VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES'	)	
ASSOCIATION, INC., RONALD	)	DOCKET NO. 94-77
WEST and MERILL CRAY	)	
	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 14, 1994, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of VSEA, Ronald West and Merill Cray ("Grievants"). Grievants alleged that the State of Vermont, Department of Personnel ("Department"), violated Article 16 of the collective bargaining agreement between the State of Vermont and the VSEA for the Non-Management Unit, effective for the period July 1, 1994 to June 30, 1996 ("Contract"). Specifically, Grievants alleged that the classification section of the Department of Personnel failed to produce all information and documents it had provided the Commissioner of Personnel during its classification review of Grievants' positions. Grievants also alleged that the Department violated Article 16 of the Contract by refusing to allow Grievants to tape record classification grievance proceedings.

Hearings were held on April 27, 1995, and May 4, 1995, in the Labor Relations Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievants.

At the April 27, 1995, hearing, prior to the taking of testimony, the Employer raised an issue of subject matter jurisdiction and orally moved to dismiss the case. Grievants responded to such motion by moving to amend the grievance, alleging a violation of Article 6 of the Contract. The Board reserved judgment on both motions. On May 2, 1995, Grievants filed a motion to amend the grievance, alleging that the Employer violated Articles 6 and 11 of the Contract. The parties filed briefs on May 18, 1995.

FINDINGS OF FACT

1. The Department of Personnel ("Department") uses a system for classifying positions in state government developed by a contract consultant, Norman Willis, called the Willis point factor analysis system. Willis Associates trained the Department to use this system in the early 1980's. Positions are analyzed and assigned numerical ratings (point factors) in four major categories - knowledge and skills, mental demands, accountability and working conditions - and several subcategories. After applying the point factor analysis to a position, the Department compares the position's point factor rating to point factor ratings of similar positions as a double check on its work and to ensure that similar positions are rated similarly.

2. Article 16 of the Contract sets forth the procedure for employees or management to request classification reviews, grieve classification decisions to the Commissioner of Personnel and appeal the Commissioner's decision to the Vermont Labor Relations Board. These procedures have changed over the years as the State and the VSEA have bargained new contracts. At one time, a classification panel performed classification reviews, witnesses presented evidence before the panel and

there was a specific contractual procedure for tape recording evidence before the panel. Prior to negotiating the current contractual provision, classification reviews were lengthy procedures and there was general dissatisfaction with the process. The specific issue of tape recording classification proceedings was not discussed during negotiations leading to the current contractual provision, which provision does not mention tape recordings.

3. Article 16 of the Contract states in pertinent part:

SECTION 3. PROCEDURE FOR REVIEW OF CLASSIFICATION

...

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

. . .

c. . . . the Department of Personnel 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 . . .

SECTION 4. CLASSIFICATION GRIEVANCE

a. . . . a classification grievance may be filed only if the position submitted for review was not changed to a higher pay grade.

. . .

SECTION 6. EXCLUSIVE REMEDY

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.

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) . . .

4. The Office of the State Secretary of State ("Employer") currently employs five full time investigators, a temporary investigator and a chief investigator, in its Office of Professional Regulation ("OPR"). The Employer's investigators conduct criminal and civil investigations for approximately 30 licensing boards and commissions that license professionals in the State of Vermont (Grievants' Exhibit 2).

5. In 1990, the Department conducted a classification review of the OPR investigator positions pursuant to Article 16 of the Contract. Prior to the classification review, all investigators were classified at a Pay Grade 19. The Department reclassified two positions to a Pay Grade 17, two positions to a Pay Grade 18 and one position remained at the Pay Grade 19 level. This created three levels of investigators - i.e., licensing board investigators I, II, and III.

6. Grievants work in the OPR and are employed as licensing board investigator III's.

7. In late 1993, Secretary of State Donald Hooper requested a meeting with employees of the Department's classification section to discuss the classification of investigators in his office. Secretary Hooper, Chief Investigator

Reginald Bragg, Grievant West, Investigator Gregg Fisher, John Detoire, Director of the OPR; Charly Dickerson, the Department's Operations Director for Human Resources; and William Rose, the Department's Classification Section Chief; attended the meeting at Secretary Hooper's office.

8. The Employer's representatives told Dickerson and Rose that they believed the Employer's investigator positions should be classified at a higher pay grade and at the same pay grade as the investigators at the Attorney General's Office, currently classified at Pay Grade 22. Dickerson said he was not going to discuss the Attorney General's Office investigators. He said he would not perform a one-on-one review between the OPR investigators and Attorney General's Office investigators; he told Secretary Hooper that he should not expect the Department to conduct such a one-on-one review as it was inappropriate to do so. At one point during this meeting, the case of Jean Lowell, a civil rights investigator at the Attorney General's Office who had filed a discrimination complaint against the Department over her pay grade, was discussed. Dickerson indicated that he was not going to talk about that situation because "the ink was not dry" on the settlement of that case. Lowell is classified at a Pay Grade 22. Grievance of Jean Lowell, 15 VLRB 291 (1992).

9. Dickerson recommended that Hooper file a PER-10, or request for classification review ("RFR"), pursuant to Article 16 of the Contract.

10. On December 13, 1993, the Employer submitted a management RFR to the Department and requested that it review all licensing board investigator positions. The RFR recommended Pay Grade 22 as an appropriate pay grade, and Investigator and Compliance Officer/OPR as an appropriate class. The RFR did not

specifically request that the investigator positions be compared to the investigators in the Attorney General's Office. Chief Investigator Bragg, Personnel Officer Woodruff, and Secretary Hooper signed the RFR. Grievant West reviewed the RFR before the Department forwarded it to the Department (Grievants' Exhibit 2).

11. The RFR set forth the following reasons for requesting the review at that time:

> . . .
>
> 4. As an agency, it has become apparent that the scope of knowledge and expertise needed to carry out the duties necessary to complete an investigation of a licensed professional has not been properly addressed in the job specification presently in use.
>
> It is our goal to set forth in this classification all duties that we currently require our investigators to do at any given time.
>
> . . .
>
> 4(A) . . . we are not only investigators for OPR but for the AG's and for the State's Attorney as well.
>
> . . .
>
> 4(B) . . . The cross assignments, from one board to another, require each investigator to become knowledgeable in the laws and requlations [sic] pertinent to criminal and civil process, as well [as] those laws pertaining to all licensing boards.
>
> Investigators, in the past, were frequently assigned to individual boards . . .
>
> . . .
>
> 4(c) . . . Much of [the investigators' work] is done in conjunction to civil as well as criminal cases that are then turned over to the AG's or State's Attorney for prosecution, with no further investigation other than ours.
>
> We feel this close association with the AG's and the State's Attorney, as well as the independence our investigators have in the performance of their investigations, and the vast scope of regulatory knowledge they require, should warrant a higher classification level.

. . .

(Grievants' Exhibit 2).

12. Classification analysts from the Department's classification section routinely perform desk audits as part of a classification review. The desk audit is an opportunity for analysts to interview incumbent employees and their supervisors to fully understand the job duties associated with the position under review.

13. Secretary Hooper contacted the Department and invited members of the classification section to a presentation by the OPR investigative unit in lieu of a desk audit. Such presentation took place at the Employer's office on or about February 10, 1994. Commissioner Thomas Torti, Dickerson and Audrey Quakenbush, a classification analyst with the Department, attended the presentation. Presentations were made by Secretary Hooper; Detoire; Bragg; Investigators Fisher, Al Wolters, Harold Whipple and Grievant West; Jane Woodruff, the Employer's Personnel Officer; Stanley Burns, Chair, Medical Practice Board; Barbara Neuman, Executive Director, Medical Practice Board; Assistant Attorney General Eve Jacobs-Carnahan; and Mary Willmuth, Member, Board of Psychological Examiners. The Employer tape recorded the presentation with the acquiescence of the Department.

14. During the presentation, Fisher, and others, presented information to support higher ratings for their job duties. Fisher presented a chart which suggested Willis point factor ratings in each job component category and subcategory.

15. The suggested ratings Fisher used were comparable to the current ratings for Attorney General's Office investigators.

16. Anne Noonan, VSEA Director of Administrative Services, became

involved in the classification request in February, 1994. The Department's decision in 1990 to downgrade four of the Employer's five investigator positions was the first time Noonan had known that the Department had downgraded a position as the result of a request for classification review. Noonan was concerned about the inequity of the current classification rating among the investigators and between the Employer's investigators and the Attorney General's Office investigators.

17. Noonan and some members of the Employer's OPR investigative unit, including Grievants, met with Dickerson to determine what the classification section needed to conduct a classification review. This was a very brief meeting because Noonan and the Employer's investigative unit wanted to tape record the meeting to establish a complete and accurate record of the information exchanged and Dickerson did not permit the meeting to be tape recorded.

18. On or about April 13, 1994, the Department analysts assigned to the case, Quakenbush and Walter Duda, met with the investigators, Chief Investigator Bragg, Personnel Officer Woodruff and Noonan, for the purpose of conducting a desk audit. Noonan attempted to tape record the meeting and attempted to take notes on a laptop computer. The analysts objected and neither a tape recorder nor a computer were used at the meeting.

19. The investigators compared their job duties with the job duties of the Attorney General's Office investigators and tried to show that the positions were fully comparable. They pointed out the disparity in pay grades between their positions and that of the Attorney General's Office investigators. The analysts tentatively concluded that the Employer's investigators should be consolidated into

one class and assigned a Pay Grade 19 (Grievants' Exhibit 23).

20. At some point in early 1994, the Department established an evaluation committee, called a "benchmark committee", to review the classifications of entire occupational groups or classes. This evaluation committee procedure is an internal classification review procedure of the Department and not a procedure set forth in the Contract. The Department rehired Norman Willis in May, 1994, to train the committee to perform classification reviews. For its first classification review, the Department assigned the committee the task of reviewing all investigator positions in state service. There were approximately sixteen positions at the time, involving approximately 100 employees in eight or nine departments.

21. Lowell and other investigators at the Attorney General's Office discovered that the Department was conducting a classification review of all investigator positions. They filed a grievance over this classification review. In response to this grievance, the Department officially suspended its classification of all investigator classes with the intent to resume such review at a future time.

22. Although the Department officially suspended its classification review of all investigator classes, the benchmark committee went forward and completed its assigned classification task. It reviewed various positions in the investigator class, including the Employer's investigator positions, and assigned point factor ratings to each position. The Department used this occupational class review as a training exercise for the benchmark committee. The committee recommended that the Department upgrade some investigator positions from their current classification rating and downgrade some positions from their current classification rating. It

recommended that the Employer's investigator positions be consolidated into one class, licensing board investigator, and assigned a Pay Grade 19 (Grievants' Exhibits 5, 12A).

23. The benchmark committee assigned 22 fewer overall points to the new licensing board investigator position than the 1990 classification review had assigned to licensing board investigator III positions. The pay grade still remained in the range for a Pay Grade 19. The committee lowered the point factor ratings for the licensing board investigator III positions as follows:

	1990 rating	1994 rating
Knowledge and skills	D1N.- 160	D1N.- 160
Mental Demands	D4J- 61	D3I- 53
Accountability	D1S- 70	D1S- 61
Working conditions	L2B- 10	L1B- 5
Total	301	279

(Grievants' Exhibits 5, 12A)

24. Dickerson discussed the committee's work with Commissioner Torti. On June 13, 1994, Dickerson sent Torti a memorandum entitled "Committee Results on Investigators" and attached the committee's rating results. Dickerson stated in such memorandum, in pertinent part:

> I am also forwarding a copy to Norman Willis as per our discussion for his independent evaluation and evaluation of the committee work.
>
> The following are the rationale highlights which have been reviewed and discussed with the committee.
>
> [exhibit redacted]
>
> 5. **Licensing Board Investigator (Secretary of State)** (Bold type in original): This position currently exists at three different levels. The position description rated by the committee reflected a change in the organization consolidating the duties of all incumbents into a single job function within

the Office of Professional Regulations. The Committee rated it on the high side of the D level in Job Knowledge primarily due to the breath of the position dealing with a variety of boards and professions. The position was given a solid supportive role in the Accountability rating and minimum working conditions points for the field work and the impact of working with distraught complainants (Grievants' Exhibit 12).

25. Willis reviewed the committee's work, and on June 27, 1994, sent a letter to Dickerson stating in pertinent part:

> The Evaluation Committee did an excellent job. My evaluation varied from theirs in only a few areas. They undoubtedly had more information than I did, so in some cases their evaluations may be more correct than mine.
>
> [content of letter redacted]
>
> Licensing Board Investigator: Working Condition: L 1 B leaning toward 2 due to some exposure to assault (Grievants' Exhibit 11).

26. On August 4, 1994, the Department sent Grievants and the other investigators Employee Notice Forms notifying them that the classification review had resulted in placing all the Employer's investigators in a single class, licensing board investigator, Pay Grade 19. Former licensing board investigator I and II's were upgraded from Pay Grade 17 and 18. As former licensing boards III's, Grievants' pay grades remained the same. The Department's analysis of Grievants' position was identical to the point factor analysis conducted by the benchmark committee (see Finding of Fact 23) (Grievants' Exhibit 5).

27. The Employee Notice Form summary sheet stated in pertinent part:

> In rating the Secretary of State's Investigators, the review is based on the assumption that each investigator performs the same level of duties and is able to work with each board.
>
> The rating assigned to the Secretary of State's investigators fits well into the entire range of investigative classes which were reviewed. These ratings fall into three broad categories:

> Positions which deal primarily with paper record reviews received a rating of pay grade 17.
>
> Positions which must proceed beyond paperwork to the interviewing of witnesses and the analysis of other physical evidence were assigned to pay grade 19.
>
> Positions which, in addition to investigations, are required to do more than the investigative nature of their job and have more complex roles in the respective departments.

The Secretary of State's Investigators are most appropriately considered as part of the middle group (pay grade 19) (Grievants' Exhibit 5).

28. Article 16, Section 3(d) of the Contract, provides for an opportunity by an employee to request an informal meeting with a member of the classification staff within ten workdays of a classification decision to discuss the decision. Such procedure has occasionally resulted in changes to a classification decision without the employee going through a classification grievance. Noonan contacted Dickerson to informally discuss the classification review and decision.

29. Dickerson told Noonan that he had reviewed the classification decision and agreed with it. At some point Noonan learned from Dickerson that the benchmark committee had conducted the classification review. Dickerson told Noonan that Norman Willis had also reviewed the benchmark committee's work and had concurred with the committee's analysis and recommendation that the licensing board investigators should be classified at a Pay Grade 19. Noonan asked to see what Willis had been provided. On or about August 21, Noonan sent Dickerson a letter which stated in pertinent part:

> In reviewing the VLRB's decisions in classification grievance appeals, it is clear that the establishment of the record during the steps prior to the VLRB is mandated since the Board cannot conduct de novo hearings.

> In representing the Investigators at the Secretary of State's Office, there are many areas of the record which are incomplete. I have asked, for example, to be provided with a copy of any and all materials which were sent to Willis to review. You have verbally told me that he was sent the PER-10 forms. Was he also sent the auditor's notes? Please provide me a complete copy of the file, record, auditors' notes, and any and all other written materials or notes, pertaining to this case, as soon as possible.
>
> In addition, at the informal meeting scheduled for this week, the employees wish to tape record the discussions for transcription/record. I know you have objected to this in the past, but it is imperative to have a full and complete record in any appeal proceeding (Grievants' Exhibit 8).

30. On or about August 24, 1994, Dickerson sent Noonan a memorandum denying her the right to tape record informal meetings in the classification grievances, stating that "the purpose of an informal meeting . . . is to give the employee an opportunity to have access to the thinking and rationale for decision made by the Classification Unit prior to the employee deciding whether he or she might want to file a grievance". The memorandum also stated in pertinent part:

> . . .
>
> I am enclosing a copy of the Audit Report to the [benchmark] committee which is an addendum to the PER10. The material sent to Willis Associates regarding the Licensing Board Investigators included the PER10, the addendum audit report, three current ratings for the 3 levels [of licensing board investigators] . . . and a brief statement of the Committee's views of the job as stated to Commissioner Torti in a separate memo . . .
>
> . . .
>
> As you know, the total review of all the investigator positions has been put on hold without completion from the Committee. This was done at the behest of the VSEA until we have completed the initial reviews of the Bench Mark classes. Though we may modify that approach somewhat, we have agreed to not do any further reviews of the other investigators for now, and probably won't be working on any of the rest of them until at least January or February (Grievants' Exhibit 10).

31. At some point Noonan received a copy of the memorandum Dickerson had sent to the Commissioner on June 13, 1994 (Finding of Fact 24), the Employee Notice Form sent to the investigators in response to the RFR (Findings of Fact 26 and 27); the benchmark committee's point factor evaluations, including the 1990 licencing board investigator I, II and III point factor rating and the new rating for a consolidated class of licensing board investigators (Finding of Fact 23) and the response from Norman Willis (Finding of Fact 25). All the documents were redacted, except the Employee Notice Forms (Grievants' Exhibits 5, 10, 11, 12, 12A).

32. The information edited from the redacted documents related to other state investigator positions. Dickerson, or someone else in the Department, edited these documents before sending them to VSEA. The Department did not want, and does not want, any information concerning other positions made public because the Department has not yet acted on the benchmark committee's point factor evaluations (Grievants' Exhibits 10, 11, 12, 12A).

33. On August 25, 1994, Noonan wrote to Commissioner Torti, and again requested "the complete file, including all auditors' notes, report by Norman D. Willis, a complete memo on the recommendation of the benchmark committee, an addendum audit report, and any and all other information pertaining to this review". Noonan also advised Torti in this letter that she intended to tape record the informal meeting with Dickerson "to ensure a proper and complete record at the Department of Personnel level"(Grievants' Exhibit 13).

34. Michael Seibert, General Counsel for the Department, responded to

Noonan's letter to the Commissioner and denied her the right to tape record informal meetings in classification reviews (Grievants' Exhibit 16).

35. Dickerson met with Noonan and Grievants on or about August 25, 1995, for an informal meeting. He refused to permit the meeting to be tape recorded (Grievants' Exhibit 14).

36. On September 1, 1994, pursuant to Article 16, Section 4, Noonan filed a classification grievance on behalf of Grievants and three other full time investigators employed by the Employer at the time, Harold Whipple, Stephen Kennedy and Alfred Wolters. Such grievance stated in pertinent part:

> 3. Statement of Grievance . . . The position of State Investigator, prior to the grievance, was at three (3) levels; the highest at a paygrade 19. As a result of Personnel's review, the positions are now all rated at paygrade 19. In a comparative analysis of this position to the Attorney General Investigator, VSEA believes that the positions are fully comparable in duties, knowledge, skills, abilities, mental demands, accountability, working conditions, and other related classification factors, to the AG Investigator position at paygrade 22 . . .
>
> The VSEA believes that the Department of Personnel's review of the Secretary of State Investigator positions is incorrect, flawed and not related to a proper review of the position and duties. As such, the decision is also arbitrary and capricious. The position of Investigator was reviewed by Classification within the past six months for one employee who was seeking reallocation from the grade 18 to grade 19 level position. The point total was 301, grade 19, based upon the PER-10 submitted in support of the Licensing Board Investigator III position. In this review, the position total was 279, with no diminution of duties of this position within the same time frame. It is also not a relevant classification factor to maintain this position at a paygrade 19 due to the "opening of the floodgates" theory put forth by Personnel relative to other investigator positions in State government.
>
> . . .

(Grievants' Exhibit 17).

37. On September 1, 1994, Noonan also sent letters to Dickerson, Torti

and Seibert and stated that the Department had failed to meet its obligation under Article 16, Section 3 (c), which requires that the Department "respond pointedly and directly to the specific reasons listed in the request for review and will specify any changes in the point factor rating for that rating", and stated that the grievance may be amended after VSEA receives such specific reasons. She also stated her intent to tape record the grievance meeting with the Commissioner to establish a full and complete record (Grievants' Exhibits 18, 19, 20).

38. Commissioner Torti designated Human Resources Douglas Pine to hear the classification grievance filed on September 1, 1994.

39. At some point Noonan received a copy of Duda's auditor notes, including those he took at the Employer presentation on February 10, 1994. Noonan also received a September 16, 1994, memorandum Rose had submitted to Pine in response to the classification grievance. Rose noted in his memorandum to Pine that Article 16, Section 4(a), provides that classification grievances could only be filed if the classification review did not result in a higher pay grade, and since Whipple, Kennedy and Wolters had received pay grade increases, they could not grieve their classification. Rose set forth the benchmark committee's rationale in applying the Willis point factors in all categories and subcategories. Rose also stated in pertinent part:

> ...The [benchmark] committee considered the overall combination of the lower level duties of Investigators at level I and II being combined with those of the stronger level III...
>
> We have been unable to discern any newly assigned higher level duties that had not already been reflected in the previously Licensing Board Investigator III class at pay grade 19 which would warrant a higher pay grade assignment.

> There are also a variety of other investigative classes in State Government, including Liquor Board Investigators, Welfare Fraud Investigators, Unemployment Compensation Investigators, and Securities Investigators. Comparisons with all of these classes tend to confirm the rating assigned to the Licensing Board Investigators . . .
>
> (Grievants' Exhibit 23)

40. The Department has not performed a classification review of at least one of these positions, the Welfare Fraud Investigator position, for over ten years.

41. The Department performed a classification review of Attorney General's Office investigators approximately five years ago.

42. The Department has not provided any additional information to VSEA and has not released the edited portions of the benchmark committee's evaluations and letters to and from Willis.

43. On or about November 3, 1994, VSEA filed a step III grievance on behalf of Grievants, alleging that the Department failed "to allow the establishment of a full record, and fact-finding of all related materials and information necessary to properly pursue a classification grievance" in violation of Articles 5, 15 and 16. The grievance was denied, and VSEA filed this grievance with the Board.

44. The Commissioner of Personnel or his designee has not decided the classification grievance filed by VSEA on September 1, 1994 (Finding of Fact 36).

45. Article 6, Section 5, of the Contract states in pertinent part:

> The State will . . . provide such . . . information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law.

MAJORITY OPINION

At issue is whether the State has violated Articles 6, 11 and 16 of the Contract because the Department of Personnel failed to produce certain information and documents it had used and provided to the Commissioner of Personnel during a classification review of Grievants' positions. Also at issue is whether the State violated the Contract because the Department of Personnel refused to permit Grievants and VSEA to tape record classification proceedings. The State contends that the issues presented in this grievance are not grievable under Article 15, the grievance procedure article of the Contract.

The initial grievance filed in this matter alleged that the State violated Article 16 of the Contract. On the first day of hearing, the State filed a Motion to Dismiss, contending for the first time that the Board lacked subject matter jurisdiction over the matter. Grievants orally moved to amend their grievance that day, alleging violations of Article 6. Grievants then filed a filed a Motion to Amend on May 2, 1995, prior to the second day of hearing, alleging violations of Article 6 and 11.

Before discussing the merits of these contractual claims, we address Grievants' Motion to Amend. Section 12.7 of the Board Rules of Practice permits amendment of grievances as the Board "deems proper". In deciding whether to permit amendment of grievances, the Board examines whether amendment would prejudice the employer or be disruptive to the orderly and efficient processing of cases by the Board. Grievance of VSEA, 17 VLRB 203, 225 (1994). Grievance of Rennie, 16 VLRB 1 (1993).

We conclude that it is proper to grant Grievants' motion to amend. This

case had been pending before the Board for approximately four months and at no time prior to the first day of hearing did the State raise the issue of subject matter jurisdiction and request that the Board dismiss the case. The belated raising of the jurisdictional issue meant Grievants were confronted with a significantly different case than existed prior to the first day of hearing. There would be an element of fundamental unfairness if Grievants were precluded from amending their grievance on the heels of the State belatedly raising a significant issue.

Further, although Grievants could have moved to amend prior to the first day of hearing in this matter, we conclude that the State was not prejudiced by Grievants' delay. The underlying facts supporting Grievants' motion to amend are identical to the underlying facts supporting Grievants' initial grievance; the State did not face new evidentiary issues as a result of the motion to amend. Also, there was a second day of hearing in this case and the State did not indicate that its preparation for the case and the presentation of evidence was affected in any way. We conclude that the State would not be prejudiced by our granting this motion to amend. Granting the amendment also will not be disruptive to the processing of this case by the Board.

Article 16

Article 16 of the Contract provides that an "employee aggrieved by an adverse decision of the Commissioner of Personnel may have that decision reviewed by the [Board] on the basis of whether the decision was arbitrary and capricious in applying the point factor system utilized to the facts established by the entire record". Article 16, Section 7. Our jurisdiction under Article 16 is limited to determining whether the Commissioner of Personnel has made an arbitrary and capricious

decision in applying the point factor system. Grievance of Plunket, 15 VLRB 30, 33 (1992). *Affirmed*, Unpublished decision, Vt. Supreme Court Docket No. 92-110 (December 18, 1992).

Article 16, Section 7, of the Contract also 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, which information and documents must be disclosed to the other party. Appeal of Fisher, 15 VLRB 519, 520 (1992). The reaching of a decision by the Commissioner without ensuring that appellants were provided with the whole record before him is arbitrary and capricious. 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. Appeal of Transportation District Technicians, 18 VLRB 224, 230 (1995).

The procedure the Department uses for conducting classification reviews is to apply the point factor analysis system to the position it is reviewing. It then compares such analysis to point factor ratings of similar positions to ensure that similar positions are rated similarly. In the matter before us, a newly formed benchmark committee performed a classification review of approximately 16 investigator positions in State service, including Grievants' investigator position, as

a training exercise for conducting a classification review of an entire occupational class. Norman Willis also performed an independent analysis of the entire investigator class to evaluate the committee's work. The Commissioner was provided with a copy of the committee's written work product. The Department then notified Grievants that it had completed its analysis of their position and that Grievants' pay grades would be retained at the same level. Grievants grieved the Department's classification to the Commissioner.

At some point, Grievants and VSEA discovered that the committee and Willis had performed an analysis of the entire occupational class and that the entire analysis had been provided to the Commissioner. Because Grievants were in the process of grieving their classification review to the Commissioner, Grievants and the VSEA requested to be provided with the same information so that it could effectively prepare its classification grievance.

The Department would only release the committee's analysis with respect to Grievants' positions. It refused to release the committee's analysis of the entire occupational investigator class and Willis' independent analysis of the entire occupational investigator class. Grievants and the VSEA contend that this comparative information is already part of the record before the Commissioner and they are entitled to it under Article 16. Grievants are not seeking at this point to have the Commissioner's decision reviewed but are seeking information the Department had used and had provided to the Commissioner during its classification review.

We conclude that we have no jurisdiction to decide this claim under Article 16. There is no dispute that at the time the grievance was filed, the procedure for

classification reviews set forth in Article 16 had not been fully exhausted. The Commissioner has not yet made a final decision on Grievant's pending classification grievance. Our jurisdiction under this article is limited to determining whether the Commissioner of Personnel has made an arbitrary and capricious decision in applying the point factor system. Plunket, 15 VLRB at 32. Accordingly, this grievance is premature and we lack jurisdiction under Article 16 to decide this claim.

Grievants also allege that the Department violated Article 16 of the Contract because it would not permit them to tape record meetings in their classification review. This, too, is premature under Article 16 for the same reasons discussed above concerning the analysis by the benchmark committee and Willis.

Even assuming *arguendo* that the tape recording issue was properly before us under Article 16, Grievants' claim is without merit. The VLRB has such adjudicatory jurisdiction as is conferred on it by statute; In re Grievance of Brooks, 135 Vt. 563, 570 (1977); and in deciding grievances the VLRB is limited by the statutory definition of grievance which is "the employee's . . . expressed dissatisfaction . . . with aspects of employment or working conditions under the collective bargaining agreement or the discriminatory application of a rule or regulation". 3 V.S.A. Section 902(14). In deciding grievances, the VLRB has concluded that violations of past practices are encompassed within the statutory definition of grievance; Grievance of Cronin, 6 VLRB 37, 67-69 (1983); and the Rules and Regulations for Personnel Administration promulgated by the Department of Personnel have been recognized by the Board as past practices encompassed within the definition of grievance. Grievance of Allen, 5 VLRB 411, 417 (1982).

In interpreting the provisions of collective bargaining agreements in resolving grievances, the VLRB follows the rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacy, 139 Vt. 68, 71 (1980). The Board will not read terms into a contract unless they arise by necessary implication. Id. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their understandings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

The Contract provides that "an employee may request an informal meeting with a member of the Classification section for a discussion of the classification decision". Article 16, Section 3(d). There is nothing in this provision requiring the Employer to permit such informal meetings to be tape recorded. The parties are bound by the plain and express language of their agreement; it is not our role to remake their agreement to include such language. Further, the current classification review and grievance provision has been in effect for many years and there is no evidence of past practices under the current provision that the parties have tape recorded classification proceedings. Accordingly, the State has not violated Article 16 of the Contract, or a binding past practice, in this regard and this portion of the grievance is without merit.

Article 6

We next consider whether the State has violated Article 6, Section 5, of the

Contract, which provides in pertinent part that "(t)he State will . . . provide such . . . information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law".

At the outset, the State contends that Article 6 is limited to information regarding bargaining and does not apply to information sought in the course of a classification review and grievance. We disagree. We have previously held that VSEA, as grievants' exclusive bargaining agent, has the right under Article 6, Section 5, to request and acquire information necessary to represent its members in grievance proceedings and pre-disciplinary meetings. Grievance of VSEA, 15 VLRB 13, 22 (1992). Grievance of Munsell, 11 VLRB 135, 144 (1988).

VSEA contends that the State has violated this provision of the Contract by failing to provide VSEA with information on the classification review of the entire occupational investigator class conducted by the benchmark committee and independently analyzed by Willis. Such entire class review was used by the committee, and Willis, for comparative purposes in conducting Grievants' classification review. VSEA contends that it is unable to properly prepare the step 3 classification grievance before the Commissioner without such comparative information.

We agree, pursuant to Article 6, Section 5, and under the specific facts of this case, that providing such information to VSEA is reasonably necessary to allow VSEA, as Grievants' exclusive bargaining agent, to properly represent Grievants before the Commissioner at the step three classification grievance hearing. Access to such information is relevant to the issue of whether the committee and Willis

properly applied the point factor analysis in conducting its classification review of Grievants' position.

We recognize that the benchmark committee evaluated the entire investigative class as a learning exercise and that the Department has not made such comprehensive analysis public and does not intend to immediately implement the committee's recommendations. We also understand the sensitivity of such committee results and recommendations, particularly for employees occupying positions for which the committee recommends changes in pay grades.

However, the Department relied on the classification reviews conducted by the committee in conducting its classification review of Grievants positions; the Department also relied on Willis' independent analysis to corroborate the committee's findings. In notifying Grievants of its decision to retain Grievants' pay grade, the Department stated that Grievants' pay grade "fits well into the entire range of investigative classes which were reviewed". The Department point factor rating was identical to the point factor rating that the committee had provided to the Commissioner. Under these circumstances, VSEA has made a legitimate request and is entitled to have access to the classification reviews conducted by the committee and by Willis Associates. Such information is reasonably necessary for VSEA to properly prepare for Grievants' classification step III grievance hearing before the Commissioner of Personnel. Thus, we conclude that the State violated Article 6, Section 5, of the Contract by refusing to provide the information to VSEA.

Our colleague's dissenting opinion, including his views that the information sought by VSEA is irrelevant and confidential, fails to take into consideration the

fact that the Department relied on the benchmark committee's classification analysis to justify its classification of Grievants' position, but then refused to disclose the committee's report. Although Article 16 sets forth an exclusive classification procedure which limits the Board's jurisdiction in classification reviews, we conclude that Article 6 applies under the specific circumstances of this case.

In Grievance of Lowell, 15 VLRB 291, 324-325 (1992), we concluded that while generally it is true that the grievance and appeal procedures are the exclusive procedures for seeking review of the classification status of positions, this did not preclude employees from grieving alleged sex discrimination which occurred during the course of a classification review. Similarly, here, Grievants are not precluded from challenging through the grievance procedure denial of access to information during the course of a classification review which is reasonably necessary to properly prepare for a classification grievance hearing before the Commissioner of Personnel.

This seeking of information during the course of a classification review distinguishes this case from Grievance of Plunket, supra. In Plunket, the Board dismissed a grievance filed by an employee who had lost his classification grievance before the Commissioner of Personnel, and then failed to file an appeal to the Board under the provisions of Article 16. In affirming the Board's decision, the Vermont Supreme Court characterized the Board decision as follows: "In essence, the Board found that appellant repackaged his classification grievance as a general grievance in order to avoid the limited standard of review for classification grievances and to start anew with the Commissioner" (slip op. at 1). The circumstances present in Plunket are not present in the case before us. Grievants are not attempting to

repackage a classification grievance as a general grievance after failing to appeal the Commissioner's classification decision to the Board in a timely manner. Instead, Grievants simply are seeking to ensure that they have access to pertinent information during the course of a classification review so that they can properly prepare for a classification grievance hearing.

Grievants also contend that the State violated Article 6 of the Contract because the Department refused to permit VSEA and Grievants to tape record grievance proceedings. Grievants have not indicated how Article 6 is relevant to this issue and we conclude that it is not relevant.

Article 11

Grievants further allege a violation of Article 11, Section 3, of the Contract, which provides in pertinent part that "any material, document, note or other tangible item which is to be entered or used by the employer in any grievance hearing held in accordance with the Grievance Procedure Article of this Agreement, or hearing before the Vermont Labor Relations Board, is to be provided to the employee on a one-time basis..."

Given our conclusion that the State violated Article 6 by refusing to provide VSEA with the classification reviews conducted by the benchmark committee and by Willis, it is not necessary to analyze Grievants's Article 11 claim in this regard.

With respect to the tape recording issue, Grievants have not indicated how Article 11 is relevant to this issue, and we conclude that it is not relevant.

Charles H. McHugh

Carroll P. Comstock

DISSENTING OPINION

I agree with my colleagues' conclusion that the Employer did not violate Article 16 of the Contract, and conclude further that Article 11 is not relevant to the issues in this matter. I also agree with the majority opinion that the Employer did not violate Article 6 of the Contract by not permitting tape recordings of informal meetings held during a classification review. I disagree with my colleagues' conclusion, however, that the Employer violated Article 6 by its failure to provide VSEA with copies of the classification reviews conducted by the benchmark committee and independently conducted by Norman Willis.

To the contrary, I conclude that the Employer committed no violation of Article 6. First, the information sought by VSEA is not relevant to any potential contractual challenge to the classification of positions in this case. Let us look beyond the arguments of counsel and look to the facts. The law provides that classification actions are based on a point factor comparison method, which is defined as "a system under which positions are assigned to salary ranges based on a scale of values against which job evaluations of individual positions are compared".

3 V.S.A. Section 310(a). In examining the classification review which occurred in this case pursuant to the statutory language, it is important to look at the sequence of events.

The assigned analysts in the review process, Quackenbush and Duda, met with Grievants, Chief Investigator Bragg, Personnel Officer Woodruff, and VSEA Representative Noonan for a desk audit. At this time, the analysts tentatively concluded that all the Secretary of State investigators should be consolidated into one class, and assigned to pay grade 19.

At some point later, the benchmark committee of six or more trained analysts performed its own review and confirmed the classification and pay grade of 19 for the investigators. These reviews finally were submitted to Willis, along with many others, to determine if the analysts were properly using the system he had established in the 1980's. He in turn confirmed that the analysis was proper and valid.

Given this sequence of events, the fact that the benchmark committee and Willis also evaluated other positions, and did a general comparison of all the investigators to see if the ratings were reasonable, serves only to further establish the validity of the rating which was made prior to the review by the benchmark committee and Willis. The agreement with a decision already made makes any documents stemming from the benchmark committee and Willis review superfluous, and irrelevant to the initial process and decision in this case.

The decision of my colleagues to order the State to provide VSEA with information and documents produced through the review by the benchmark committee and Willis will create serious problems throughout state government, and

add nothing to a potential claim by Grievants that the Commissioner of Personnel's decision is arbitrary and capricious. The Department of Personnel has not released the benchmark committee's classification review because it is not ready to implement the committee's recommendations. I believe that releasing such information at this time will cause unnecessary turmoil among employees occupying positions for which the committee recommends pay grade changes. The fact that the benchmark committee's recommendations with respect to these positions has not been implemented up to this point means that the information which VSEA seeks is confidential within the meaning of Article 6, and thus reinforces my view that the State is not required to provide VSEA with the information.

In addition to the information sought by Grievants being irrelevant and confidential, it is otherwise inappropriate to invoke Article 6 in this classification dispute. Article 16 provides the exclusive procedure for employees to seek review of their positions by the classification section, grieve that decision to the Commissioner of Personnel and appeal the Commissioner's decision to the Board. The procedures in Article 16 are "the exclusive procedures for seeking review of the classification status of a position or group of positions". Our jurisdiction under Article 16 is limited to determining whether the Commissioner of Personnel has made an arbitrary and capricious decision in applying the point factor system. Plunket, 15 VLRB at 32.

Grievants are asking us to intervene in the middle of an Article 16 classification grievance and require the Department to provide them with certain information and documents before the procedures set forth in the article are fully

exhausted. There is no procedure set forth in Article 16 that allows the Board to intervene in the middle of a classification review or grievance. Our jurisdiction is limited to reviewing the Commissioner's decision at the end of the process set forth in Article 16.

VSEA is engaging in an attempt in this case to change the process established through negotiations to settle classification disputes. The parties negotiated the language of Article 16 and are bound by its provisions. If VSEA is dissatisfied with the classification provisions it has negotiated and seeks to have the Board take a more expansive role in classification proceedings, it can renegotiate such provisions at the bargaining table. Grievance of Plunket, Unpublished decision (Vermont Supreme Court Docket No. 92-110, December 18, 1992). They cannot make an "end run" around the exclusive provisions of the article and create a new right in a classification dispute by alleging an Article 6 violation.

It also is apparent to me that VSEA is trying to have it both ways in this matter. When VSEA discovered that the Department of Personnel was conducting an entire occupational class review, it asked the Department to suspend such review. The Department agreed to suspend the review at VSEA's behest and did not implement any of the committee's recommendations. Now VSEA is seeking the information it had earlier asked the Department not to implement.

Thus, unlike the majority opinion, I conclude that Grievants are not entitled to more than they bargained for in negotiating the provisions of Article 16 and Article 6 cannot be invoked in the middle of an Article 16 classification review. In sum, I concur with the State that the view adopted by the majority opinion gives too

expansive a meaning to the applicability of Article 6. I would dismiss this grievance.

Leslie G. Seaver

ORDER

Now, therefore, based on the foregoing findings of facts and for the foregoing reasons, it is hereby ORDERED that the Grievance of the Vermont State Employees' Association, Ronald West and Merill Cray is SUSTAINED IN PART; and the State of Vermont forthwith shall provide Grievants with a copy of the classification review of the entire investigative class conducted by the benchmark committee in 1994 and a copy of the classification review of the entire investigative class *independently conducted by Norman Willis in* 1994.

Dated this 27th day of September, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Carroll P. Comstock