VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 13-37
PAULINE LIESE	)	

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 ("Contract").

On November 1, 2013, Pauline Liese ("Appellant"), Lemon Law Administrator in the State of Vermont Agency of Transportation, filed an appeal with the Vermont Labor Relations Board from the decision of the Commissioner of Human Resources denying Appellant's grievance concerning the classification of her position. Appellant had submitted a request for classification review in November 2007, requesting that the pay grade of her position be increased from the existing pay grade 22. The Department of Human Resources Classification Division denied Appellant's request, and the designee of the Commissioner of Human Resources denied Appellant's subsequent grievance. Appellant alleges in the appeal filed with the Board that the Commissioner's decision in applying the point factor system to the facts established by the entire record was arbitrary and capricious in violation of Article 16, Section 7, of the Contract.

Appellant filed a motion on November 20, 2013, to amend her appeal. The State did not oppose the motion, and the Board granted it on January 30, 2014.

Appellant filed the whole record of the proceeding before, and the decision of, the Commissioner of Human Resources on February 24, 2014. She filed a brief in support of

her position on February 24, 2014. The State filed a brief in support of its position on March 25, 2014. Oral argument was held before Board Members Richard Park, Chairperson; Gary Karnedy and Edward Clark, Jr., on April 3, 2014, in the Board hearing room in Montpelier. Appellant represented herself. Assistant Attorney General William Reynolds represented the State.

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 Human Resources 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 shall give substantial deference to the Commissioner's decision.[1] 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.[2] "Capricious" is an action characterized by or subject to whim.[3] Rational disagreement with an appellant's position,

[1] 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).
[2] Id.
[3] Id.

based on applicable classification principles, does not indicate arbitrary and capricious action.[4]

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.[5] 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.[6]

Appellant has made several allegations. We will discuss each in turn. Appellant first contends that the decision of the Commissioner of Human Resources was arbitrary and capricious because "job evaluations, i.e., RFRs (Requests for Review) were not compared, contrary to statute." Appellant asserts that the decision was arbitrary and capricious because the Classification Committee failed to compare her Lemon Law Administrator position to other positions in state government. The statute referenced by Appellant is 3 V.S.A. §310(a), which provides in pertinent part:

> The department of human resources shall adopt a uniform and equitable plan of classification for each position within state service . . . For purposes of internal position alignment and assignment of positions to salary ranges, the plan shall be based upon a point factor comparison method of job evaluation. As used in this section, "point factor comparison method" means a system under which positions

[4] Appeal of Smith, 17 VLRB 145, 149 (1994). Appeal of Berlin, 15 VLRB 245, 247 (1992).
[5] Cram, 11 VLRB at 247.
[6] Id.

> are assigned to salary ranges based on a scale of values against which job evaluations of individual positions are compared.

Our review under the Article 16, Section 7, of the Contract is limited to whether the decision was arbitrary and capricious "in applying the point factor system" used by the State to the facts established by the entire record. Appellant confuses the Willis position measurement method used in state government with a position comparison method which is not adopted by statute. Willis is a point factor comparison method, not a position comparison method as asserted by Appellant. Although the State may supplement its analysis by examining other positions, it is not a statutory or contractual requirement. Appellant's contention in this regard has no grounding in statute or the Contract, and accordingly is unfounded.

Appellant next asserts that the decision of the Commissioner of Human Resources was arbitrary and capricious because the notice of classification action she received from the Department of Human Resources did not respond directly and pointedly to the specific reasons listed in the request for review, and did not explain the decision, in violation of Article 16, Section 3, of the Contract and personnel policies. 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) . . . 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.
> (d) Within ten (10) workdays of receipt of the notice from the Department of Human Resources, an employee may request an informal meeting with the departmental classification review committee . . . for a discussion of the decision. . . .

The January 17, 2008, Notice of Classification Action from Classification Analyst Julie Chenail, working with the Department of Motor Vehicles Classification Committee, to Appellant 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.
>
> Willis Rating/Components:
>
> | | | |
> |---|---|---|
> | Knowledge & Skills | E1Y | 212 |
> | Mental Demands | D4J | 80 |
> | Accountability | D2S | 80 |
> | Working Conditions | L1A | 0 |
> | Total Points | | 372 |
>
> 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 828-3497, or by email: Julie.chenail@state.vt.us.
> (Record III-2)

We concur with Appellant that this Notice of Classification Action did not comply with the Article 16, Section 3 requirement "to respond directly and pointedly to the specific reasons listed in the request for review". In the request for review which she submitted, and during a subsequent field audit, Appellant indicated the reasons she was seeking a change in classification (Record I, II). The Notice of Classification Action did

not respond directly and pointedly to these reasons simply by listing the Willis rating components and the assigned points and directing Appellant to the Willis *Guide to Position Measurement*.

Nonetheless, this deficiency in the Notice of Classification Action does not necessarily translate into the subsequent decision of the Commissioner of Human Resources denying Appellant's classification grievance decision being arbitrary and capricious in applying the point factor system used by the State to the facts established by the entire record. It is necessary to examine subsequent developments which were reflected in the entire record before the Commissioner. Subsequent to the issuance of the Notice of Classification Action, Appellant participated in an informal meeting on February 21, 2008, with the departmental Classification Review Committee pursuant to Article 16, Section 3(d).

During this meeting, the Committee informed Appellant that she had the opportunity to present information and discuss the classification decision made by the Classification Committee. Appellant's union representative indicated that Appellant did not want to follow this normal approach, but instead wished to have a give and take discussion at the meeting. The Committee agreed to this approach. During the meeting, Appellant indicated that a change in duties since her latest classification review, which had been done very recently, was not the issue. Instead, Appellant emphasized that there were other circumstances which warranted a classification change. Appellant asked questions of the Committee and stated her position to the Committee on the "other circumstances" issue. The Committee responded to Appellant's questions and position on

this issue and explained its process and considerations in reaching a decision (Record VIII-42).

Appellant subsequently submitted a classification grievance to the Commissioner of Human Resources on February 29, 2008, requesting assignment of her position to pay grade 25 (Record VII). Article 16, Section 5, of the Contract sets forth the Commissioner's scope of review on the grievance, providing "the burden shall be on the grievant to establish that the present classification, pay grade assignment, or any subsequent classification decision arising from the application of these procedures, is clearly erroneous under the standards provided by the point factor analysis system utilized by the Department of Human Resources". This placed a difficult burden on Appellant to prevail in the classification grievance.

Given this burden and given an examination of the entire record before the Commissioner, the deficiencies in the notice of classification action does not result in the determination that the Commissioner of Human Resource was compelled to conclude that the classification decision was clearly erroneous pursuant to Article 16, Section 5, of the Contract. Appellant had the opportunity to discuss the reasons for the classification action at the February 21, 2008, informal meeting held subsequent to the notice of classification action. She also pointed out the deficiencies in the notice of classification action to the Commissioner in her grievance, so this presumably was considered in the final decision. Given our limited scope of review and the substantial deference we must accord the Commissioner's decision, the conclusion of the Commissioner that the deficiencies in the notice of classification action did not make the ultimate classification decision clearly

erroneous was not arbitrary and capricious in applying the point factor system to the facts established by the entire record.

Appellant next contends that the Commissioner's decision was arbitrary and capricious because her "position's occupational category is more reflective of Legal Services". This issue is outside our scope of review in this matter. Our review is limited to determining whether the Commissioner's decision is arbitrary and capricious in applying the point factor system. The determination of occupational category referenced by Appellant is not part of the Willis point factor system, and thus cannot serve as a basis for us to question the Commissioner's decision.

Appellant further alleges that the Classification Committee did not "explain the rationale" for the decision at February 21, 2008, informal meeting as required by Personnel Policy 6.2. Policy 6.2 provides in pertinent part with respect to informal meetings: "The purpose of this meeting is to allow the Department of Personnel to explain the rationale for the decision and to answer any questions the employee may have regarding the Position Evaluation System".

Appellant's contentions are not persuasive in this regard. As discussed above, the Committee informed Appellant at this informal meeting that she had the opportunity to present information and discuss the classification decision which she had received. Appellant's union representative indicated that Appellant did not want to follow this normal approach, but instead wished to have a give and take discussion at the meeting. The Committee agreed to this approach. Appellant asked questions of the Committee and stated her positions to the Committee. The Committee responded to Appellant's questions and positions and explained its process and considerations in reaching a decision. We

conclude that this meeting provides no basis for concluding the Commissioner's subsequent decision was arbitrary and capricious. This is particularly so since the meeting appeared to be conducted according to Appellant's request.

Appellant next contends that the denial of her classification grievance constitutes discrimination against her for "filing a complaint or grievance". She states:

> "(Appellant) contends the denial of Willis position evaluation points reflecting the true scope of the position is only one example of retaliation towards (Appellant) for seeking help 1/31/02 – 3/31/03 from a hostile work environment, while in the same position, at a different location, within the Agency of Transportation, from a former and now "retired" supervisor. The former supervisor, who worked within the Agency of Transportation for approximately 40+ years, continues to be close acquaintances with DMV management, including the appointing authority. A second example of perceived retaliation by not recognizing the position at a level reflective of its true scope is because employee has advised management of observed excessive socializing within one area of the Department since the position was relocated, 3/31/03, to the former supervisor's Department of Motor Vehicles which is a 3rd example of retaliation by AOT, who should have protected (Appellant) by disciplining, counseling or relocating the supervisor from the former AOT location.

In several cases, the Board has indicated the analysis it will employ where employees claim management took action against them for engaging in protected activities. The Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of

the protected conduct.[7] This analysis has been employed by the Board in protected activity grievance cases involving filing of complaints and grievances.[8]

The VLRB has noted the factors it would examine in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision protected activities;
- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.[9]

In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own.[10] Moreover, the longer the time period between the adverse decision and the protected activity the more attenuated causation becomes.[11] In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.[12]

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[7] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).

[8] Grievance of Richardson, 31 VLRB 359 (2011). Grievance of Abel, 31 VLRB 256 (2011). Grievance of Benoit, 31 VLRB 237 (2011). Grievances of Cray, 25 VLRB 194 (2002); *Affirmed,* Sup.Ct. Dock. No. 2002-538 (November 6, 2003); Grievance of Brewster, 23 VLRB 314 (2000); Cronin, supra; Grievances of McCort, 16 VLRB 70 (1993), *Affirmed,* (Unpublished decision, Sup.Ct. Dock. No. 93-237, 1994); Grievance of Day, 16 VLRB 312 (1993); Danforth, supra; Grievance of Greenia, 22 VLRB 336 (1999).

[9] Sypher, 5 VLRB at 131.

[10] In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation, AFT, UPV, Local 3180, AFL-CIO, 176 Vt. 641 (2004).

[11] Id.

[12] Id.

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights".[13] The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights.[14]

In applying these factors to the record in this matter, we conclude that Appellant has not sustained her burden of demonstrating that her complaint and grievance activity was a motivating factor in the classification decision in this matter. Other than knowledge of Appellant's complaint and grievance activity, there are no other relevant factors present here.

The timing was not suspect, as the classification review process here began years after the complaint and grievance activity identified by Appellant. Appellant has identified no climate of coercion anywhere near the time of the classification review process. She has presented no specific information indicating discrimination between her and employees not engaged in protected activities.

The fact that Appellant's former supervisor may be close acquaintances with Department of Motor Vehicles management does not aid Appellant's case with respect to these factors since there is nothing in the record linking him to the classification review process in this matter. Similarly, there is nothing in the record indicating her complaint about socializing resulted in any improper management responses close in time to the classification review process. Also, her movement to an area near her former supervisor

[13] Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994).
[14] Id.

lacks probative value since it occurred approximately five years prior to the classification review process.

The remaining factors are not involved here. In sum, knowledge of protected activity is the only relevant factor present, and mere knowledge standing alone does not suffice to demonstrate that complaint and grievance activity was a motivating factor in the classification decision.[15] Thus, we find no merit to Appellant's claim in this regard.

The final contention by Appellant is that there were four errors in the wording of the Commissioner's classification grievance decision, and that the decision error pattern demonstrates the Commissioner was arbitrary and capricious in applying the point factor system. We have examined the alleged errors. Suffice it to say that three of them constitute harmless error at most and have no bearing on whether arbitrary and capricious action was involved in applying the point factor system.

The remaining item warrants more discussion. The Commissioner states in her letter denying Appellant's classification grievance that "my designee. . could not find that the State's decision was "clearly erroneous" under the standards provided by the Willis Point Factor Analysis System, or that it was arbitrary and capricious" (Record XIII). Appellant correctly points out that this was an error because "clearly erroneous" is the standard for the classification grievance process, while "arbitrary and capricious" applies to the Board standard of review.

Nonetheless, the Commissioner indicated in the letter that she was adopting the designee's recommendation that the classification decision was not "clearly erroneous", the correct standard for scope of review at that stage of the process. The fact that she also indicated that she was adopting the designee's extra-contractual recommendation that the

[15] Grievance of Sileski, 25 VLRB 285, 313 (2002).

decision was not "arbitrary and capricious" does not deflect from the validity of her conclusion on the correct standard for review.

In sum, upon review of the record and given our limited scope of review and the substantial deference we must accord the Commissioner's decision, we conclude that the decision of the Commissioner of Human Resources to uphold the classification decision, assigning Appellants' position to pay grade 22, was not arbitrary and capricious in applying the point factor system to the facts established by the entire record.

Based on the foregoing reasons, it is ordered that the Appeal of Pauline Liese is dismissed.

Dated this 5th day of May, 2014, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Gary F. Karnedy

Gary F. Karnedy

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.