

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)
) DOCKET NO. 91-46
BRUCE EPSTEIN AND DOUGLAS ZORZI)

MEMORANDUM AND ORDER

This matter is before the Labor Relations Board as an appeal from a classification decision of the Commissioner of Personnel pursuant to Article 16, Section 7, of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract").

On July 24, 1991, Bruce Epstein and Douglas Zorzi ("Appellants") filed an appeal with the Vermont Labor Relations Board from the decision of the Commissioner of the Department of Personnel denying Appellants' grievance concerning the classification of their positions. Appellants each occupy the position of Environmental Engineer C, AC: Construction, pay grade 21, in the Department of Environmental Conversation. Appellants had submitted a request for classification review requesting the reclassification of their positions to Construction Project Manager, pay grade 23. The Department of Personnel classification section denied Appellants' request, and the Commissioner of Personnel denied Appellants' subsequent grievance contesting the failure to reclassify their positions to pay grade 22. In their appeal from the Commissioner's decision, Appellants allege that the Commissioner's decision violated Article 16 of the Contract in that it was arbitrary and capricious in applying the point factor system utilized by the State to the facts established in the record.

Appellants submitted the whole record of the proceedings before, and the decision of, the Commissioner of Personnel. Appellants filed a brief in support of their position on December 31, 1991. The State filed a brief in support of its position on January 23, 1992. Oral argument was held before Board members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver on January 29, 1992, in the Board hearing room in Montpelier. Appellants appeared on their own behalf. Michael Seibert, Assistant Attorney General, represented the State.

At the oral argument, the State sought to admit for the Board's consideration a May 29, 1991, memorandum from Audrey Quackenbush to Mary Powell. Appellants objected to the memorandum because they had not seen the memorandum prior to the oral argument. The Board noted the objection to the memorandum, and reserved its decision as to whether to allow the memorandum into the record. The Board will not admit this memorandum into the record because the Board has decided not to admit materials into the record during oral argument. It is the obligation of the Board to decide classification appeals based on the record submitted prior to oral argument.

We turn to discussing the merits. Article 16 provides in pertinent part as follows:

Section 5. Burden of Proof

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

Section 7. Appeal to VLRB

An employee aggrieved by an adverse decision of the Commissioner of Personnel 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 Personnel (or designee). The VLRB's authority hereunder shall be to review the decision(s) of the Commissioner of Personnel, 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 reasons 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 Cram, 11 VLRB 245, 246-247 (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. c.f., Degreenia and Lewis, 11 VLRB at 233.

Given the statutory responsibility of the Commissioner of Personnel pursuant to 3 VSA §310 to ensure that state service has an 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. We have jurisdiction to review the Commissioner's actions in this regard where they may impact on the Commissioner's own decision in applying the point factor system 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 allege that the Commissioner's decision was arbitrary and capricious with respect to ratings in three of the four major point factor system categories: 1) mental demands, 2) accountability, and 3) working conditions. Appellants do not contest the rating in the fourth major category - job knowledge and skills. We will discuss Appellants' allegations in each of the three contested categories in turn.

Mental Demands

Appellants contend that the Commissioner's decision was arbitrary and capricious with respect to the problem solving component of the mental demands category because the Department of Personnel failed to perform a direct comparability analysis with respect to Appellants' positions and the Environmental Waste Treatment Facilities Engineer position. We disagree. While review of the relationship between the position under consideration and other state positions could be relevant to the application of the point factor system, the Contract and the point factor system contain no requirement for the Department of Personnel to do a

comparability analysis with respect to all those positions requested by the employee contesting the classification of a position. Here, the Department of Personnel did compare Appellants' positions to several other positions with respect to different rating categories. Given our limited scope of review and the substantial deference we must accord to the Commissioner's decision, failure to do a comparability analysis concerning problem solving with respect to a position suggested by Appellants does not demonstrate arbitrary and capricious action.

Appellants further contend that the Department of Personnel failed to acknowledge information provided to the Department by Appellants and consciously disregarded information presented by Appellants. This allegation by Appellants reflects a theme present throughout this appeal. Appellants are critical of the Department of Personnel for not engaging in a point by point rebuttal of contentions made by Appellants with respect to their grievance as amended. Article 16, Section 3 (c), of the Contract does provide that, during the classification review process, the Department of Personnel is required in its written response to a request for review to "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." However, once the classification review process is completed and an employee files a classification grievance, the contractual requirements are much less stringent with respect to the Commissioner of Personnel or designee providing a written rationale for the decision responding to a grievance. Article 16, Section 4(f) simply provides that, after review of the grievance

and any grievance meeting held, the Commissioner or designee shall issue a "written decision." This contractual requirement falls well short of obligating the Commissioner or designee to engage in a point by point rebuttal of Appellants' contentions. Given the Contract requirements, mere failure to respond in writing to each allegation made by Appellants is insufficient, without more, for us to conclude that The Department of Personnel failed to consider information presented by Appellants. Thus, we conclude that the Commissioner's decision was not arbitrary and capricious in applying the point factor system with respect to the mental demands category.

Accountability

Appellants contend that the Commissioner's decision was arbitrary and capricious with respect to the dollar size of the impact attributed to Appellants' positions. They claimed that the Department of Personnel failed to take into account documentation submitted by Appellants and substantially discounted the impact attributed to the positions, thus resulting in less points being assigned to the positions than is appropriate. While the state of the record is not totally clear on this issue, it is apparent that the Department of Personnel did not disregard information submitted by Appellants with respect to size of impact, but sought to reconcile conflicting information which the Department of Personnel received on the size of the impact. Ultimately, the Department of Personnel disagreed with Appellants with respect to the proportion of total costs of projects assigned to Appellants which should be attributed to their positions.

Appellants have contended throughout the classification process that the total costs of projects should be attributed to

them in determining size of impact. The Department of Personnel position is that only the federal and state cost share of the projects should be considered in determining the size of the impact of Appellants' positions, and has not taken into account the local cost share of projects. This difference in approach accounts for the difference in the number of points assigned to the positions by the Department of Personnel compared to the number of points proposed by Appellants. Under the circumstances, the Commissioner of Personnel did not act in an arbitrary and capricious manner by failing to conclude that the Department of Personnel application of the point factor system in this regard was clearly erroneous.

Working Conditions

Appellants contend that the Commissioner's decision was arbitrary and capricious with respect to the discomfort component of the working conditions category for the following reasons: 1) the Department of Personnel failed to consider documented facts presented by Appellants, 2) direct comparability was not made for positions within Appellants' agency in terms of actual point assessment, and 3) the Department of Personnel correctly indicated that Appellants' rating with respect to the discomfort factor should be the same as the Environmental Waste Treatment Facilities Engineer position, but failed to assign the same number of points.

Once again, the mere failure of the Department of Personnel to respond in writing to each piece of information presented by Appellants does not indicate that the Department of Personnel failed to consider that information. Further, the record does

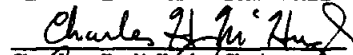
clearly indicate that the Department of Personnel addressed the comparability of Appellants' discomfort rating with respect to several other positions in state government, both inside and outside Appellants' agency.

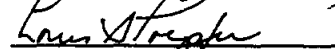
Finally, while it is true that the Department of Personnel indicated that Appellants' discomfort rating was the same as for the Environmental Waste Treatment Facilities Engineer position, when in fact Appellants' positions were given two fewer points in this area, this did not mean the Commissioner of Personnel was compelled to conclude that the classification decision was clearly erroneous pursuant to Article 16, Section 5 of the Contract. The two additional points would not have resulted in a higher pay grade for Appellants, since they still would have been seven points below the cutoff for pay grade 22. Thus, we conclude that the Commissioner's decision to uphold the classification decision of the Department of Personnel, assigning Appellants' position to pay grade 21, was not arbitrary and capricious in applying the point factor system.

Now therefore, based on the foregoing reasons, it is hereby ORDERED that the Appeal of Bruce Epstein and Douglas Zorzi is DISMISSED.

Dated this 28th day of June, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Louis A. Toepfer


Leslie G. Seaver