in no change in classification. The position has been found properly classified as the duties are consistent with current job class, Attorney General's Investigator, pay grade 22.

Willis Rating/Components:

Knowledge & Skills	E1Y	212
Mental Demands	D4K	92
Accountability	D2S	80
Working Conditions	S2C	15
Total Points		399

Description of the Willis Rating Components can be found on our website: <http://www.vermontpersonnel.org/employee/classification.cfm>; the document is titled, Guide to Position Measurement. You may also obtain a copy of this document from your Personnel Administrator or from VSEA.

If you have any questions, please contact me at 828-3604, or by email: [Tammie.Ellison@state.vt.us](mailto:Tammie.Ellison@state.vt.us).  
(VLRB Record 23-24)

The State contends that Ellison cannot be faulted for failing to “respond directly and pointedly to the specific reasons listed in the request for review” because there were no “specific reasons” listed in Appellants’ request for review. The State asserts that Appellants failed to “state with particularity the change(s) in duties or other circumstances which prompt the Request for Review” as required by Article 16(3)((b)).

The State’s attempt to defend its response to the request for review based on an alleged failure of Appellants to follow the Contract in submitting their review request is not well taken. Article 16, Section 3, of the Contract provides that “(a)n incomplete Request for Review shall be returned for completion to the originator by the Department of Human Resources”. A request for review is not complete pursuant to the Contract if it does not “state with particularity the change(s) in duties or other circumstances which prompt the Request for Review”. If the Department of Human Resources classification

analyst believed that Appellants' request for review in this regard was not adequate to allow her to respond as required by the Contract, she was obligated under the Contract to consider the request for review as "incomplete" and return it to Appellants for amendment to ensure that she was able to "respond directly and pointedly to the specific reasons listed in the request for review".

Nonetheless, the State asserts that Appellants have waived the right to contest the sufficiency of the reasons provided in the Notice of Classification because they did not raise this issue in the classification grievance which they filed with the Commissioner of Human Resources over the classification action. Article 16, Section 4(d)(3) provides that a classification grievance "shall minimally include" among other things: "A brief statement why the State's response to the RFR is being grieved. Such response should refer both to the original statement as to why the RFR was being sought and also to the State's response thereto."

This provision requiring a "statement why the State's response to the (request for review) is being grieved" obligated Appellants to raise in the grievance filed with the Commissioner of Human Resources the allegation that the Department of Human Resources failed to provide Appellant with a written report explaining the classification decision in violation of Article 16, Section 3, of the Contract. Our review of the classification grievance filed below indicates that Appellants made no such contention before the Commissioner.

There must be specific and timely raising of issues at earlier steps of the grievance procedure or the right to raise the issue is waived. Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed*, 157 Vt. 290, 293-95 (1991). Grievance of Bagley, et al, 16 VLRB

448, 464 (1993). Grievance of O’Neil, 3 VLRB 100, 103 (1980). In providing in Article 15, Section 1, of the Contract that “(i)t is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level”, the State and VSEA made the goal of early resolution clearly paramount, and required that in-house resolution of problems should first be attempted. In re Bushey, 142 Vt. 290, 294 (1982). Grievance of Mason, 16 VLRB 222, 237 (1993).

The failure of employees to grieve issues at earlier steps of a grievance procedure frustrates the desirable goal of early and in-house resolution of problems. Mason, 16 VLRB at 237. Appellants’ failure to grieve the issue concerning the alleged Article 16, Section 3, violation by the Department of Human Resources in the grievance filed below frustrated the goal of early and in-house resolution of problems and means they waived the right to raise the issue in the appeal filed with the Board.

We next address Appellants’ contention that the Commissioner of Human Resources arbitrarily and capriciously disregarded the distinct differences between the work of the Investigators assigned to the Criminal Division and the Civil Investigators of the Attorney General’s Office. In their grievance filed with the Commissioner of Human Resources, Appellants did not focus on their differences with the Civil Investigators. Instead, they made arguments with respect to the points they believe they should have received under the Willis point factor system and focused on the similarities they had with higher-rated positions. Appellants referred the Commissioner to other positions in state government with higher pay grades to show the similarities to their positions. We

have no basis to conclude that the Commissioner or his designee did not review all of the information submitted by Appellants in this regard in arriving at his decision.

Given the focus by Appellants in their grievance filed with the Commissioner, and given our limited scope of review and the substantial deference we must accord the Commissioner's decision, we conclude that the Commissioner did not act in an arbitrary and capricious manner by not focusing on the differences between the Criminal Investigators and the Civil Investigators. Thus, we conclude that the decision of the Commissioner of Human Resources to uphold the decision of the Classification Section of the Department of Human Resources, assigning Appellants' position to pay grade 22, was not arbitrary and capricious in applying the point factor system.

Although we dismiss this classification appeal, we do not believe that the classification review and grievance proceeded in a constructive manner in this case. Appellants submitted a request for review that the State apparently viewed as not providing sufficient information for the Department of Human Resources to develop an adequate response. Yet the Department did not seek the information from Appellants that would have improved its response to the classification review request. Then, when Appellants subsequently filed a grievance over the classification action, they did not raise the significant allegation of the Department's failure to explain the classification decision which may have furthered an improved review of the classification of their positions. Thus, deficiencies by both sides contributed to a significantly flawed classification review. We would hope that these procedural deficiencies on both sides are corrected the next time these positions undergo a classification review to ensure that a proper classification action occurs.



Based on the foregoing reasons, it is ordered that the Appeal of Thomas Howell, Virginia Merriam, Jefferson Kraus, Darin Barber and Steve Merchant is dismissed.

Dated this 24th day of February, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

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Edward R. Zuccaro, Chairperson

/s/ Richard W. Park

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Richard W. Park

/s/ James C. Kiehle

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James C. Kiehle