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INVESTIGATIVE REPORT

E12-0006

CHARGING PARTY: Debra Vigneault

RESPONDING PARTIES: Vermont Department of Corrections (DOC); Vermont Department of Human Resources ("DHR"); Vermont Agency of Human Services (AHS); Vermont Agency of Administration (AoA) and Northwest State Correctional Facility (NWSCF).

CHARGE: Discrimination in Employment on the basis of sex in violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA).

SUMMARY OF CHARGE: In June of 2012,[1] Debra Vigneault an Administrative Service Coordinator III (ASCIII)[2] at the Northwest State Correctional Facility (NWSCF) in Swanton, Vermont and a state employee with thirty-nine (39) years of state service discovered that she was making what appeared to be the same salary as a male co-worker, Mr. Doe, who was hired into the same position in 2006 at Southern State Correctional Facility (SSCF).[3] However Ms. Vigneault had approximately seven (7) years more experience than Mr. Doe as an ASCIII and approximately twenty-nine (29) years of overall seniority over Mr. Doe, which, based upon the State's seniority system, should have resulted in her making a higher wage than Mr.

[1] After the reasonable grounds finding in Lynne Silloway's HRC case no. E11-0002.
[2] At the time Ms. Vigneault discovered the equal pay issue, she was classified as an Administrative Services Coordinator III (ASCII). ASCIII's were formerly known as "Business Managers' A" prior to reclassification. For purposes of this report, Ms. Vigneault will be referred to as an ASCIII.
[3] To protect his privacy, this employee is referred to throughout this report as "Mr. Doe."

Doe. Ms. Vigneault and Mr. Doe had the same pay grade - PG 23 - and the same job description and responsibilities. As a result, Ms. Vigneault filed a charge of discrimination with the Human Rights Commission alleging a violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA). Upon further investigation it was revealed that for almost ten (10) months after Mr. Doe was hired, Mr. Doe actually made *more* than Ms. Vigneault. This resulted in a continuing disparity at the time she filed the complaint despite the fact that by that time, they made the same hourly wage. This is explained further in Part II and associated attachments.

SUMMARY OF RESPONSE: The State has asserted that Ms. Vigneault cannot make a prima facie case of discrimination since she and Mr. Doe made the same wage at the time she filed her complaint with the HRC. The State also denied that Ms. Vigneault and Mr. Doe do "equal work on jobs requiring equal skill, effort and responsibility" and that they perform their jobs "under similar working conditions." In the alternative, the State asserted that even if Ms. Vigneault were able to make a prima facie case pursuant to VFEPA, all available defenses under VFEPA apply with the result that Mr. Doe's salary is legitimately higher than or equal to Ms. Vigneault's salary.

PRELIMINARY RECOMMENDATIONS:

Ms. Vigneault can demonstrate a prima facie case of discrimination under Vermont's Equal Pay Act. In light of this, the State had the burden to produce an affirmative defense – that is to produce evidence and prove that the evidence makes one or more of the VFEPA defense(s) applicable in Ms. Vigneault's case. However the State has presented no proof of its defenses beyond the mere assertion of them. Nor has it offered proof to support its claim that there is no prima facie case. This investigation's inspection and

review of requested documents and lack of any affirmative defense therefore results in the following recommendations:

(1) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Agency Human Services (AHS) discriminated against Ms. Vigneault because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(2) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Department of Corrections (DOC) discriminated against Ms. Vigneault because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(3) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Department of Human Resources (DHR), discriminated against Ms. Vigneault because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(4) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Agency of Administration (AoA) discriminated against Ms. Vigneault because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(5) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Northwest State Correctional Facility (NWSCF) discriminated against Ms. Vigneault because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

SUMMARY OF INVESTIGATION

Interviews

Debra Vigneault - Complainant – Administrative Services Coordinator III at NWSCF –Approximately fifteen phone contacts between June 2012 and October 30, 2013.

Keith Tallon – Community Corrections District Manager, formerly Southern State Correctional Facility (SSCF) Superintendent from 2003-2005 – the "Appointing Authority" - 1/18/12

Chris Telfke –Operations Director for VSEA - 2/2/12

Molly Paulger - Director, Personnel Division Services & Operations – the "Hiring Authority" in DHR who had ultimate approval over the DOC's request to hire Mr. Doe into-range– 2/9/12

Mr. Doe– Administrative Services Coordinator III at SSCF - 3/26/12

Anita Carbonell – Former Superintendent at Marble Valley Correctional Facility, Southeast and Southern State Correctional Facilities; Supervised three ASCIII's: Ms. Silloway at MVRCF, Mr. Doe at SSCF and Mary Bertrand at SESCF. 10/17/2012

Sarah Systo – Corrections Site Legal Program – Interview Panel member for Mr. Doe 2003 and at that time Business Manager A for Southern State – 11/14/2012

Barbara Lester – Food Service Supervisor, Marble Valley Regional Correctional Facility (MVRCF) - Interview Panel member for Mr. Doe 2003 – FSSI at the time of interview – 10/18/12, 10/23/13

Bob Scarcello – Former Fitz, Vogt & Associates representative – provided menus to SSCF and other DOC facilities - Interview Panel member for Mr. Doe 2003 – 11/1/12

James Kamel – Living Unit Supervisor and Interview Panel member for Mr. Doe 2003 - 11/2/12

Lynne Silloway – 10/29/13 ASCIII MVRCF

Mary Bertrand – 10/27/13 ASCIII SESCF

Lisa Deblois – 10/29/13 ASCIII NSCF

Meroa Benjamin – 10/28/13 ASCIII NESCF

DOCUMENTS/RESEARCH

a. Charge of Discrimination alleging a violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA)

b. State's Response to Charge – 7/30/12

c. VSEA Supervisory Collective Bargaining Agreement

d. Vermont Personnel Policy & Procedures Manual

e. Equal Employment Opportunity Commission (EEOC) Compliance Manual

f. Personnel division data on promotion and pay grade/step movement

g. Personnel division data on hire-into-range figures between 2000-2010

h. Statutes/case law/law review articles/treatise extracts

i. Review of legislative history file of Vermont's Equal Pay Act provision

j. Pay history of Mr. Doe and Ms. Vigneault, including social security and retirement calculations

k. Documentation from the other four Department of Corrections (DOC) employees who were hired-into-range between 2002-2004

l. Personnel File of Debra Vigneault

m. Reclassification documents of all Business Managers' A statewide.

n. Vermont Transparency Website Data - www.vttransparency.org

o. Analysis of Kenneth M. Nussbaum, CPA (Attached)

ACRONYM KEY

AHS	Agency of Human Services
DHR	The Department of Human Resources within the Agency of Human Services - the **hiring authority** which gives the final hiring approval to the appointing authority.
ASCIII	Administrative Services Coordinator III (Ms. Vigneault & Mr. Doe were reclassified as ASCIII's from **Business Managers' A**).
CBA	Collective Bargaining Agreement
DOC	Department of Corrections - the **appointing authority** that proposed the hiring of Mr. Doe to DHR.
EPA	Equal Pay Act
FSS	Food Service Supervisor (the job Mr. Doe was hired-into-range to perform). (**See Attachment 1** for description of the FSS in 2003).
MVRCF	Marble Valley Regional Correctional Facility – Rutland Where Lynne Silloway works.
NWSCF	Northwest State Correctional Facility – Swanton - Where Ms. Vigneault has worked since 2006.
NESCF	Northeast State Correctional Facility – St. Johnsbury - Where Meroa Benjamin works
SSCF	Southern State Correctional Facility – Springfield - Where Mr. Doe has worked since 2003 as a FSS and as Business Manager A/ASCIII.
SECF	Southeast State Correctional Facility – Windsor - Where Mary Bertrand works
NSCF	Northern State Correctional Facility – Newport - Where Lisa Deblois Works
PG	Pay Grade
VLRB	Vermont Labor Relations Board
VSEA	Vermont State Employees Association
VFEPA	Vermont Fair Employment Practices Act

ORGANIZATION OF INVESTIGATIVE REPORT

Part I of this report reviews the elements of the prima facie case and the available defenses to an equal pay claim. It discusses the respondents' legal burden when defending an Equal Pay Act violation, provides a brief history of the federal Equal Pay Act, compares Vermont's version of the equal pay act with its federal counterpart and briefly explores the possible impact of a recent decision by federal district court Judge William Sessions interpreting the Vermont version of the "any factor other than sex" defense for the first time.

Part II evaluates the State's initial defense to Ms. Vigneault's claim – e.g. that she cannot make a prima facie case and should not be allowed to pursue her claim. Analysis provided by a financial expert consulted by the HRC, as well as inspection of state documents and interviews with the complainant and other parties, show the State's assertion to be without merit.

Part III reviews the State's first set of defenses, that is, their "merit/seniority/collective bargaining" defenses. It should be noted that collective bargaining is not a recognized EPA defense however this report will address it insofar as the State has tried to bootstrap it to other defenses. This report finds all of these defenses inapplicable to the set of facts in Ms. Vigneault's case.

Part IV reviews the "any factor other than sex" defense. The State claims that Mr. Doe legitimately makes the same wage as Ms. Vigneault – in spite of her greater experience in the job and thirty-nine years of state service - because he was hired into state service through use of a personnel policy which allowed him to be hired at a greater rate of pay than is usual for a new state employee. Based on the State's own records and interviews with members of the interview panel and the hiring and appointing authorities, this investigation finds this defense to be flawed and without

merit. Interviews with the hiring panel members have raised troublesome questions and revealed that Mr. Doe may have been given preferential treatment due to a relationship with one of the members on the interview panel. This section also emphasizes the point that the State continued to violate the VFEPA when they hired Mr. Doe as a Business Manager A – the sole male in a group of six other female comparators – all but one with greater overall state seniority and all but one with more years of experience in that position. It also emphasizes the drastic financial impact of hiring Mr. Doe at such a high step with respect to the amount of overtime he claimed during the period of time he could claim time and half wages.

Part V concludes with a summary of findings and the preliminary recommendation that the Human Rights Commission find reasonable grounds to believe that the Respondents have continuously violated the VFEPA's equal pay provision from the time Mr. Does was hired and continue to violate it with the issuance of each new paycheck to Ms. Vigneault (and her comparators).[4]

It may be helpful to recall that Ms. Vigneault's case had its genesis in 2010, when Lynne Silloway, an ASCIII and comparator to Ms. Benjamin and Mr. Doe (and the other DOC ASCIII's), discovered via the Vermont Transparency website, that she was making approximately $10,000 less than Mr. Doe, a male co-workers with less experience and seniority. The website showed data which was confirmed with greater detail through

[4] Public Law No. 111-2, 123 Stat. 5 (2009). The Lilly Ledbetter Fair Pay Act of 2009 amended (42 U.S.C. 2000e-5(e)) known as "Title VII") by adding the following language (3)(A) "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, **including each time wages, benefits, or other compensation is paid**, resulting in whole or in part from such a decision or other practice."

discovery. It led to Lynne Silloway's HRC complaint and subsequent comparator complaints:

CHART A (2010 figures)

Gender	PG/ Step	Salary		Start Date	Years of Service
		Hourly	Annual		
Male **(Mr. Doe)**	23-12	$28.14	$58,531.20	9/15/2003	7 yrs.
Debra Vigneault	23-12	$28.14	$58,531.20	9/3/1974	36 yrs.
Meroa Benjamin	23-12	$28.14	$58,531.20	8/2/1982	28 yrs.
Female (terminated)[5]	23-08	$25.07	$52,145.60	2/2/1998	12 yrs.
Lynne Silloway	23-06	$23.44	$48,755.20	6/10/2002	8 yrs.
Lisa Deblois	23-05	$22.71	$47,236.80	5/13/2002	8 yrs.

I. ESTABLISHING A PRIMA FACIE CASE IN AN EQUAL PAY CASE AND THE AVAILABLE DEFENSES TO A RESPONDENT

To establish a prima facie case of discrimination pursuant to the equal pay section of the Vermont Fair Employment Practices Act, 9 V.S.A. §495(a)(8), Ms. Vigneault must show by a preponderance of the evidence (i.e. that it is more likely than not) that:

1. The employer pays different wages to employees of the opposite sex; **(Respondents deny this element claiming Mr. Doe and Ms. Vigneault make the same wage)**.

2. The employees perform equal work on jobs requiring equal skill, effort, and responsibility; **(Respondents deny this element)**; and,

[5] Terminated since the chart was published.

3. The jobs are performed under similar working conditions. **(Respondents deny this element)**.

If the evidence demonstrates that Ms. Vigneault can establish a prima facie case, the Respondent may assert one or more of the following affirmative defenses in an attempt to justify the wage differential:

1. A seniority system;
2. A merit system;
3. A system which measures earnings by quantity or quality of production; or
4. A differential based on any factor other than sex.[6]

Ms. Vigneault need not show intentional discrimination – only the elements outlined in the prima facie case since the EPA is a "strict liability"[7] statute. As a strict liability statute, the employer's burden is a "heavy" one[8] and an employer asserting any one or more of the four defenses must produce evidence *and* prove that this evidence establishes one or more of the four defenses.[9]

The Federal Equal Pay Act is a "remedial statute"[10] and must be read broadly in order to achieve its intended purpose – that is, ending wage disparities between men and women when they perform the same or similar work. In *Corning Glass Works v. Brennan*, the United States Supreme Court discussed the purposes behind the passage of the EPA:

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination . . . that the wage structure of many segments of American industry has been based on an ancient but outmoded belief

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[6] *See* 9 V.S.A. §495(a)(8)(A)(i)-(iv) and 29 U.S.C. § 206(d)(1)(1982).
[7] Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135, 142 (2nd Cir. 2000).
[8] Timmer v. Michigan Dep't. of Commerce, 104 F.3d 833, 843 (6th Cir. 1997).
[9] Strict products liability, statutory rape and dog bite laws are some example where the element of intent need not be shown.
[10] "Remedial" statues are to be interpreted broadly since their purpose is to right past wrongs, so to speak. *See* generally Black's Law Dictionary under "Remedial Laws or Statutes."

> that a man, because of his role in society, should be paid more than a woman even though his duties are the same. The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the [plaintiff] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[11]

While the language of Vermont's Equal Pay Act is modeled on the federal Equal Pay Act, it carries more severe monetary penalties than its federal counterpart by allowing for the recovery of double lost wages.[12] Vermont also allows for investigations to be conducted in-state by the Attorney General's Office[13] and for an action to be brought by an aggrieved employee no matter how small the business.[14] A separate subsection ensures that employees can speak openly about their wages without fear of punitive action[15] which creates an opportunity for employees to learn what their co-workers make without fear of negative employment consequences.

Recent amendments in the 2013 Vermont legislative session significantly amended the VFEPA by strengthening[16] the fourth affirmative defense of a factor-other-than-sex. The new language specifies that an employer may pay different wages under the VFEPA <u>only</u> when the differential wages are paid pursuant to:

> (iv) A bona fide factor other than sex. An employer asserting that differential wages are paid pursuant to this subdivision shall demonstrate that the factor does not perpetuate a sex-based differential in compensation, is job-related with respect to the

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[11] 417 U.S. 188, 195 (1974).
[12] 21 V.S.A. §495b(c).
[13] 21 V.S.A. § 495b(a).
[14] *Id.*
[15] 21 V.S.A. §495(a)(8)(B).
[16] As introduced, the amending legislation intended "to clarify and strengthen existing laws regarding equal pay[.]" 2013 Vt. House Bill No. 99.

> position in question, and is based upon a legitimate business consideration. 21 V.S.A. § 495(a)(7)(A)(iv).

This added language makes it clear that employers must show that use of the defense really is a job related factor.

In addition, for the first time, in the summer of 2013, the Vermont federal District Court construed the VFEPA's factor-other-than-sex affirmative defense.[17] The Dreves court followed Second Circuit precedent (further discussed in Part V below) and concluded that the factor-other-than-sex must be "gender-neutral, bona fide, and business-related."[18] In sum, precedent and continuing developments and interpretations of the fourth affirmative defense both legislatively and through case law suggest that the respondents cannot successfully avail themselves of the factor-other- than-sex defense.

II. STATE ASSERTS A LACK OF A PRIMA FACIE CASE

On July 10, 2012 the State submitted its defenses to Ms. Vigneault's complaint. With respect to the prima facie case, the State asserted the following:

1. The State claimed that Ms. Vigneault could not make a prima facie case of discrimination since she and Mr. Doe appeared to make the same wage at the time she filed her HRC complaint.
2. The State denied that Ms. Vigneault and Mr. Doe do "equal work on jobs requiring equal skill, effort and responsibility."
3. The State also denied that they perform their jobs "under similar working conditions."

In the alternative, the State asserted that even if Ms. Vigneault made a prima facie case of equal pay discrimination, all available defenses under VFEPA applied and that Mr. Doe's salary was therefore legitimately higher

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[17] Dreves v. Hudson Group Retail, Inc., 2013 WL 2634429 (D. Vt. June 12, 2013) (Sessions, J.) (granting summary judgment to plaintiff on her VFEPA claim).
[18] *Id.* at 13.

than Ms. Vigneault's. It is Ms. Vigneault's burden to produce evidence establishing a prima facie case. If successful, the burden shifts to the Respondents to prove one or more of the VFEPA defense(s). This investigation now examines the reasons the State has offered to support its claim that Ms. Vigneault lacks a prima facie case.

1) State assertion #1 – No Equal Pay Violation because wages are the same at the time the complaint was filed.

This investigation first evaluated the State's claim that Ms. Vigneault and Mr. Doe made the same wage at the time of the complaint and that because of this, her claim of equal pay was null and void. The sections of the Code of Federal Regulations that interpret the Equal Pay Act, define the term "wages" in a very expansive manner. According to the code, "wages:"

> ....generally includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. **Fringe benefits** are deemed to be remuneration for employment. "Wages" as used in the EPA (the purpose of which is to assure men and women equal remuneration for equal work) will therefore include payments which may not be counted under section 3(m) of the FLSA toward the minimum wage (the purpose of which is to assure employees a minimum amount of remuneration unconditionally available in cash or in board, lodging or other facilities). Similarly, the provisions of section 7(e) of the FLSA under which some payments may be excluded in computing an employee's "regular rate" of pay for purposes of section 7 do not authorize the exclusion of any such remuneration from the "wages" of an employee in applying the EPA. Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment and therefore wage

> payments that must be considered in applying the EPA, even though not a part of the employee's "regular rate."[19]

"Fringe benefits" (highlighted above) includes, "e.g., such terms as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such concepts"[20] including overtime.

Ms. Vigneault's complaint was accepted by the HRC on the grounds that it stated enough of a prima facie case to warrant investigation. However this investigation had to examine two central questions. The first question was whether there was ever a pay disparity between Ms. Vigneault and Mr. Doe? The answer turned out to be "yes" – there was a pay disparity from September 14, 2006 through July 5, 2007, during which time Mr. Doe actually made more than Ms. Vigneault. Furthermore, there was an overlapping period of time when all the Business Managers were eligible for time and a half overtime. During that time, Mr. Doe claimed an extraordinary amount of overtime compared to Ms. Vigneault (or any of the other Business Managers' A). When he was no longer able to charge time and a half overtime however, he quit doing overtime almost completely. His time and half overtime wage was certainly more than Ms. Vigneault's because he was hired into range. This is discussed further in Part IV.

The second question arose out of the answer to the first: would Ms. Vigneault be able to make a prima facie case of equal pay discrimination? She had a significant hurtle at first glance: the age of the disparity, the fact that it appeared to have been remedied after ten months, and the HRC's one year statute of limitations.[21] If Ms. Vigneault could not show that the old

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[19] 29 C.F.R. 1620.10. (Emphasis added).
[20] *Id.* at 1620.11(a).
[21] *Id.* at Rule 1: A complaint must be made to the Commission within one year of the alleged discriminatory act or practice.

disparity continued[22] to negatively impact her current wages compared to Mr. Doe's wage, the HRC would have had to administratively dismiss[23] her complaint for lack of prima facie case and staleness, i.e. failure to file at the time the disparity occurred some six years earlier even though she had no idea it was occurring)..

After reviewing the definitions of "wages" and fringe benefits" it became clear that not only was there a difference in the base wage (not including overtime), but that this affected contributions to retirement and social security. This investigation theorized that if Ms. Vigneault suffered a wage disparity for nearly 10 months, she might never have "caught up" to Mr. Doe, even though their hourly wage leveled out after the ten month period and was facially "the same" ever since that time. If it could be shown that the old disparity still affected the wage Ms. Vigneault now receives, i.e. that in fact she is not really receiving an equal wage to Mr. Doe because of the period of time she fell behind him in terms of pay, Ms. Vigneault could establish a prima facie case and invoke the Lily Ledbetter Act.[24] This would negate issues with the statute of limitations since the violation was a continuing one.

This investigation therefore submitted the pay histories to Ken Nussbaum, C.P.A. and he confirmed that theory. **See Attachment 2.** Based on Nussbaum's analysis Ms. Vigneault can establish the first element of the prima facie case and her complaint is therefore not time barred by the

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[22] This references The Lily Ledbetter Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). The Lily Ledbetter Act made each discriminatory paycheck reses the period of time during which a worker may file a pay discrimination claim. The Act explicitly provides that "an unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

[23] Rules of the Human Rights Commission, Rule 11. The rule allows the Executive Director to administratively dismiss charges for "lack of jurisdiction," "failure to substantiate a claim of discrimination."

[24] *See supra* note 22.

HRC's rules. The investigation then considered whether there was evidence to establish elements two and three of the prima facie case.

2) State's assertions #2 and #3: No Equal Pay Violation because Ms. Vigneault and Mr. Doe do not do "equal work on jobs requiring equal skill, effort and responsibility" and do not perform their jobs under "under similar working conditions."

In order to determine the validity of the State's assertions, this investigation looked for guidance to legislative history, the EEOC Compliance Manual, the Code of Federal Regulations, relevant case law, and at the State's own personnel records. In addition, this report interviewed retired Superintendent Anita Carbonell who had a thirty (30) year career in the Department of Corrections. She directly supervised three of the Business Managers' A - Mr. Doe, Lynne Silloway and Mary Bertrand, at three different facilities and participated in the reclassification process to change their pay grade and title from Business Manager A at PG 21, to Administrative Services Coordinator III at PG 23. Reclassification records of all six ASCIII's affected by the unequal pay were reviewed:

- Lynne Silloway- Marble Valley Regional Correctional Facility, (MVRCF) – hired **2002.**
- Meroa Benjamin - Northeast State Correctional Facility (NESCF) in St. Johnsbury and was hired in August of **1982**.
- Ms. Vigneault - Northwest State Correctional Facility (NWSCF) in Swanton and was hired in September of **1974**.
- H.T. - at Chittenden Regional Correctional Facility (CRCF) and was hired in **2002**. However H.T. resigned her position in 2012 and was replaced by a person who has not filed a complaint with the HRC.
- Mary Bertrand – Southeastern State Correctional Facility (SESCF) hired in **1998**.
- Lisa Deblois – Northern State Correctional Facility (NSCF), hired in **2006.**

Since the Equal Pay Act is a "broadly remedial" statute, it is not intended to make it painstakingly difficult for a complainant to make out a prima facie case, which is what the State apparently seeks to do. The goal of the statute is to address and redress the sources of past pay inequities. If the drafters of the Equal Pay Act intended to make it incredibly difficult for complainants to make out a prima facie case, then the central issue the statute targeted – wage disparity - could not be so readily exposed and the statutory language would have reflected a higher evidentiary hurdle for complainants. However strict liability statutes place the greatest burden upon respondents in defending a claim of discrimination based upon unequal pay, not the complainant/employee since the nature of the statute obviates the element of intent.

The EEOC Compliance Manual[25] sets forth a number of helpful tests for determining whether a prima facie case exists. The overall question is whether the jobs are "substantially equal." In making that determination, an inquiry into the *actual* duties of the proposed comparators is key to determining whether they perform a "common core of tasks." While job titles and classifications are not dispositive, they are one factor to consider. If it is determined that there is a common core of tasks, the inquiry can be further refined to consider whether "in terms of overall job content, the jobs require substantially equal skill, effort, and responsibility and whether the working conditions are similar."[26] These three categories are defined in the Compliance Manual as follows:[27]

> **a. Skill** -experience, ability, education, and training required are substantially the same for each job;
>
> **b. Effort -Effort is the amount of physical or mental exertion needed to perform a job.** Job factors that cause physical or mental

[25] *See* http://www.eeoc.gov/policy/docs/compensation.html for the online EEOC Compliance Manual, Section 10: Compensation Discrimination, subsection 10-IV - COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT.
[26] *Id.* (emphasis added).
[27] *Id.*

fatigue or stress are to be considered in determining the effort required for a job. Differences in the *kind* of effort exerted do not justify a compensation differential if the *amount* of effort is substantially the same.

c. **Responsibility - Responsibility is the degree of accountability required in performing a job.** Factors to be considered in determining the level of responsibility in a job include:

- the extent to which the employee works without supervision;
- the extent to which the employee exercises supervisory functions; and,
- the impact of the employee's exercise of his or her job functions on the employer's business.

**Moreover, the mere fact that an employee has assistants does not necessarily demonstrate that he or she has a more responsible position than one who does not have assistants.

**If one employee in a group performing otherwise equal jobs is given a different task that requires a significant degree of responsibility, then the level of responsibility in that person's job is not equal to the others.

d. Working Conditions - Working conditions consist of two factors:

- **Surroundings -** Surroundings take into account the intensity and frequency of environmental elements encountered in the job, such as heat, cold, wetness, noise, fumes, odors, dust, and ventilation.
- **Hazards -**Hazards take into account the number and frequency of physical hazards and the severity of injury they can cause.

A claim of a prima facie case can only be defeated if there are extra duties which would make the work of one comparator *substantially different* than the work of the other comparators. However jobs with the same common core of tasks can be equal even though the comparators perform extra duties if the extra duties are not substantially different. In sum, if a common core of tasks exists, then the jobs are substantially equal and a prima facie case is established.

i. Reclassification of Business Managers' A at pay grade 21 to Administrative Service Coordinator's III at pay grade 23

Several sources of information provide convincing proof to this investigation that Ms. Vigneault can establish a prima facie case of equal pay discrimination under VFEPA. The most convincing proof comes from the State's own records. This investigation requested and received the personnel files of Ms. Vigneault, Mr. Doe and the other ASCIII's cited above, however Mr. Doe's file was heavily redacted by the State and was essentially useless. This investigation reviewed the records of the statewide reclassification of all Business Managers' A that occurred between 2006 and 2008. At that time, Ms. Vigneault and Mr. Doe were both Business Managers' A and each was assigned to their own correctional facility – Ms. Vigneault to NWSCF and Mr. Doe to SSCF.

The reclassification effort was the best objective source for reviewing the skills, effort, responsibilities and working conditions (cited above by the EEOC Compliance Manual) of Ms. Vigneault and Mr. Doe and the other ASCIII's.[28] It required both DOC and DHR to consider the proposed new positions for the Business Managers' A, their assigned duties and working conditions very carefully, both initially in defining the positions in great detail and during the review process and in making the final pay grade, job duties and title determination. Interestingly, on October 23, 2013, all the ASCIII's were again reclassified pay grade 24, re-emphasizing the fact that these employees are indeed proper comparators.

The State of Vermont uses the Willis Point Factor System to make reclassification decisions. The state's Human Resources website describes the Willis system in this way:

> Willis is a point factor system that the State of Vermont has used since 1986. Willis evaluates duties assigned to the position on the basis of the highest skill or most challenging level required

[28] *See supra* notes 25-27 above.

> as a normal part of the job. The evaluation is based upon the job functions not the person or job title. The Willis evaluation components are: Knowledge & Skills; Mental Demands; Accountability; and Working Condition. Each of the four components has an additional two or three dimensions.[29]

The guide itself is twenty-six (26) pages in length but the critical aspects of how the system is used to evaluate job classes are set forth in Part II of the guide.[30] This highly specific and systematic approach teases out dissimilar job classes and allows for new ones to be created only if the knowledge, skill sets, mental demands, accountability and working conditions are consistent.[31] State records showed that in 2006 when the reclassification effort commenced, DOC had eleven (11) Business Managers' A assigned to all the then existing[32] correctional facilities. Two other DOC Business Managers' A were assigned to probation and parole.[33]

The reclassification records were persuasive evidence of a prima facie case for the following reasons:

- The reclassification was initiated by DHR as part of a statewide financial review. This demonstrated an in-depth understanding of the nature of the job and the need to adjust the objectives of the position based on functions within agencies and departments and other correctional facilities.

- DOC Central Office actually wrote the request for classification for all the Business Managers' A assigned to the various

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[29] http://humanresources.vermont.gov/services/classification/process_employees
[30] *Id.*
[31] The language used by Willis tracks the EEOC Compliance Manual guidelines, and the method used would suggest that the employer wishes to use a system of reclassification that prevents pay inequities. However the reason for this particular pay inequity of course predated the reclassification and had to do with hiring rather than reclassification once hired.
[32] At the time the Dale Correctional Facility was still operational with its own separate business manager. While Woodstock Correctional Facility had closed, NESCF was divided into a work camp and a detainment facility with two separate business managers, three of whom overlapped. Ultimately the work camp and facility became one unit, under one Business Manager A, Meroa Benjamin, who is still there as an ASCIII.
[33] These Business Managers' A were reclassified and got only a new job title – Administrative Services Coordinator I – but they stayed at PG 21.

correctional facilities. This meant the reclassification request was by "management" and not an "employee(s)" request. This demonstrated that DOC saw the Business Managers' A job at each correctional facility as comparable positions.

- Furthermore:

  - All the requests were written uniformly in terms of content and order which again showed that that DOC saw the jobs as comparable positions.

  - While DOC personalized each reclassification request to reflect distinguishing items such as the number of people supervised and difference in facility budget, otherwise, the reclassification requests were essentially the same for each Business Manager A.

  - Most importantly, regardless of individual facility budget size or number of personnel supervised, DOC still saw all the facility Business Managers' A positions as having a common core of tasks since the same pay grade and job title was requested for each.

  - The detail contained in the requests showed that <u>all</u> facility Business Managers' A performed the same major job duties, such as payroll, budget, contracts, purchasing, supervision of personnel and supervision of inmate accounts. Furthermore, all applicable audit processes (budget etc.) were identical in each facility.

  - In addition, DOC represented that all facility Business Managers' A were exposed to the same hazards such as "physical/sexual harm from unpredictable inmate population" and "Exposure to blood-borne diseases such as HIV, Hepatitis and other pathogens." This completely distinguished them from any other Business Manager A not only throughout the state, but also including the DOC Business Managers' A in probation and parole.[34]

  - All facility Business Managers' A were required to meet the same licensing, registration and certification

[34] For instance the two Business Managers' A in the Parole & Probation Department did not have hazards of this type.

requirements whereas other Business Managers' A in other agencies or departments had different requirements.[35] There was more emphasis on what an ASCIII needed on the job to maintain training and certification than what the person had to have to get the job.

- The chain of command for all the facility Business Managers' A was the same. All facility Business Managers' A had staff that reported to them. The Business Manager A reported directly to the Superintendents of their respective facility. Those Superintendents all reported to the Director of Facilities who reported to the Assistant Superintendent or Superintendent, so there was (and still is) an identical chain of command.[36]

- Once the requests were submitted, DHR initially failed to assign pay grade 23. At that point all of the Business Managers' A at each facility appealed this decision and received support from DOC in their appeal.

- As a result, DHR then proposed to upgrade the Business Managers' A to ASCIII's, pay grade 23. This was irrespective of size of facility, size of budget, number of people supervised – all factors that DHR was clearly aware of.

- Furthermore, before DHR made the final decision to upgrade to PG 23, records show that an email was sent to DOC to give it time to "disagree" and respond. On August 20, 2008, an email from DOC to DHR directed DHR to go ahead with the upgrade.

[35] The Business Manager A job description in the Department of Motor Vehicles was broad and more vague, citing requirements such as "Bachelor's degree, three years' experience" and computer skills etc.

[36] This investigation obtained a copy of the FY 2013 DOC Organization Chart showing the chain of command structure which covers about 31 pages.

- Outside of the DOC Business Managers' A, the statewide reclassification of other Business Managers' A, even within the same Department or Agency yielded inconsistent results.[37]

- Inside of DOC, two Business Managers' A located in the office of Probation & Parole remained at the same pay grade (21) after the reclassification with only a change in title to Administrative Service Coordinator I (ASCI). They clearly had a different core of duties than the ASCIII's.

Currently, the ASCIII's within DOC continue to be treated as professional equals (and thus comparators for purpose of the prima facie case analysis). This investigation obtained copies of meeting minutes of all facility ASCIII's held at Central Office, as well as some emails from Central Office which show higher management making requests for ASCIII's to assist each other. This shows a common core of tasks in perception and reality. All ASCIII's attend the same trainings in Payroll, at Business Manager Meetings in Williston and elsewhere to ensure consistency with Financial Directives & Procedures. They are trained as a group by DHR in personnel issues such as FMLA (Family Medical Leave Act), the new payroll system and other financial systems such as dealing with inmate monies. They participate in the hiring process. They are collectively addressed with an email alias – "AHS - DOC - Business Managers"- which demonstrates that top management at DOC considers them to be a collective professional group with a congruency of issues. Major issues relevant to one ASCIII are relevant to all ASCIII's. If there had been any *substantially dissimilar* differences in job requirements, settings or duties that distinguished one DOC Business Manager A from another, the DOC group, which included Ms. Vigneault and Mr. Doe, would not have been reclassified to the same pay grade, job description and title. Indeed it would have been at this critical

[37] While there were four Business Managers' A within the Agency of Transportation, none of them were reclassified as ASCIII's and only one was classified to PG 23 with the title of Financial Administrator II. Two other Business Managers' A became Administrative Service Coordinator's II at PG 21 and a Financial Administrator I at PG 22.

point that they could have been variously reclassified – one as an ASCI, another as an ASCIII, ASCIV or ASCII and so on with different pay grades to match. The organizational chart would have been adjusted to show them falling into different places within it.

In sum, Ms. Vigneault can establish a prima facie case pursuant to VFEPA. The State's own evidence clearly shows that both DOC and DHR believed that all the DOC facility-assigned Business Managers' A had the "same common core of tasks" and reclassified them all as a result. This determination was made over a period of approximately two years and was an involved and thorough evaluation of each individual position, which identified the overall core similarities of all the Business Managers' A assigned to DOC facilities. The fact that one facility might house more inmates than another, that one facility's budget might be greater than another's budget, that one ASCIII might supervise more staff than another ASCIII, ultimately did not matter in the reclassification decision jointly made by DOC and DHR with knowledge and consent of AoA and AHS. In making this determination, all aspects of skill sets, effort, responsibility, and working conditions were considered as set forth by the EEOC guidelines.

ii. Interview with Anita Carbonell

Ms. Carbonell worked for DOC over a thirty (30) year period until she retired in 2011. In 2006, while Superintendent of Marble Valley Correctional Facility[38] (MVRCF), Ms. Carbonell hired and supervised Lynne Silloway for three years as a Business Manager A. She then moved to Southeast State Correctional Facility (SESCF) where she supervised Mary Bertrand as a Business Manager A for approximately two and a half years. After leaving Southeast State, she became Superintendent at Southern State Correctional Facility (SSCF) and supervised Mr. Doe as a Business Manager A until her retirement on March 31, 2011. All three of these Business Managers'

[38] Ms. Carbonell was Superintendent at MVRCF from August 2003 - July 2006.

A/ASCIII's reported directly to her and she considered them to be part of the "executive team." As a result of this close working relationship, she had in-depth knowledge of the nature of the position, the duties attached the position and how the persons in the positions interacted with each other between facilities to assist, train, provide coverage and ensure the necessary compliance and conformity at their respective facilities.

As a Superintendent, Ms. Carbonell reported to the Director of Facilities (there were three during her tenure as Superintendent). She stated that the Director of Facilities reported directly to the Commissioner of DOC or through the Deputy Commissioner of DOC. At that time, Central Office was located in Waterbury[39] and the departmental business manager was situated there. This position is now called the "Financial Director." (This position was vacant at time of writing but was most recently held by Sarah Clark). She confirmed that all ASCIII's reported to Central Office for Business Manager meetings as noted above.

This investigation reviewed a list of identified core duties performed by the ASCIII's with Ms. Carbonell. She confirmed that those core duties were duties the Business Managers' A/ASCIII's performed based on her experience with Mary Bertrand, Mr. Doe and Lynne Silloway. She emphasized the departmental expectation that the Business Managers' A work individually and collectively to assist and train each other due to the need for consistency in all of the facilities, particularly with respect to financial functions. She stated she had observed ASCIII's working together cooperatively during her supervision of them. She stated that ASCIII's should be able to move between facilities since the work involves the same core set of tasks.

She pointed out that DOC audits all financial functions at each facility using the same software and procedures. She stated that the scales between

[39] After Tropical Storm Irene it moved to Williston.

facilities are relative from the point of view of the ASCIII and affect their particular jobs only in whether their software "crunch(es)" numbers with an extra '0' at the end of it. If one facility does more sentence computations an administrative staff is assigned to that function - the ASCIII does not do it. In her opinion, an ASCIII who has to do an extra staff evaluation as compared to another does not make the job substantially different since it does not change the fundamental nature of the job or the common core of tasks. It does not affect the skill required, the working conditions and the level of responsibility. In sum, based on her experience at three different facilities of different sizes and budgets, she believes that the ASCIII position itself is essentially fungible in nature, thus making all ASCIII's proper comparators. The reclassification process bore out the information she provided. The most recent reclassification, official as of October 23, 2013 further confirms it.

Ms. Carbonell was asked if she had authorized or asked for a new employee to be hired-into-range for any position. She did not recall ever asking for or authorizing the hire-into-range of any employee even though she had done a substantial amount of hiring. She stated that based on her experience with hiring, Mr. Doe's hire would not have been in keeping with her understanding of general DOC policy and she was not aware of a hire-into-range in a "field level" position.[40]

III. THE STATE'S FIRST SET OF DEFENSES: MERIT/SENIORITY/COLLECTIVE BARGAINING DEFENSE

This investigation now reviews the State's assertions that the wage differential is the product of gender neutral, merit and/or seniority based classification system created by statute and collective bargaining. These defenses are without basis and can be summarily dismissed. The four VFEPA

[40] Meaning not in Central Office – i.e. it would be unheard of to even hire a Business Manager A into range even if they were part of the executive staff.

defenses include a merit defense and a seniority defense however Mr. Doe qualifies for neither. Merit – as it is defined in VFEPA and the EEOC Compliance Manual – occurs when an employee has been on the job in a particular position and is awarded for performance while in that job.[41] However in this case, the wage disparity was created by the respondents on the date Mr. Doe was hired in 2003 and carried forward into his position as a Business Manager A/ASCIII. Therefore, merit does not apply.

The State's argument with respect to collective bargaining is peculiar given that it is not VFEPA defense. However the State may be making an effort to define the 8% increase Mr. Doe received when he became a Business Manager A as "merit." However the 8% increase is a provision in the CBA which is awarded this increase to all first time supervisors – not just Mr. Doe. The State's records show that even without the 8% increase, Mr. Doe would still make more than Ms. Vigneault - an unfair result based on her seniority and experience.[42] Thus, attempting to tie the 8% increase to merit pay or making it into a kind of stand-alone merit pay does not work as a VFEPA defense. While the union contract also contains the hire-into-range provision,[43] unions are not exempt from adherence to the federal[44] or state[45] equal pay acts and a collective bargaining agreement cannot trump the mandate of equal pay for equal work.[46]

The seniority defense does not apply since Ms. Vigneault had approximately twenty-nine (29) years of overall seniority over Mr. Doe when

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[41] *See* the online EEOC Compliance Manual, Section 10: Compensation Discrimination, subsection 10-IV - COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT. http://www.eeoc.gov/policy/docs/compensation.html

[42] The 8% bump raised hourly wage from $24.42 to $25.10. Ms. Vigneault was making $23.75.

[43] Currently Article 45, §14(a) of the Non-Management Collective Bargaining Agreement and Article 50 § 14(a) of the Corrections Contract.

[44] 29 U.S.C. §206(d).

[45] 21 V.S.A. §495(a)(8).

[46] *See generally* Gibbs-Alfano v. Burton, 281 F.3d 12, 21-22 (C.A.2 N.Y. 2002); *See also* Hodgson v. Sanger, 326 F. Supp. 371, 373 (D.C. Md. 1971) ("There is no apparent reason why a union which violates Section 206(d) [of the EPA] should be treated any differently from an employer violator.").

he was hired in 2003 and approximately seven (7) years more experience as a Business Manager A. Had Mr. Doe been hired at step 1 rather than step 13 Ms. Vigneault would have had a higher wage than Mr. Doe *because of* her seniority and greater steps accrued over time. The EEOC Manual defines the requirement of a valid seniority system:

> "A seniority, merit, or incentive system must be bona fide to operate as an EPA defense. This means it:
>
> - was not adopted with discriminatory intent;
> - is an established system containing predetermined criteria for measuring seniority, merit, or productivity;
> - has been communicated to employees;
> - has been consistently and even-handedly applied to employees of both sexes; and
> - is in fact the basis for the compensation differential.[47]

The reason for the difference between Mr. Doe and Ms. Vigneault is not due to merit, collective-bargaining or a bona fide seniority system but due to his being hired-into-range. Thus the only defense left to the State is the "any factor other than sex" defense.

IV. THE "ANY FACTOR OTHER THAN SEX" DEFENSE

The State asserts that hiring Mr. Doe into range pursuant to state personnel policy, §12.2 – the "hire-into-range" policy qualifies as a valid application of the "any factor other than sex" defense. (**Attachment 3**). The State claims that DOC and DHR properly followed this policy and that because it followed this policy, the hiring of Mr. Doe did not result in an unlawful pay disparity with Ms. Vigneault. The factual and legal findings of this investigation do not support the State's interpretation. It is the position of this investigation that the State failed to follow the policy in several important respects when it hired Mr. Doe and that this failure led to the current equal pay violation. As a result of these deficiencies, merely citing to

[47] *See supra* note 41.

the use of §12.2 to hire Mr. Doe does not qualify as the "any factor other than sex" defense. It is the State's burden to produce proof which legitimates the use of the defense and to persuade the finder of fact that the proof offered is valid. The State has produced insufficient proof and it is therefore unpersuasive.

Section 12.2 contains a system of checks and balances: DOC as the appointing authority must provide very specific information to DHR – the hiring authority - so that DHR can review the proposed hire to see if the candidate merits being hired-into-range. In addition to reviewing DOC's information, §12.2 requires DHR to generate its own set of data to evaluate the legitimacy of the hiring request independent of DOC's representations. These multi-tiered levels of administrative review are intended to ensure that laws such as equal pay act are not violated. However when the policy is not followed, as it was not in Mr. Doe's case, a host of problems arise. Hiring a new employee contrary to the customary payment plan at a higher-than-normal salary can create significant workplace complications, not the least of which may be equal pay problems between male and female workers. In this case, hiring Mr. Doe violated VFEPA's equal pay provision both immediately and prospectively.

This investigation determined that DOC and DHR failed to follow § 12.2 by inspecting subpoenaed state records and through interviews with the key appointing and hiring authorities involved in hiring of Mr. Doe. This investigation's interviews with members of the hiring panel raised questions about the integrity of Mr. Doe's hire.

Section §12.2 clearly states that "The Department of Personnel (DHR) has the responsibility to ensure appointing authorities (DOC) maintain practices that preserve internal equity and adhere to the principles of the classified pay plan."[48] Interestingly, there was enough awareness about pay

[48] *See* §12.2.

disparities resulting from the hire-into-range policy that the CBA contains a "fix"[49] for possible problems. In correspondence with this investigation, General Counsel for DHR stated that use of this provision is rare at best and the "fix" is hard to assess due to the complications associated with step calculations.[50] In any event, equal pay violations resulted both at the time Mr. Doe was hired as an FSS and later as a Business Manager A and a comparator to Ms. Vigneault, thus the "any factor other than sex" does not apply.

a. The State Pay System

A brief overview of the state pay system is necessary to understand how the pay structure resulted in inequity between Ms. Vigneault and Mr. Doe. In September of 2003, when Mr. Doe was hired, there were thirty-two (32)[51] pay grades with minimum and maximum pay rates established for each pay grade.[52] The pay rates within the particular pay grade are assigned a "step" and all pay grades contain fifteen (15) steps.[53] Typically, a new employee starts at step 1 for a period of six months. At the end of this successful probation the employee moves to step 2. An employee receives an annual one step increase until he/she reaches step 6.

At steps 6-12, an employee must wait two years between each step increase. At steps 13-15 an employee must wait 3 years for the next step increase to take effect. Thus, if an employee were to stay within one pay

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[49] The VSEA SUPERVISORY BARGAINING AGREEMENT states: "[the] Commissioner of Human Resources may raise the rate of current employees in that department in the same class and/or associated class to the rate of the newly hired employee. Employees so raised shall retain their old step date and time already accrued toward his/her next step movement. VSEA SUPERVISORY BARGAINING UNIT AGREEMENT EFFECTIVE JULY 1, 2010 — EXPIRING JUNE 30, 2012 - Article 49, §15(a) - Salaries and Wages.
[50] Letter from General Counsel Steve Collier to Investigator Nelson Campbell, dated November 4, 2011.
[51] POLICIES AND PROCEDURES MANUAL §12.1. The manual says there are 28, but the current pay chart reflects 32 pay grades.
[52] *Id.* at §6.0
[53] *See* §12.1.

grade throughout his or her career, and have satisfactory job performance, it would take approximately twenty-four and half years to reach step 15.[54] When Mr. Doe was hired at step 13, DOC and DHR essentially gave him salary that could take a state employee (using the assumptions just set forth) approximately 18.5 years to achieve.

An employee's pay grade can also increase through promotion or reclassification. Supervisory employees in DOC may also increase their step[55] through a step acceleration program, but not their pay grade. When a pay grade change occurs, the employee does not start at step 1 in the new pay grade. Instead, the employee takes the rate of pay s/he had at the then current step to the new position. A complex provision from the bargaining agreement provides the calculation personnel uses to set the new step when a higher pay grade is achieved.[56] Thus, each time Mr. Doe moved to a new pay grade, his pay reflected the financial advantage of the step he was originally hired into; in other words, the higher the original step, the greater the new rate of pay. [57] This system is supposed to be used to ensure equity and seniority in the state pay system but hiring Mr. Doe into range knocked it askew.

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[54] Variations can occur via cost-of-living increases, changes in the amount each step pays based on legislative action such as step increase freezes, or faster step movement based on merit and/or the union contract. However once step15 is reached within any pay grade, an employee would have to move to a higher pay grade for significant increases in salary.

[55] Step acceleration can also occur, for instance, if an employee advances their education. VSEA SUPERVISORY BARGAINING UNIT AGREEMENT EFFECTIVE JULY 1, 2010 — EXPIRING JUNE 30, 2012, Article 81 - Accelerated Step Advancement Program.

[56] VSEA CORRECTIONS BARGAINING AGREEMENT-ARTICLE 50 (SALARIES AND WAGES) §9: "...upon promotion, upward reallocation or reassignment of a position to a higher pay grade, an employee covered by this Agreement shall receive a salary increase by being slotted onto that step of the new pay grade which would reflect an increase of at least five percent (5%) over the salary rate prior to promotion (i.e., five percent (5%) is the lowest amount an employee will receive, and the maximum amount would be governed according to placement on a step which might be higher than, but nearest to, the five percent (5%) minimum specified). The rate of five percent (5%) as outlined above shall be eight percent (8%) if the employee is moving upwards three (3) or more pay grades."

[57] This investigation reviewed 974 entries from State documents of men and women who were promoted three or more pay grades to see what whether their pre and post step movement appeared gender based. This investigation could find no significant anomalies in the material provided.

b. DOC and the DHR hire Mr. Doe into-range – The Preliminary Numbers

In September 2003, Mr. Doe, an external applicant, was hired as a "Facility Food Services Supervisor," at the then newly constructed Southern State Correctional Facility (SSCF) in Springfield, Vermont. In spite of his title he was not classified as an actual "supervisor" pursuant to the collective bargaining agreement. Mr. Doe was hired-into-range at a step 13 even though the personnel manual states that step 1 is the "normal hiring rate established for most positions and is the salary usually offered to applicants when they apply for positions in State Government."[58]

This investigation asked the State to release records for hire-into-range numbers from 2000-2010 for any hires at step 10 and above. These records showed that during that period, Mr. Doe was the single hire-into-range at or above a step 10 by DOC over this ten year period. This investigation is aware that DOC hired four other employees into-range in the same time period as Mr. Doe from 2002-2004. However those new employees were hired into newly created, unique positions and none was hired above a step 8.[59] In general, the figures between 2000-2010 show that hires-into-range were for highly specialized positions such as State Veterinarian (PG 27, step 13, male), Chief, Special Audits and Reviews (PG 27, step 10, one male, one female), Market & Insurance Analyst (PG 23, step 12, two males), and Deputy Medical Examiner (PG 29, step 15, male).[60]

Chart B shows the incredible disparity between Mr. Doe's starting salary when he was originally hired in 2003 and the salaries of those with significantly higher pay grades and likely far greater job responsibilities. Pay

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[58] *See* §12.2.

[59] This investigation subpoenaed the files of other DOC employees hired into range from 2002-2004 for comparison.

[60] There are some anomalous looking hires like Mr. Doe but they are few and would be interesting to examine to see why they occurred, for instance Sanitarian at PG 17 step 10, AOT Maintenance Worker IV (PG 15, step 10).

grades 22 and up fall under the supervisory bargaining unit, whereas Mr. Doe did not at PG 18.

CHART B

EMPLOYEE Based on 2003 Pay Chart	Pay Grade	Step at time Mr. Doe was hired	Hourly Wage
DOE	18	13 (Step at which Doe was hired)	$19.94
Employee #1	19	11	$19.92
Employee #2	20	9	$19.91
Employee #3	21	7	$19.72
Employee #4	22	5	$19.57
Employee #5	23	3	$19.45
Employee #6	24	2	$19.86

Chart C shows the pay difference between a Food Service Supervisor hired at PG 18 step 1 versus Mr. Doe hired at PG 18 step 13:

CHART C

Difference in salary using 2003-2004 pay chart	
PG 18 Step 1	**PG 18, Step 13 *(Mr. Doe)***
$13.65/hr.	$19.94/hr. ***(Mr. Doe)***
$28,392.00/yr.	$41,475.20/yr.
	$13,083.20 difference in pay plus retirement benefits and social security contributions

The State's records show a female FSS was hired one year prior to Mr. Doe at another facility at a pay grade 18, step 1. Since he was hired at step

13, his salary exceeded that of another female FSS with thirteen (13) years of seniority and more experience as an FSS. Chart D illustrates these differences:

CHART D

	Female FSS hired in 1988	Female FSS hired in 2002	Mr. Doe FSS hired in 2003
Year of hire	**1988**	**2002**	**2003**
PG and Step as of September 2003	PG 18, Step 11 (hiring step not provided by State)	PG 18, Step 3 (hired at Step 1 at $28,392.00/yr. and $13.65 an hour)	PG 18, Step 13 at hire
Hourly/Yearly in 2003	**$18.89** **$ 39,291.20**	**$14.76** **$30,700.80**	**$19.94** **$41,475.20**
			Difference in pay not including retirement and social security contributions

Although this investigation could not verify this, one of the interviewees, Barbara Lester, reported that the two women who followed Mr. Doe as FSS's at SSCF after he became a Business Manager A were given no pay raise or extra salary. Should further investigation reveal such a fact, it would present concerning information about continuing inequities within the network of female Food Service Supervisors. Mr. Doe worked as a Food Services Supervisor until 2004 when he requested and received a reclassification to a higher pay grade. As a result, his overall salary increased again because of the new pay grade but it was compounded because of having started at such a high step. His resulting salary after the reclassification was much higher

than it would have been had he not originally been hired-into-range at step 13.[61]

When Mr. Doe became a Business Manager A his salary increased disproportionately once again. The pay period of September 28, 2006 showed the first disparity in pay between Mr. Doe and Ms. Vigneault, post the 8% first-time supervisor increase he received for becoming a supervisor, for the first time. Chart E reflects the hourly difference in wages on September 28, 2006.

CHART E

Employee	Hourly wage
Ms. Vigneault (7 years more experience as a Business Manager A and 29 years of seniority).	**$23.75**
Mr. Doe (0 years of experience as a Business Manager A and 3 years of seniority)	**$25.10 (after 8%)**

c. Lack of Compliance with the Hire-into-Range Policy §12.2

After reviewing the requirements of §12.2 and other policy manual and bargaining unit sections on hiring practices, as well as the records produced by the State, this investigation determined that on the whole, DOC and DHR did not follow their own policies and procedures in some of the most fundamentally important ways and therefore failed to hired Mr. Doe into-range in compliance with §12.2. Mr. Doe's hiring file showed that DOC (the appointing authority) failed to supply specific information required by §12.2

[61] In 2004 Mr. Doe asked to be reclassified. His request for reclassification was granted and he became a Facility Food Services Supervisor II. As a result, within one year of being hired, his pay grade went from 18 to 20. His step was adjusted to a step 11 and his hourly wage went from $19.94 to $21.56. He did not tell the other Food Service Supervisors about this however they found out and were all ultimately reclassified. Interview with Barbara Lester 10/18/12 and 10/23/13.

to DHR (the hiring authority). Records and interviews also showed that DHR failed to ensure that DOC provided this information.

The following information that §12.2 required DOC to provide was missing or could not be produced by the State:

A. *Candidate and Job Information*:

1. There was no information on the qualifications of the staff serving in the same class as Mr. Doe; it appears that the impact on other Food Service Supervisors was not considered at all and it was considerable.

2. There was no explanation of how the request to hire Mr. Doe into-range met the regulatory standards under which the salary exception could be granted (possibly because this was not the kind of position contemplated by the hire-into-range policy).

B. *Hiring Process:*

1. There was an incomplete summary of recruitment efforts; 3 V.S.A. §327(a) requires that "When a vacancy in the classified service occurs, the appointing officer [here DOC] shall make a diligent effort to recruit an employee from within the classified service to fill the vacancy."

2. A copy of the hiring certificate was missing- this document would have identified which candidates were external or internal (if any).

3. There appears to have been one internal applicant, however since the State could not produce the hiring certificate which would have identified that person, there was no way to know why that person did not qualify or who they were.

4. There was no information about turnover/vacancy data for the position class over the last two years.

C. *Implications (of hiring Mr. Doe into range)*:

1. There was no list of other employees or classes that would potentially be affected by the hire-into-range request, i.e. other Food Service Supervisors, other classes or other future co-workers. **See Chart A-D above.**

2. There was no information regarding recent hires in the same or similar class and any other related factors.

In addition, DHR failed to produce evidence that it considered the factors required by §12.2, specifically:

1. There was no information on the recruitment and retention experience for the position.

2. There was no information on the salary market for the particular type of expertise.

3. There was no information on the impact of the vacancy on program service.

4. There was no information about the impact on current incumbents with similar qualifications.

Furthermore, §12.2 prohibits DHR from approving a hire-into-range request unless:

1. There was a "shortage of qualified applicants for the position."

    - There were at least two other applicants with high rankings and one internal non-applicant who claims she was offered the job informally but without extra compensation
    - Furthermore, officials from DOC and DHR admitted during interviews that existing staff could have covered the facility until a permanent hire occurred – there was no "emergency."

2. The applicant had "special qualifications, training, or experience, that while not necessarily a requirement of the job, have some unique value to the organization."

    - DHR accepted DOC's superficial representations in this regard but was not able to produce evidence of research of its own.

3. That the "candidate possesses exceptional and outstanding qualifications that exceed those of other applicants and to such an extent that not hiring that particular employee will be detrimental to the State."

- Again, the State has shown no convincing evidence, whatsoever, that this was the case with Mr. Doe and the position at hand.

Mr. Doe's position required no specialized skills and could have been performed by another existing FSS or a team of COII's, Cook C's and inmates. When Mr. Doe was hired, there were five other Food Service Supervisors in existence, all of whom were PG 18. The position was non-unique, non-supervisory and required only a high school education or its equivalent. It might have been difficult to obtain information on the salary market, recruitment, retention and regulatory standards for a Food Service Supervisor since it was perhaps not the type of position suitable for a hire-into-range request. The State has produced no evidence to refute this. The difficulty of gathering the necessary information (had any effort been made) should have been a red flag for DHR.

This investigation obtained further information from the individuals on the interview panel and the two individuals ultimately responsible for hiring Mr. Doe, Keith Tallon from DOC, and Molly Paulger from DHR.

d. Members of the Interview Panel

Members of the interview panel and Mr. Doe himself were in disagreement about the hiring of Mr. Doe. The most important aspects of the interviews as they relate to the State's claims are included.

- Mr. Doe – During this investigation's interview of Mr. Doe, Mr. Doe was asked if he knew anyone on the interview panel. He denied knowing any of the members.
- Robert Scarcello, - Mr. Scarcello was on the interview panel even though he was not a state employee. Mr. Scarcello was a contractor for Fitz-Vogt, the company that developed menus for Southern State and other prisons. During his interview he provided information that contradicted Mr. Doe's statement that he had not known anyone on the interview panel. Mr.

Scarcello stated that Mr. Doe's wife had been one of his employees and that he had offered Mr. Doe a job but had not been able to provide the salary Mr. Doe wanted.

- Barbara Lester – At the time Mr. Doe was hired, Ms. Lester was the Food Service Supervisor at MVRCF. She stated she had been informally offered the position at Southern by Keith Tallon, but for no extra money. She turned it down because of the lengthy commute it would entail. She noted she had filled in as an FSS at other facilities on a few occasions during staffing shortages and that in her opinion it would have been an option to wait to hire someone at a more reasonable salary. She did go and look at the kitchen and while she said it was state of the art, it was nothing so extraordinary as to require particular expertise. When she turned down the offer, Keith Tallon asked her to serve on the interview panel, which she did. Ms. Lester remembered all the candidates interviewed clearly – the DOC candidate, an African-American male candidate and Mr. Doe. She stated that Mr. Doe was not the first choice of the interview panel, and that she believed all of their scoring and work sheets would have reflected this had they been available. She stated that first choice was the then current DOC employee. She stated that Mr. Doe was their last choice because he seemed to lack the kind of personality that would do well in a correctional setting. She said the decision to rank him the lowest was unanimous amongst the members of the panel she recalled – Sarah Systo and Bob Scarcello. There was a fourth member, James Kamel, that she did not recall being on the panel. She also stated a number of times that Keith Tallon reiterated that he wanted Mr. Doe and so their evaluations and suggestions were immaterial. Her statement that all of the members of the interview panel wanted the DOC employee has been contradicted by all other members of the interview panel and none of the other members interviewed remembered an African-American candidate.

- Sarah Systo – Ms. Systo was the Business Manager A at MVRCF. She moved with Mr. Tallon to Southern when he left MVCRF. Lynne Silloway was hired by Superintendent Anita Carbonell to replace Ms. Systo. At that time, Business Managers' A supervised Food Service Supervisors. Ms. Systo stated that Mr. Doe was the best candidate but could not recall the other candidates. She also said that she knew he had been hired into range but didn't recall the step only that he got a high salary. She stated it was Keith Tallon's decision. She was asked whether there was concern about setting a precedent and she said this had not been expressed to her and she had not expressed such a concern about that or his salary. She said it did not seem unfair to her that he made so much money or might make more than others with more experience and seniority. She agreed that if they hadn't been able to hire anyone that they would have had to "make it work" and called on another FSS to see if they could assist. She also stated that COII's could have filled in on the weekends and the Cook C could have helped run the show as well as the second in command. Even though she was the Business Manager and part of the executive team, helped write the interview questions and at the time was the direct supervisor of the FSS, she did not read the hire-into-range policy and wasn't aware of it. She said there was no discussion of leveling the playing field with the other Food Service Supervisors by raising their salaries. She did not recall Jim Kamel being on the interview panel but she said she had "been told he was."
- Jim Kamel – Like Mr. Scarcello, Mr. Kamel had already been interviewed by the Attorney General's Office by the time this investigation spoke to him. At the time Mr. Doe was hired, Mr. Kamel was a Living Unit Supervisor. His position had nothing to do with Food Service and he believed he had been just a "warm body" so Keith Tallon could add someone else to the panel. Mr. Kamel only recalled Mr. Scarcello being on the interview panel not Ms. Lester or Ms. Systo. He recalled that Mr. Doe was the most qualified

candidate and had the highest score even though he could not recall the other two persons interviewed. He recalled Mr. Doe had a high income at the hospital where he had been working and that Keith Tallon did not think he could afford him although he also said he had never spoken to Mr. Tallon about Mr. Doe.

e. Interview with the DOC Appointing Authority – Keith Tallon

The person responsible for requesting that Mr. Doe be hired-into-range was Keith Tallon who was the new superintendent[62] of SSCF in the fall of 2003. Mr. Tallon wrote the letter recommending that Mr. Doe be hired-into-range to Cynthia LaWare,[63] who was then the Commissioner of Personnel. The letter was then forwarded to Molly Paulger in the personnel division of DHR. Ms. Paulger was responsible for approving all hire-into-range requests from appointing authorities at that time.

Mr. Tallon was unable to recall whether the particular position of Food Services Supervisor was advertised and there was no evidence in the file or in the letter he wrote to DHR detailing how the position had been advertised, information that is required by §12.2. Mr. Tallon stated he believed he would have had to discuss his hire-into-range request with his direct supervisor at the time, but the State produced no documentation that he did so. Mr. Tallon believed it was his first hire-into-range request. He stated that he consulted the personnel manual before he hired Mr. Doe and that he went "by the book" in hiring Mr. Doe. However the paper record (or lack of it) and his statements during the interview contradict this assertion.

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[62] Mr. Tallon was removed from this position in 2005.

[63] She is no longer with the state. There was a brief one page cover letter to Ms. LaWare from Steve Gold. The letter was signed by Sister Janice Ryan, then Deputy Commissioner of DOC, on his behalf. Mr. Gold was the Commissioner of Corrections and he is also no longer with the state. His cover letter refers Ms. LaWare to Mr. Tallon's "memo." Other than this cover memo from Sister Ryan/Mr. Gold, there is no other evidence of their, or Ms. LaWare's involvement.

During the interview, Mr. Tallon noted that two correctional facilities were in transition[64] during that period in 2003 and that employees at one of those facilities would have had the right-of-first-refusal for positions at SSCF.[65] Thus, the transitional status of these two institutions potentially held significant staffing implications for the SSCF hiring pool and would have required that Mr. Tallon pay special attention to internal candidates even beyond the requirements of §12.2 and the statutory mandate of 3 V.S.A. §327(a) which requires that the appointing authority (DOC), make a "diligent effort to recruit an employee from within the classified service to fill the vacancy." However Mr. Tallon's letter to Ms. LaWare merely mentioned one DOC candidate to Ms. LaWare, but provided no other information about the identity, sex or qualifications of that candidate. The scoring chart he sent to DHR did not identify the internal candidate and the hiring certificate (which would have identified the internal candidate) could not be produced by the State. Mr. Tallon did not recall seeing the hiring certificate but thought there must have been one.

Mr. Tallon was "not 100% sure" whether he had interviewed Mr. Doe for the position, but he thought he probably had. He was certain however that he had spoken to Mr. Doe's references. He stated that he and Mr. Doe may have had general salary discussions such as "what are you making now" but could not recall any other conversation as to salary.[66] For such a vague recollection of Mr. Doe, Mr. Tallon made the statement that "nobody even came close" to Mr. Doe as a good candidate. However the chart that Mr. Tallon submitted to DHR showed that Mr. Doe had an overall score of 34

[64] Woodstock Correctional Facility was closing down at the same time SSCF was opening and. In addition, the prison in Windsor (SESCF) was being converted to an all-female facility so some male staff from that facility might have been seeking to transfer to other institutions.

[65] This investigation confirmed the accuracy of this statement with VSEA.

[66] Mr. Doe, on the other hand, stated that Mr. Tallon did not interview him and that he therefore had no salary discussions with Mr. Tallon.

points, while two other interviewed candidates each scored 32.75.[67] Mr. Tallon could not recall who these candidates were.

Mr. Tallon stated he did not consider the impact of Mr. Doe's hire-into-range on future hires into the FSS position, or on existing Food Service Supervisors who held that position when Mr. Doe was hired. Again, **Chart C** above details the impact on this set of employees. Mr. Tallon stated it was necessary to hire Mr. Doe at step 13 due to the necessity of getting the kitchen at the new facility quickly up and running, getting the "offender" work force assigned and other civilian staff hired.[68] Mr. Tallon stated that he believed these tasks and the timing element made the job unique and therefore worth an extraordinarily higher base pay. Mr. Tallon was asked whether in light of this "uniqueness" he could have re-classified the position (as Mr. Doe did on his own initiative a year later) or have offered a more moderate step increase. Mr. Tallon did not consider these options at the time.

When asked what he would have done if he had been unable to hire someone for the position, Mr. Tallon stated he would have had to get staff from other facilities to perform the work while the search for a permanent employee continued. Ms. Paulger, who ultimately approved the hire, also agreed that using staff from another facility was an option in that circumstance. So did Ms. Systo, who was then charged with supervising the FSS. So did Barbara Lester, the FSS, who, as noted, has actually gone to other facilities to help provide coverage when needed. This acknowledgement by all witnesses completely undermines the assertion that

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[67] One interviewee had four years of food service experience and an associate degree in computer technology. The reason given for his rejection was "not enough experience." The other candidate with 32.75 had seventeen years of food service experience, no college education and no reason was given for his rejection. Mr. Doe was listed as having twenty-four years of experience and having an associate and bachelor's degree. The position required a high school education or equivalent and food service experience with volume cooking.

[68] The legislature passed the budget for staff salaries on July 1, 2003. Mr. Doe was hired in September of 2003 and the facility opened in October of 2003.

the job was unique. It also undermines the assertion that an outside applicant would have been the most qualified person to set up the new kitchen and that there was a "compelling" need to resort to §12.2.

f. Interview with the DHR Hiring Director – Molly Paulger

Ms. Paulger became the Personnel Division Services Director in the spring of 2003, not long before she approved Mr. Doe's hire. She worked for DHR within the Agency of Administration. As the person in charge of compensation administration for the state, she reviewed and approved hire-into-range requests. She stated that she had the sole authority to approve or deny these requests, and that no one reviewed her decisions. She also stated that it was her role to ensure compliance with state policy in the hiring process and she agreed that §12.2 outlined what was required of DOC and DHR with respect to hiring a new employee into range.

Ms. Paulger had no records or documentation on Mr. Doe's hiring. She recalled very little about the request to hire him other than that SSCF was opening in October of 2003 and she knew staff was needed to fill positions. This investigation had requested, through the Attorney General's Office, that Ms. Paulger bring Mr. Doe's DHR hiring file(s), however she did not bring any file(s) with her. This investigation asked her why there were several pieces of required information missing from the DOC hiring file, since her position as its reviewer dictated that she should have known about its contents. Ms. Paulger could not recall whether documentation had existed or was just missing.

Ms. Paulger also could not recall who the internal DOC candidate was and did not know the location of the hiring certificate. When asked if she was aware of the agreement between VSEA and the State with respect to Woodstock and Windsor employees, she indicated that this issue would have been an internal matter for DOC's consideration and she did not recall

having any information about what was happening at either facility. She simply recalled that SSCF was opening and knew there was a push to get staff in place. When Ms. Paulger was asked if she was surprised by the request to hire Mr. Doe at step 13, she stated she could not recall what she thought at the time. However she stated that if she were presented with the same request at the current time she would need to be presented with a "very good case" before granting such a request.

Ms. Paulger was asked why the "best" candidate - at least on paper - was chosen for a food service position instead of someone who might have been able to do the job just as well (or better) for less pay in light of the fact that §12.2 lists a "shortage of qualified applicants" as one of the central rationales for hiring a new employee into range. Her response was that she had more recently had the "why buy a Rolls Royce when a less expensive model will do the job just as well"[69] conversation with hiring managers, but did not recall having it with Mr. Tallon when he put Mr. Doe forward. Therefore, the fact that there were two other candidates with scores close to Mr. Doe's did not cause her to question Mr. Tallon or consider disapproving his request.

As noted above, Ms. Paulger also acknowledged that existing staff could have been brought from other facilities to run the Springfield kitchen if DOC was not able to hire someone for the job or if the hire was delayed, but she did not discuss this alternative with Mr. Tallon since he did not raise the issue with her. She could not identify the "exceptional and outstanding qualifications [of Mr. Doe]" that "exceed[ed] those of other applicants...to such an extent that not hiring [Mr. Doe would have been detrimental] to the state."[70] In sum, Ms. Paulger failed to hold Mr. Tallon accountable for the information that §12.2 required him to provide as the appointing authority.

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[69] This paraphrases the question and answer, but this was the example used.
[70] STATE POLICY AND PROCEDURES MANUAL §12.2 – this is a quotation from the hire-into-range policy.

She also failed to generate the information that §12.2 required DHR to generate as the hiring authority such as looking at the consequences to current and future staff, all of which implicated possible equal pay claims.

Ms. Paulger admitted that her lack of experience resulted in a failure to ask the right questions such as whether it was necessary to hire "the best" when "the best" was not needed for the particular job. She also stated that she would now need to be presented with a "very good case" for such a hire-into-range request. Had there been the required effort to identify and recruit an internal candidate, it could have determined whether that candidate was as viable a hire as Mr. Doe. This would have presented the State with options that were not only more fiscally sound, but which also avoided basic unfairness and legal problems.

The State offered no evidence to suggest that either the hiring authority or the appointing authority could treat §12.2 in a discretionary manner, that is, to follow some, but not all of the procedures required by the policy. In 2003, a decision by the Vermont Labor Relations Board (VLRB), Grievance of Hooper,[71] found that hiring the most desired employee in that case was "invalid" because those doing the hiring failed to follow all of the hiring rules and procedures in order to get the employee they wanted.[72]

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[71] 27 VLRB 167 (2003).

[72] The Hooper decision lends support to the argument that hiring procedures need to be followed. In Hooper, the VLRB found the hiring of the external employee invalid and called for the hiring process to be re-initiated because those responsible for hiring that employee had not followed correct hiring procedures and had therefore prejudiced other internal applicants. In its decision, the Board wrote:

> ...the Employer [State] contends that the rehire of Shea should not be impeded because she was an outstanding social worker and to make her and the Employer "jump through unnecessary hoops that would not have changed the end result makes no sense." This contention disregards the "Purpose and Policy Statement" of Policy 4.0, Recruitment...When a vacancy in the classified service occurs, the appointing authority shall make a diligent effort to recruit employees from within the classified service to fill the vacancy." The latter sentence of this statement is identical to 3 V.S.A. Section 327(a), which also is incorporated in Article 2 of the Contract. The provisions of the Personnel Policies and Procedures violated by the Employer in rehiring Shea... are the specific means to ensure adherence to the policy and purpose behind the merit system in state government, and it is inappropriate for the Employer to minimize compliance with them.

From this investigation's perspective, Ms. Paulger ratified Mr. Tallon's hire-into-range request without question. She accepted Mr. Tallon's representations and overlooked the fact that information §12.2 required DOC to produce was missing. She also failed to perform the analysis that §12.2 required of DHR and it has now led to a host of problems for the State.[73]

Essentially, the hiring of Mr. Doe has become suspect not only in terms of failure to follow policy, but also in terms of potential preferential treatment through the placement of someone on the hiring panel who was not a state employee and who had ties to Mr. Doe and his wife. Furthermore, Barbara Lester (possibly in conjunction with other staff) could have been hired to fill in temporarily or offered a higher rate of pay to make up for a longer commute. This also raises the question, unanswered by this investigation, as to whether sex consciously or unconsciously played a role in the ultimate hiring decision.

g. Hiring Mr. Doe as a Business Manager A in 2006

Hiring Mr. Doe as a Business Manager A perpetuated the original VFEPA violation and affected a whole new group of female comparators. When Mr. Doe was selected for the position, the Department of Human Resources should have reviewed his salary and those of his female

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[73] The Labor Board went on to say:

> ...we disagree with the Employer's statement that to make...the Employer "jump through unnecessary hoops that would not have changed the end result makes no sense"....The Employer's mishandling of the process of the rehiring of Shea as Social Worker B and subsequent promotion to Interim Intake Supervisor was so serious as to result in Hooper being denied a fair opportunity to compete for the Intake Supervisor position. The Employer was required by statute, rules and the Contract to "make a diligent effort to recruit employees from within the classified service to fill [a] vacancy" that arises in the classified service. Here, the Employer's efforts to recruit employees from within the classified service to fill the vacancy in the Intake Supervisor position fell far short of "diligent"....[the offer of] the Intake Supervisor position to Shea...even though Shea was no longer in the classified service...was in complete disregard of this requirement.

comparators and realized that they were allowing for a further and new violation of the VFEPA.

During his interview, Mr. Doe stated that his decision to become a Business Manager A had actually negatively impacted his pay. When asked for the reason, Mr. Doe stated that he was no longer able to do overtime as a Business Manager A. Investigation revealed a more complicated picture. Mr. Doe claimed extensive overtime as long as he was able to claim time and a half pay, but he almost completely ceased to put in overtime when he could only claim straight pay. As a Food Service Supervisor I and II, Mr. Doe was able to claim time and a half for each hour of overtime pursuant to the CBA. When he became a Business Manager A, he went from a pay grade 20 as a Food Service Supervisor II, to a pay grade 21. His step increased. His wage increased almost $2.00/hour from $22.43 to $24.42 then to $25.10. However since he was still a pay grade 21, he was allowed time and a half for each hour of overtime he worked and indeed he collected a great deal of overtime over the next two years. Once he and the other ASCIII's were reclassified in October of 2008, his pay grade was increased to pay grade 23 and pursuant to the CBA he was no longer eligible to receive time and half for overtime, only straight-time pay and almost immediately quit working any overtime.

Thus, his representation that becoming a Business Manager A meant he made less money is not accurate, at least up to the time his pay grade was reclassified. Records show he collected some $23,328.32 in overtime alone between September 14, 2006 and October 9, 2008 as a Business Manager A. Had he not been reclassified to a pay grade 23, he could have continued to collect time and half. Once reclassified to pay grade 23 however, he only collected a total of straight-time overtime of $239.19 over a three and one-half year period.[74] It is certainly less profitable to work

[74] Between October 23, 2008 until July 26, 2012.

more hours for straight pay. In addition, the amount Mr. Doe was able to make at the time-and-a-half overtime rate was directly linked to his hire-into-range pay and would have been more than Ms. Vigneault after his 8% increase. The availability of overtime certainly helped him recoup some of the salary he had lost by leaving the private sector.

Chart F shows the breakdown of comparator overtime. [75] While still a Business Manager A at pay grade 21, prior to becoming a pay grade 23 (and having his title changed to ASCIII), Mr. Doe claimed some $23,328.32 between September 14, 2006 and October 9, 2008. Upon becoming a pay grade 23, when time and half was no longer available, as noted, Mr. Doe quit working overtime almost completely. Ms. Vigneault, by contrast, collected $2581 in overtime during the same period.

[75] According to Ms. Silloway, Ms. Benjamin, Ms. Deblois and Ms. Bertrand, generally speaking, overtime could be claimed in compensatory time or could be paid out in compensatory leave so no dollar figure would be represented. Getting permission for overtime was dependent upon who the superintendents were, what the facility budget was. In some emergent circumstances (such as a widespread health outbreak), cash overtime might be granted on a limited basis. However it was generally frowned upon in most facilities except for Southern in spite of the fact that SSCF's budget was frequently in the "red." Interestingly Mr. Doe immediately halted overtime when it became available on in straight time dollars.

CHART F

Business Managers' A/ASCIII's[76]	Overtime Between 9/14/2006 And 10/9/2008 At Pay Grade 21 when time and a half was available	Overtime Between 10/23/08 and 7/26/12 when time and a half was no longer available Pay Grade 23
Doe	$23,328.32	$239.19
Vigneault	$2581.00	$2309.78
Benjamin	$329.67	$112.56
Silloway	$0.00	$0.00
Bertrand	$392.90	$0.00
Deblois	$1273.28	$937.60

h. Conclusion: Reviewing the Law on the "Any Factor Other than Sex" Defense

In the recently decided Dreves v. Hudson Retail Group, LLC, Judge William Sessions underscored the continuing problem of unequal pay for men and women:

> The unequivocal promise of equal pay for equal work continues to go unrealized. In 2012, women's median weekly earnings were 81 percent of men's. Not all of that disparity is the product of discrimination, whether intentional or otherwise, but at least ten percentage points of the gap is unexplained by measurable differences in male and female educational attainment, work experience, choice of occupation, choice of industry, and other factors. Alarmingly, women who have earned professional

[76] Business Managers are responsible for reviewing and approving hours. Superintendents were responsible for reviewing Business Managers' time submissions and some Superintendents likely scrutinized submissions more than others.

> degrees, work longer hours, or hold management positions are subject to some of the largest pay disparities.[77]

With respect to the "any factor other than sex defense," the Dreves court (which interpreted Vermont's own equal pay law) was clear: "Any gap in the pay of men and women, whether forty or ten or one percent, is an implicit statement to our children that we value the work of our daughters less than that of our sons."[78] The court was also clear that the defense does NOT mean any factor will do - the factor must be a "bona fide, legitimate business reason" and the State's reasons for hiring Mr. Doe do not qualify as bona fide or legitimate.

In Knight v. G.W. Plastics, the federal district court of Vermont refused to grant G.W. Plastics' motion to dismiss a former employee's equal pay claim. The court took issue with G.W. Plastics on several fronts, including the following:

> ....the defendant points out that the plaintiff started her career at a lower salary. However the defendant has not adequately explained why salaries established two decades ago, which may or may not have been discriminatorily established in the first instance, justify continued wage disparity once the plaintiff allegedly began her duties as a supervisor in 1984.[79]

The court's first point was that the Equal Pay Act recognizes that present inequities can be the product of long-standing, systemic problems that may or may not be intentional, but a complainant need not show bad or ill intent. Ms. Vigneault "fell behind" as the result of an ill-founded hiring decision made in 2003 which was repeated and reinforced in 2006 when Mr. Doe was promoted. There is no evidence that Ms. Vigneault (or any other of the female comparators) was intentionally targeted however the decision to

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[77] Dreves v. Hudson Retail Group, LLC, 2013 WL 2634429, at *12 (D. Vt. June 12, 2013).
[78] *Id.* at *13.
[79] 903 F.Supp. 674 at 678. In *Knight*, the plaintiff, Marilyn Knight, had worked for defendant G.W. Plastics for 23 years. After her retirement she learned that the males who replaced her had been hired at salaries approximately $10,000 more than G.S. Plastics had paid her to perform the same job. *Id.* at 677.

hire Mr. Doe into range operated like a time-traveling wrecking ball: it crashed (albeit unnoticed) into the orbit of the female FSS workers first, then swung out through the employment stratosphere and crashed into the female Business Managers' A/ASCIII's when Mr. Doe moved into that position in 2006.

The second point made in Knight is the importance of the Equal Pay Act's remedial nature –it remedies pay inequities between males and females even when the reason for the inequity is unintentional or is the result of negligence and inexperience as it appears to be here. Because of its remedial nature and its design to root out workplace gender-based pay inequities, any defense, such as the "any factor other than sex" actually has to have real meaning in order to achieve the statute's purposes.

Theoretically speaking, the State has a problem without end: if Mr. Doe moves to yet another position, he will likely start at a higher salary than more experienced and more senior female comparators because of the manner he was originally hired and equal pay violations will continue to compound. Refer back to **Chart B** for an illustration of how this would work. He likely makes more than those who supervise him which should not be the case. His retirement and social security payments will all reflect this benefit. Hiring Mr. Doe into range without assessing the impacts and following §12.2 or re-evaluating his pay and his comparators pay in 2006 has cost the State in a number of ways.

The Second Circuit Court of Appeals, which governs Vermont, has taken the position that the "any factor other than sex" cannot be just "any" factor a respondent wishes to use and of course this is the precedent on

which the Dreves decision was based.[80] Other circuit courts have interpreted the "any factor other than sex" defense as one that reflects a "legitimate business reason" for the pay disparity.[81] Some courts have required the employer to articulate the reason[82] and some have given the employer *carte blanche* to come up with any reason whatsoever.[83] However the Second Circuit has required that employers demonstrate that there is a well ordered, fairly administered system in place that reflects objectivity and compliance with established rules and procedures. The EEOC is in agreement with the Second Circuit's strict interpretation of the "any factor other than sex" defense.[84]

In the Second Circuit case Aldrich v. Randolph Central School District[85], Cora Aldrich, a female cleaner at an elementary school, alleged that she performed the same work as male custodians for less pay, and sued

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[80] Some circuit courts have interpreted the latter exception so broadly that the purpose of the law itself has been essentially eviscerated. *See* Ernest F. Lidge III, *Disparate Treatment Employment Discrimination And An Employer's Good Faith: Honest Mistakes, Benign Motives, And Other Sincerely Held Beliefs*, 36 Okla. City U. L. Rev. 45, 69-73 (2011); NATIONAL WOMEN'S LAW CENTER, *Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act*, pp. 1-3., April 12, 2011 (http://www.nwlc.org/resource/closing-factor-other-sex-loophole-equal-pay-act); Nat'l Women's Law Center, *The Paycheck Fairness Act Resolves the Debate Among Courts over the Meaning of the "Factor other than Sex" Defense*, p. 1, APRIL 12, 2011 (http://www.nwlc.org/resource/paycheck-fairness-act-resolves-debate-among-courts-over-meaning-factor-other-sex-defense); Ruben Bolivar Pagán, Note, *Defending The "Acceptable Business Reason" Requirement Of The Equal Pay Act: A Response To The Challenges Of Wernsing V. Department Of Human Services*, 33 J. Corp. L. 1007, 1025-27 (2008); Jessica L. Linstead, *The Seventh Circuit's Erosion of the Equal Pay Act*, 1 SEVENTH CIRCUIT REV. 129, 130 (2006); NOTE, *When Prior Pay Isn't Equal Pay: A Proposed Standard For The Identification Of "Factors Other Than Sex" Under The Equal Pay Act*, 89 Colum. L. Rev. 1085, 1089-90 (1989).

[81] *See* Aldrich v. Randolph Central School District, 963 F.2d 520, 525 (2nd Cir. 1992).

[82] *See, e.g.*, Belfi supra at 136 (noting that an employer seeking to rely on the "factor other than sex defense [ ] . . . must . . . demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential").

[83] *See, e.g.*, Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (describing how the "factor other than sex" defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[84] EEOC COMPLIANCE MANUAL §10-IV(F): "There is disagreement in the courts with regard to whether a factor other than sex must be based on the requirements of the job or otherwise beneficial to the business. The Commission agrees with the courts in the Second, Sixth, Ninth, and Eleventh Circuits that such a basis must be shown."

[85] 963 F.2d 520 (C.A. 2 NY 1992).

pursuant to the EPA.[86] The school district used a job classification system that distinguished between "cleaners," who happened to be all women, and "custodians," who happened to be all men.[87] Custodians were paid higher wages than cleaners.[88] In order to be eligible for a custodian position, an individual had to place in the top three applicants on a civil service examination.[89] In defending against Ms. Aldrich's claim that the system violated the EPA, the school district argued that its civil service exam and job classification system constituted a "factor other than sex" defense *even if* custodians and cleaners performed the same work.[90] The district court granted the school district's motion for summary judgment and Ms. Aldrich appealed to the Second Circuit.

On appeal, the Second Circuit determined that the district court had improperly dismissed the case and held that the employer bore the burden of showing that the "factor other than sex" defense was a "bona fide business-related reason" for the resulting wage differential.[91] The Court noted that "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would *provide a gaping loophole in the [EPA] through which many pretexts for discrimination would be sanctioned.*"[92] The Court also stated that "Once she [Ms. Aldrich] shows that she is being paid less than men for doing the same work, the employer can rely on an exam to justify that wage differential *only if the employer proves that the exam is job-related.*"[93] Furthermore, in reviewing the legislative history of the EPA, the Second Circuit wrote: "After tracing the evolution of the EPA through the legislative process, we believe that Congress specifically rejected blanket

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[86] Aldrich 963 F.2d at 522-23. She also sued under Title VII but that is not relevant to this case.
[87] *Id.* at 522.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 524.
[91] *Id.* at 526-27.
[92] *Id.* at 525. (emphasis added).
[93] *Id.* (emphasis added).

assertions of facially-neutral job classification systems as valid factor-other-than-sex defenses to EPA claims."[94]

Ryduchowski v. The Port Authority of New York and New Jersey,[95] provides support to the idea that all defenses under the Equal Pay Act have to be legitimate. Ryduchowski considered the "merit system" defense in a claim by Ms. Ryduchowski, a civil engineer, against the New York Port Authority.[96] The Ryduchowski Court found that the Port Authority's so-called "merit system" violated the EPA in several respects. The court noted that a bona fide "merit system" should be an "organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."[97] The Court went on to note that the Port Authority had a "heavy burden;" that it was required to show it had "formulated an organized and structured system based on predetermined criteria."[98] In addition, it also had to prove that it "*systematically* administered its plans for a merit system."[99] The Court found there was "ample evidence that the Port Authority had failed to meet this burden"[100] and opined that "[w]ithout systematic evaluation, a *valid* merit system cannot be said to exist."[101]

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[94] *Id.* at 524.

[95] 203 F.3d 135 (C.A. 2 N.Y. 2000) The Second Circuit dismissed Port Authority's defense and remanded for trial, opining that a reasonable jury might find that they were not meritorious under the EPA.

[96] In Ryduchowski, the plaintiff filed claims under both the EPA and Title VII although only the EPA analysis is relevant here. Ms. Ryduchowski had come to the United States from Poland where she had received a Master's of Science and a Ph.D. in Civil Engineering from the University of Warsaw. In the subsequent twenty years following her education, "she gained practical experience and eventually became a licensed engineer in both New York and New Jersey. Between 1988 and 1995, she worked for the Port Authority as an engineer. In September 1995, she was terminated from her position with the Port Authority and sued. She asserted that the Port Authority failed to promote her and terminated her employment in violation of Title VII, and paid her less than a similarly situated male colleague in violation of the EPA. Ryduchowski at 137.

[97] *Id.* at 142-43 (quoting EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980)).

[98] *Id.* at 143.

[99] *Id.* (emphasis in the original).

[100] *Id.*

[101] *Id.* (emphasis in original).

The Court found that the jury could have concluded that the Port Authority failed to follow its own policies in determining merit increases (like DOC and DHR here failed to follow §12.2.)[102] Secondly, the Court stated that the jury could have found that the Port Authority "failed to properly correlate merit increases to an employee's evaluation."[103] The Court also found that a jury could have concluded that "the Port Authority's detailed evaluation procedures were not systematically applied to all employees" and that "Ryduchowski's supervisors manipulated the evaluation process according to their personal whims and prejudices, and thereby prevented the merit system from being systematically applied."[104]

In sum, the Court opined that "the jury could have concluded that the Port Authority's merit system, while admittedly detailed, was not applied systematically, rendering a facially valid adequate merit system invalid as applied to Ryduchowski....It was the Port Authority's burden to convince the jurors that it applied a valid merit system. The jury's verdict reveals that the Port Authority simply failed to meet this burden."[105]

Both Aldrich and Ryduchowski emphasize the necessity of systematically following policies and procedures where those policies and procedures have an impact on pay equity. The Second Circuit has put a premium on having respondents produce evidence that procedures were followed and prove that those procedures resulted in systematic fairness. The Second Circuit does not consider the "any factor other than sex" defense as a green light for employers to do what they want to do when it results in pay inequity.

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[102] *Id.*
[103] *Id.* (The plaintiff had been given merit increases both in and out of range and the Port Authority did not produce the chart that specified the appropriate range of the merit increase for each performance evaluation rating).
[104] *Id.* at 144. (In this case, the court believed that the jury could find the manipulation was the result of "gender prejudice of Ryduchowski's superiors...").
[105] *Id.* at 145.

V: SUMMARY AND RECOMMENDATION

The respondents failed to follow a specific hiring policy that was designed in part to prevent unlawful and unfair salary differentials generally and between men and women. In 2003, the State could have prevented the situation altogether by not hiring Mr. Doe at step 13 or perhaps at all. In 2006, the State could have taken note of the pay inequities between Mr. Doe and his new comparators and remedied the situation by raising the salaries and steps of his female comparators but the State failed to do so on both occasions and this failure has resulted in a violation of VFEPA in Ms. Vigneault's case.

The Respondents have failed to produce evidence and prove any of the four affirmative defenses recognized under the EPA and the Vermont Fair Employment Practices Act. As a result, this investigation recommends in case E13-0006, that the Human Rights Commission find **reasonable grounds** to believe that all named Respondents violated the equal pay provision of the Vermont Fair Employment Practices Act, Title 21 V.S.A. §495(8)(A).

11-14-13

Nelson M. Campbell
Investigator

11-15-13

Karen L. Richards
Executive Director

FACILITY FOOD SERVICE SUPERVISOR

Job Code: 711800

Salary Plan: Classified

ATTACHMENT 1

Pay Grade: 18

Occupational Category:

Food Services

Effective Date: 4/23/1999 Active: ☑

Class Definition:

Large scale food preparation and service for the Department of Corrections within correctional facilities. Supervision is exercised over food service workers, other staff, and inmates. Duties include planning meals, purchasing food and facility supply items, tracking and managing inventory, budget planning, equipment care and purchasing, and exercising security controls. Duties are performed under the direction of an administrative supervisor, but with need for significant interaction with other division or department staff, and outside service providers.

Examples of Work:

Assigns, supervises, and inspects the food menu and preparation on a daily basis. Tracks menu requirements for offenders who have been placed on special diets by medical staff. Initiates orders for personal care, household and food items, and supervises the delivery, storage, and distribution of supplies for the facility. Responsible for food services budget, including development, change recommendations and monitoring. Maintains records and prepares reports as requested by an administrative superior. Maintains an inventory of kitchen and dining equipment, and deals directly with vendors for repairs. Makes recommendations for replacement of equipment and handles the purchasing once approved. Develops and conducts in-service training programs for both staff and inmate workers, as well as State-wide training programs for other food service personnel. Establishes workload and performance standards for employees and inmate workers. Responsible for hiring, maintaining records of performance, and submitting payroll on inmates working in the food service work program. Trains, supervises, and evaluates Correctional Officers or Cooks working in food services. Establishes and maintains a Food Service Procedure Manual. Performs basic security practices, conducts shakedowns and grievance investigations related to food services. Performs related duties as required.

Environmental Factors:

Work is performed in a correctional facility kitchen during an assigned shift. Incumbents must be able to operate cutters and slicers, handle knives, lift weights of up to 60 lbs., and work under conditions of high heat and humidity. Duties include supervision of inmates in work situations.

Minimum Qualifications:

Knowledge, Skills and Abilities

Considerable knowledge of the methods materials, and equipment used in institutional food services.

Knowledge of health, sanitary, and safety practices involved in institutional and large scale cooking.

Knowledge of food refrigeration and preservation procedures.

Ability to project food service needs and cost for budgeting purposes.

Ability to keep accurate records and prepare reports.

Ability to work long hours under conditions of heat and humidity.

Ability to work independently.

Ability to communicate effectively orally and in writing.

Ability to establish and maintain effective working relationships.

Education and Experience

Education: High school graduation or equivalent.

Experience: Four years of experience in volume cooking, including supervision of staff and preparing and monitoring a kitchen facility budget.

Note: Incumbent must be trained and certified in the Hazard Analysis Critical Control Point (HACCP) within the first six months of employment.

Note: Completion of a formal course in commercial food preparation may be substituted for up to two years of the experience on a semester for six months basis.

Special Requirements

n/a

K. NUSSBAUM & ASSOCIATES

PO Box 425
Richmond, VT 05477
802.264.9629
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July 10, 2013

Nelson M. Campbell
Human Rights Commission
14-16 Baldwin Street
Montpelier, VT 05633

ATTACHMENT 2

RE: Deborah Vigneault v. State of Vermont

Dear Nelson:

Enclosed you will find an analysis of the impact of the pay differential between Ms. Vigneault and Mr. Doe.

The two components of my calculation are:

1. The actual pay difference for any checks issued from September 14, 2006 through July 5, 2007.

2. Legal Interest of 12%, which is deemed to be appropriate to compensate for past losses associated with the pay difference.

According to the information provided, Ms. Vigneault and Mr. Doe had the same rate of pay from July 5, 2007 through August 9, 2012. Until Ms. Vigneault is made whole for the former disparity, however, the inequity continues, because she won't "catch-up" to where she would have been absent the disparity.

To use a race analogy, it is as though Mr. Doe was given a head start and then he and Ms. Vigneault continued to move forward at the same pace. If Ms. Vigneault starts five minutes behind Mr. Doe, for instance, she will remain five minutes behind him no matter how long the race lasts. Unless, that is, she gets a boost to reach Mr. Doe. Only then will they cross each subsequent mile-marker at the same time.

Please let me know if further analysis is warranted.

Regards,

Kenneth M. Nussbaum. CPA

Enclosures

Debbie Vigneault
Summary of Pay Disparity, based on Hourly Wages
Through July 31, 2013

Check Date	Vigneault	Doe	Difference
9/14/2006	23.75	24.42	(0.67)
9/28/2006	23.75	25.10	(1.35)
10/12/2006	23.75	25.10	(1.35)
10/26/2006	23.75	25.10	(1.35)
11/9/2006	23.75	25.10	(1.35)
11/23/2006	23.75	25.10	(1.35)
12/7/2006	23.75	25.10	(1.35)
12/21/2006	23.75	25.10	(1.35)
1/4/2007	23.75	25.10	(1.35)
1/18/2007	23.75	25.10	(1.35)
2/1/2007	23.75	25.10	(1.35)
2/15/2007	23.75	25.10	(1.35)
3/1/2007	23.75	25.10	(1.35)
3/15/2007	23.75	25.10	(1.35)
3/29/2007	23.75	25.10	(1.35)
4/12/2007	23.75	25.10	(1.35)
4/26/2007	23.75	25.10	(1.35)
5/10/2007	23.75	25.10	(1.35)
5/24/2007	23.75	25.10	(1.35)
6/7/2007	23.75	25.10	(1.35)
6/21/2007	23.75	25.10	(1.35)
7/5/2007	23.75	25.10	(1.35)

Pay Differential:	2,321.60
Legal Interest on Differential:	1,802.49
Aggregate of Above Components:	4,124.09

See detail page for additional analysis.

Prepared by Kenneth M. Nussbaum, CPA/PFS
Richmond, VT

Debbie Vigneault
Detail of Pay Disparity, on a per-week basis, and calculation of Legal Interest
Through July 31, 2013

Legal Interest Rate:	12.00%
Calculated through:	7/31/2013

Pay Disparity in Total:	2,321.60
Legal Interest Calculated:	1,802.49

			Pay Disparity				Daily	
Check Date	Vigneault	Doe	Hourly	Period	Difference	Days	Interest	Interest
9/14/2006	23.75	24.42	0.67	53.60	53.60	2,512	0.0176	44.27
9/28/2006	23.75	25.10	1.35	108.00	108.00	2,498	0.0355	88.70
10/12/2006	23.75	25.10	1.35	108.00	108.00	2,484	0.0355	88.20
10/26/2006	23.75	25.10	1.35	108.00	108.00	2,470	0.0355	87.70
11/9/2006	23.75	25.10	1.35	108.00	108.00	2,456	0.0355	87.20
11/23/2006	23.75	25.10	1.35	108.00	108.00	2,442	0.0355	86.71
12/7/2006	23.75	25.10	1.35	108.00	108.00	2,428	0.0355	86.21
12/21/2006	23.75	25.10	1.35	108.00	108.00	2,414	0.0355	85.71
1/4/2007	23.75	25.10	1.35	108.00	108.00	2,400	0.0355	85.22
1/18/2007	23.75	25.10	1.35	108.00	108.00	2,386	0.0355	84.72
2/1/2007	23.75	25.10	1.35	108.00	108.00	2,372	0.0355	84.22
2/15/2007	23.75	25.10	1.35	108.00	108.00	2,358	0.0355	83.73
3/1/2007	23.75	25.10	1.35	108.00	108.00	2,344	0.0355	83.23
3/15/2007	23.75	25.10	1.35	108.00	108.00	2,330	0.0355	82.73
3/29/2007	23.75	25.10	1.35	108.00	108.00	2,316	0.0355	82.23
4/12/2007	23.75	25.10	1.35	108.00	108.00	2,302	0.0355	81.74
4/26/2007	23.75	25.10	1.35	108.00	108.00	2,288	0.0355	81.24
5/10/2007	23.75	25.10	1.35	108.00	108.00	2,274	0.0355	80.74
5/24/2007	23.75	25.10	1.35	108.00	108.00	2,260	0.0355	80.25
6/7/2007	23.75	25.10	1.35	108.00	108.00	2,246	0.0355	79.75
6/21/2007	23.75	25.10	1.35	108.00	108.00	2,232	0.0355	79.25
7/5/2007	23.75	25.10	1.35	108.00	108.00	2,218	0.0355	78.75

The hourly pay disparity ended with the 07/05/07 check.

ATTACHMENT 3

HIRE-INTO-RANGE

Number 12.2

Effective Date: March 1, 1996

Subject: **HIRE-INTO-RANGE**

Applicable To: All classified employees, as well as temporary and exempt, with the Executive Branch of the State of Vermont.

Issued By: Department of Personnel

Approved By: William H. Sorrell, Secretary of Administration

PURPOSE AND POLICY STATEMENT

The purpose of this policy is to provide for exceptions to the compensation plan for the initial hiring of certain individuals. The State's classified pay plan provides internal equity by establishing a common set of salary ranges for each position. Entry level rates, maximum rates and the systematic method for employees to move within the salary range are uniform and applied consistently for all employees governed by the compensation plan. At times there may be a compelling reason to make an exception to the basic principle that employees are hired at the entry rate established for the job.

PHILOSOPHY OF HIRE-INTO-RANGE

The minimum rate of pay for a class is step 1 in the salary range. Step 1 is also the normal hiring rate established for most positions, and is the salary usually offered to applicants when they apply for positions in State Government. In rare circumstances a special exception can be approved for an applicant. These exceptions can only be offered if prior approval is granted by the Department of Personnel for reasons as follows:

- There is a shortage of qualified applicants for the position;
- an applicant who has special qualifications, training, or experience that while are not necessarily a requirement of the job, have some unique value to the organization;
- the candidate possesses exceptional and outstanding qualifications that exceed those of other applicants and to such an extent that not hiring that particular employee will be detrimental to the State.

A hire-into-range does not apply to applicants who are already classified employees who have completed their original probationary period.

The Department of Personnel will not consider a request to hire an employee above the minimum rate until the recruitment, examination, certification, and interview process is completed.

The Department of Personnel must approve a request in advance of any salary offer to an applicant. Several factors are considered:

- ☐ the recruitment and retention experience for the position;
- ☐ the salary market for the particular type of expertise;
- ☐ the impact of the vacancy on program service;
- ☐ the impact on current incumbents with similar qualifications;
- ☐ the candidate's current rate of compensation.

GUIDELINES FOR HIRE-INTO-RANGE REQUESTS

The Department of Personnel has the responsibility to ensure appointing authorities maintain practices that preserve internal equity and adhere to the principles of the classified pay plan.

This procedure applies to the hiring of candidates into classified, temporary, part-time, and exempt positions at any rate above the minimum pay grade or salary range (unless a permanent adjusted hiring rate (See 12.3, Market Factor Analysis) has been approved).

Agencies or departments must submit a request to the Department of Personnel, Compensation Unit which includes the following information:

1. Candidate and Job Information:

   - The candidate's name, the salary rate or step being requested, and the position number, class, and pay grade of the job for which the candidate is being considered.

   - The candidate's qualifications including their *Standard State of Vermont Employment Application* and resume.

   - A narrative describing the following: qualifications of other applicants; qualifications of staff serving in the same class as the prospective candidate; and a candidate profile (e.g. length of service, salary, position, and performance history).

- Explain in particular how this candidate merits the proposed rate and how the request meets the regulatory standards under which the salary exception may be granted.
- List the candidate's annual compensation in his or her current or most recent position.

2. **Hiring Process**:

- A summary of recruitment efforts and results, including the following information: type and dates of advertising (newspapers, journals, etc.); number of applicants; number of applicants found eligible; number of applicants interviewed; and a copy of the hiring certificate (with applications and resumes attached).

- Consideration given to State employees on the hiring certificate.

- Provide turnover/vacancy data for the position class over the last two (2) years.

3. **Implications**:

- List other employees or classes that will potentially be affected by this hire-into-range request. Include information regarding recent hires in the same or similar class and any other factors which should be considered.

MISCELLANEOUS

No salary offer should be discussed with a candidate until hire-into-range approval has been granted by the Department of Personnel. Any offer or commitment made by an appointing authority without advanced approval from the Department of Personnel is unauthorized and not binding on the State.

The Department of Personnel will review the request and will generally respond within five (5) workdays or less.

Hire-into-range does not apply to current employees; or those employees formerly on leave from classified service employed in an "exempt" capacity and returning to a classified position; or those employees who are returning within two (2) years of a break in service. The rate of pay would be determined by the salary compensation method outlined in the current contract in effect when the employee returns from the leave.

An employee hired-into-range shall not be eligible for an end-of-probation increase.

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

	) HRC Case No. E12-0008
Debra Vigneault	) EEOC Case No:
Charging Party	) 16K-2012-00106-DOC
	) 16K-2012-00119-AHS
v.	) 16K-2012-00120-DHR
	) 16K-2012-00121-Agency of Ad
	)
DOC; DHR; AHS;AOA;	)
And NESCF	)
	)
	)
	)
Responding Parties	

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are Reasonable grounds to believe that DOD; DHR; AHA; AOA; and NESCF, the Respondents, illegally discriminated against Meroa Benjamin, the Charging Party, in violation of Vermont's Fair Housing and Public Accommodations Act on the basis of sex. .

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent __	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For __	Against ✓	Absent __	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For __	Against ✓	Absent __	Recused __

Entry: ✓ Reasonable Grounds __ Motion failed

Dated at Barre, Vermont, this 5th day of December, 2013.

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers