

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 92-11
RONALD WEST)	

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 March 12, 1992, Ronald West ("Appellant"), Licensing Board Investigator III, pay grade 19, filed an appeal with the Vermont Labor Relations Board from the decision of the Commissioner of the Department of Personnel denying Appellant's grievance concerning the classification of his position. Appellant had submitted a request for classification action requesting the reclassification of his position to pay grade 23. The Department of Personnel classification section denied Appellant's request, and the Commissioner of Personnel denied Appellant's subsequent grievance contesting the failure to reclassify his position as requested. In his appeal from the Commissioner's decision, Appellant alleges that the Commissioner's decision violated Article 16 of the Contract in that it was arbitrary and capricious in the application of the point factor system to the facts established in the record.

On October 15, 1992, Appellant filed a Motion for Summary Judgment because the State had not answered his March 12,

1992, appeal. The Board denied Appellant's motion on December 10, 1992. Appellant submitted the whole record of the proceeding before, and the decision of, the Commissioner of Personnel. Appellant filed a brief in support of his position on December 30, 1992. The State filed a brief in support of its position on January 15, 1993. Oral argument was held before Board members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on January 21, 1993, in the Board hearing room in Montpelier. Appellant appeared on his own behalf. Michael Seibert, Assistant Attorney General, represented the State.

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 pursuant to 3 VSA §310 to ensure that state service has an equitable and uniform 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 in at least partial reliance on inappropriate considerations would be arrived at without consideration or reference to applicable classifications. Id.

Appellant makes several arguments in this appeal. He first contends that he was denied the right to due process because the Board is required only to hear oral argument in classification appeals. Appellant contends that the whole record of the proceeding below is incomplete in that he had no opportunity to call or cross-examine witnesses before the Commissioner or designee, and no record was kept of oral testimony.

Article 16, Section 7 of the Contract, referring to classification appeals, provides that 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)". It is evident by a review of Article 16, Section 4, of the Contract, that the "whole record of the proceeding" before the Commissioner of Personnel consists of all "information and/or documents" provided to the Commissioner by the grievant and classification section of the Department of Personnel. Appeal of Fisher, 15 VLRB 519, 520 (1992). The Contract simply does not require that employees contesting classification decisions be provided the opportunity to present and cross-examine witnesses, nor does it require the making of a record of oral testimony. Given the contractual provisions and our limited scope of review, we conclude that there has been no violation of due process.

Appellant next contends that the Commissioner of Personnel improperly failed to provide an explanation of why his classification grievance was denied. Such an explanation is not required under the Contract. 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 the grievance. Appeal of Epstein and Zorzi, 15 VLRB 247, 254-55 (1992). 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." Id.

This contractual requirement falls well short of obligating the Commissioner or designee to engage in a point by point rebuttal of Appellant's contentions. Id. Mere failure to respond in writing to each allegation made by Appellant is insufficient, without more, for us to conclude that the Commissioner of Personnel failed to consider information presented by Appellant. Id. Thus, there was no obligation on the Commissioner here to provide a statement of reasons as to her decision.

The Appellant next raises various arguments with respect to the biases and competence of the classification analyst who conducted the classification review, which, Appellant contends, resulted in an arbitrary and capricious decision by the Commissioner or designee. Appellant relies on two separate arguments to support this claim.

First, he relies on the decision of the Labor Relations Board in Grievance of Lowell, 15 VLRB 291 (1992), as evidence that the classification analyst, who was involved in both the Lowell case and this case, makes many mistakes in the classification review process. The decision of the Board in Lowell was issued after the Commissioner of Personnel's decision in the case before us. Thus, it clearly was not part of the record before the Commissioner of Personnel and can play no part in our determination whether the decision of the Commissioner was arbitrary and capricious.

Second, Appellant alleges that the conduct of the classification analyst exhibited a bias against the nature of the work performed by Appellant, demonstrates a consistent refusal to accept all evidence presented to him, and indicates a combative attitude. In making this argument, Appellant essentially is requesting us to make a determination that we could only make adequately after taking evidence on the conduct of the classification analyst in performing the classification review. This we are not allowed to do. Since the Contract provides in Article 16, Section 7, that the Board shall not conduct a de novo hearing in classification appeals, the Board does not take evidence in such matters. Appeal of West, 15 VLRB 517 (1992).

Accordingly, we are left with making a determination on whether the classification analyst's actions resulted in the Commissioner making an arbitrary and capricious decision in applying the point factor decision by examining the "paper" record produced below. The dispute between Appellant and the

Department of Personnel in this regard revolves around Appellant's belief that his position is at least equal to that of the Criminal Investigators at the Attorney General's Office. Appellant contends that, because the Department of Personnel gave Appellant's position lower points in each of the four major point factor system categories (i.e., mental demands, knowledge and skills, accountability and working conditions) than that given the Criminal Investigators, the Commissioner's decision was arbitrary and capricious in applying the point factor system. Appellant's position was placed at Pay Grade 19, while the Criminal Investigators were placed at Pay Grade 22. We will discuss Appellant's allegations with respect to each of the four major point factor system categories in turn.

Knowledge and Skills

Appellant first contends that the Commissioner's decision was arbitrary and capricious with respect to the knowledge and skills category. Appellant contends that, in performing his responsibilities as the lead investigator in his unit which includes the assignment to him of the bulk of his unit's criminal investigations, he handles the same type of cases as Criminal Investigators. Appellant thus claims that there is no rational distinction that can be made between his position and the Criminal Investigators.

The record before the Commissioner of Personnel indicates that the Department of Personnel compared Appellant's position with the Criminal Investigators, but it also considered several other positions for comparability, asserting that comparisons

should be made with a number of similar classes rather than just one. The Department of Personnel ultimately concluded that the investigations performed by Appellant were not so varied and broad-based as that of the Criminal Investigators, and were more comparable to other, lower-rated investigators in state government.

We can only presume that the Commissioner reviewed all of Appellant's information and that submitted by the Department of Personnel in arriving at her decision. Given our limited scope of review and the substantial deference we must accord the Commissioner's decision, we cannot conclude that the Commissioner of Personnel's decision was arbitrary and capricious in accepting the more comprehensive review of positions done by the Department of Personnel than the comparison with only one other class made by Appellant.

Mental Demands

Appellant contends that the Commissioner's decision was arbitrary and capricious with respect to the mental demands category in that both he and the Criminal Investigators encounter the same type of non-routine and varying problems. The record before the Commissioner of Personnel indicates that the Department of Personnel concluded that the difference between the positions in this category was attributable to: 1) the Criminal Investigators' work often requiring greater sensitivity than Appellant's investigations, and 2) the Criminal Investigators often being required to pursue a number of cases which other agencies failed to successfully pursue.

We can only presume again that the Commissioner reviewed all of Appellant's information and that submitted by the Department of Personnel in this regard in arriving at her decision. Given our limited scope of review and the substantial deference we must accord the Commissioner's decision, we cannot conclude that the Commissioner of Personnel's decision was arbitrary and capricious in accepting the distinctions made by the Department of Personnel.

Accountability

Appellant contends that the Commissioner's decision was arbitrary and capricious, with respect to assessing the accountability of Appellant's position, by considering only the cost of investigations and failing to consider the budget for Appellant's entire licensing division. Appellant contends that a different standard was used in classifying the Criminal Investigators by the Department of Personnel using the combined budgets of the three divisions at the Attorney General's Office in which the Criminal Investigators worked (Criminal, Consumer Fraud and Medicaid Fraud).

The record before the Commissioner of Personnel indicates that the Department of Personnel justified its assessing of points in this regard by assessing the size of the impact for Appellant's position as the budget of the unit to which he was assigned, and that this was the same way the various positions which were used for comparability with Appellant's position were analyzed. Moreover, the Department of Personnel indicated that in any event, if the entire licensing division was used for size of impact as suggested by Appellant, the same points would have been assigned Appellant's position.

Again, we can only presume that the Commissioner reviewed all of Appellant's information and that submitted by the Department of Personnel in this regard in arriving at her decision. In reviewing the record before us, we cannot conclude that the Commissioner of Personnel acted 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. Epstein and Zorzi, 15 VLRB at 256.

Working Conditions

Appellant contends that the Commissioner's decision was arbitrary and capricious in the area of working conditions because the only difference between his rating and the Criminal Investigators is the amount of lifting, climbing, or working in tiring positions. Again, Appellant contends no rational distinction can be made in this regard between the two positions. The Department of Personnel contended in the record before the Commissioner that the rating suggested by Appellant would be "minimally possible" in this regard, but even so there would be no difference in total rating points assigned.

Again, we can only presume that the Commissioner reviewed all of Appellant's information and that submitted by the Department of Personnel in this regard in arriving at her decision. In reviewing the record before us, we cannot conclude that the Commissioner of Personnel acted 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.

In sum, given our limited scope of review and the substantial deference we must accord to the Commissioner's decision, nothing in the record indicates that the Commissioner's decision was arbitrary and capricious in applying the point factor system to the facts as established in the record.

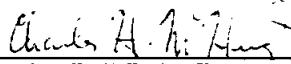
In closing, we would be remiss if we did not state that this case is a classic illustration in support of the following statement which we made in our 1992 Annual Report, at p. xi:

We note that, in our judgment, the classification review process is in need of review and revision by the VSEA and the State. The appeal to the Board creates a high level of expectation in employees which is not met given our limited scope of review. The appealing employee, the State Department of Personnel and the Board spend an inordinate amount of time on a process which accomplishes so little, thus causing frustration for all concerned.

Now therefore, based on the foregoing reasons, it is hereby ORDERED that the Appeal of Ronald West is DISMISSED.

Dated this 30th day of April, 1993, at Montpelier, Vt.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Leslie G. Seaver


Carroll P. Comstock