STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Mary Ide Bertrand Charging Party	)))	
v.	)	HRC Charge No.PA12-0005
DOC, DHR, AHS, AoA and SESCF 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 DOC, DHR, AHS, AoA and SESCF, the Respondents, illegally discriminated against Mary Ide Bertrand, the Charging Party, in violation of the equal pay provision of the Vermont Fair Employment Practices Act.

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 Winooski, Vermont, this 30th day of May, 2013

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers

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INVESTIGATIVE REPORT

E12-0005

CHARGING PARTY: Mary Ide Bertrand

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 Southeast State Correctional Facility (SESCF).

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] Mary Bertrand, an Administrative Services Coordinator III at the Southeast State Correctional Facility in Windsor, Vermont, discovered that she was making approximately $6400 less than a male co-worker, Mr. Doe,[2] who held the same position with the pay grade (PG 23), same job title – Administrative Services Coordinator III (ASC III) at the Department of Corrections (DOC). She asserted that she and Mr. Doe performed substantially similar work on jobs requiring equal skill, effort and responsibility under similar working conditions. Ms. Bertrand has been in state service approximately five and a half (5.5) years longer than Mr. Doe,[3] and has seven (7) more years of

[1] After the reasonable grounds finding in Lynne Silloway's HRC case no. E11-0002.
[2] To protect his privacy, this employee is referred to throughout this report as "Mr. Doe."
[3] Ms. Bertrand was hired into state service February 2, 1998.

experience in this position than Mr. Doe has.[4] As a result, Ms. Bertrand 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).

SUMMARY OF RESPONSE: The State asserted that Ms. Bertrand cannot make a prima facie case of discrimination and has listed the four statutory defenses available under VFEPA. The State denies Ms. Bertrand and Mr. Doe do "equal work on jobs requiring equal skill, effort and responsibility" but offers no specific reasons why it takes this position. Furthermore, the State denies that Ms. Bertrand and Mr. Doe perform their jobs "under similar working conditions" but again, offers no proof that this so. In the alternative, the State asserts that even if Ms. Bertrand could make a prima facie case of equal pay discrimination, all available defenses under VFEPA apply and that Mr. Doe's salary is therefore legitimately higher than Ms. Bertrand's. It is the State's burden to produce evidence and prove one or more of these defense(s) but it has presented no further evidence in support of them beyond mere assertion.

PRELIMINARY 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. Bertrand 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. Bertrand because of her sex, in violation of

[4] Ms. Bertrand became a Business Manager A at Woodstock Correctional Facility in February 1999. While that facility was in the process of closing, she became the Business Manager A at Southeastern State Correctional Facility in Windsor where she has remained since that time. **Source**: Personnel File of Mary Ide Bertrand.

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. Bertrand 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. Bertrand 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 Southeast State Correctional Facility (SESCF) discriminated against Ms. Bertrand 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

Mary Bertrand - Complainant – Administrative Services Coordinator III – Approximately thirty-three contacts between June 2012 and May 1, 2013.

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

Chris Teifke –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 - 3/26/12

Anita Carbonell – Former Superintendent at MVRCF, Southeast and Southern – Supervised Ms. Bertrand, Ms. Silloway and Mr. Doe – 10/17/2012

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. Bertrand, 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 Mary Ide Bertrand

m. Reclassification documents of all Business Manager's A statewide.

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

Acronym KEY

AHS	Agency of Human Services
DHR	The Department of Human Resources within the Agency of Human Services - the hiring authority who gives the final hiring approval to the appointing authority.
ASCIII	Administrative Services Coordinator III (Ms. Bertrand & Mr. Doe were reclassified as ASCIII's from **Business Manager A's**).
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).
MVRCF	Marble Valley Regional Correctional Facility (where Lynne Silloway works).
SESCF	Southeast State Correctional Facility (where Ms. Bertrand works and has worked since 1999).
SSCF	Southern State Correctional Facility (Where Mr. Doe has worked since 2003).
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 sets forth the framework of Ms. Bertrand's complaint. It reviews the elements of the prima facie case and the available defenses to an equal pay claim. It discusses the burden that a respondent carries in defending an Equal Pay Act violation, the history of the federal Equal Pay Act and compares and contrasts Vermont's version with its federal predecessor.

Part II evaluates the State's initial defense to Ms. Bertrand's claim – that is that she cannot make a prima facie case and should not be allowed to pursue her claim. 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 that their "merit/seniority/collective bargaining" defense. It should be noted that collective bargaining is not a recognized EPA defense but it will be considered nonetheless since the State may be seeking to tie it to the merit defense and/or seniority defense(s). This report finds all of these defenses inapplicable.

Part IV reviews the "any factor other than sex" defense factually and legally. The State claims that Mr. Doe legitimately makes more than Ms. Bertrand because he was properly 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. Again, based on the State's own records and interviews with critical decision-makers, this investigation finds this defense to be flawed and without merit.

Part V concludes with a summary of findings and is followed by a preliminary recommendation that the Human Rights Commission find reasonable grounds to believe that the Respondents have violated and

continue to violate the VFEPA's equal pay provision with the issuance of each new paycheck Ms. Bertrand (and her comparators) receive.[5]

[5] 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."

I. EQUAL PAY-ESTABLISHING A PRIMA FACIE CASE

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. Bertrand 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; **(Mr. Doe makes approximately $6400 more than Ms. Bertrand so this element is met)**.

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

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

Once Ms. Bertrand establishes 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 other factor other than sex.[6]

Ms. Bertrand is not required to show intentional discrimination – only those elements outlined in the prima facie case. The EPA is a "strict liability"[7] statute and the employer's burden is a "heavy" one.[8] Since it is a strict liability statute, an employer asserting any one or more of the four defenses must produce evidence *and* prove that this evidence shows that it is more likely than not that one or more of the four defenses apply.

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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).

Ms. Bertrand's complaint alleges that the Respondents failed to follow a specific state hiring policy when they petitioned for and approved of the hire of her comparator, Mr. Doe, in 2003. She alleges that the unjustified and extraordinarily high starting wage he received at the time he was hired compounded over time so that when he became a Business Manager A in 2006– a job she had already held for five and a half years - his wage unlawfully exceeded hers in violation of VFEPA. Since there is no Vermont state case law on point to provide relevant statutory interpretation, this investigation turned for guidance to the federal Equal Pay Act as it has been interpreted by the Court of Appeals for the Second Circuit[9] as well as the United States Supreme Court.[10]

The Federal Equal Pay Act is a "remedial statute"[11] 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 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 that a man, because of his role in society, should be paid more than a

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[9] The Second Circuit covers New York, Vermont and Connecticut and is therefore the controlling authority for Vermont.

[10] Lavalley V. E.B. & A.C. Whiting Company, 166 Vt. 205 (1997). The Vermont Supreme Court has "look[ed] to federal case law for guidance in construing identical provisions of two statutes." Lavalley at 210. See also Hogdon v. Mt. Mansfield Co., Inc., 160 Vt. 150, 165 (1993). The Vermont Supreme Court has not been presented with an equal pay case of this nature. As noted in the first section, Vermont must look to the federal EPA for interpretation since there is no Vermont case on point. This investigation researched the legislative history and it is essentially silent about lawmaker intent with respect to the four defenses. There were approximately two hours of unintelligible recorded committee testimony concerning the passage of equal pay provisions of the VFEPA so there was no guidance regarding passage of the law generally or the exceptions in particular.

[11] "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."

> 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.[12]

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.[13] Vermont also allows for investigations to be conducted in-state by the Attorney General's Office[14] and for an action to be brought by an aggrieved employee no matter how small the business.[15] A separate subsection ensures that employees can speak openly about their wages without fear of punitive action[16] which creates an opportunity for employees to learn what their co-workers make without fear of negative employment consequences.

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[12] 417 U.S. 188, 195 (1974).
[13] 21 V.S.A. §495b(c).
[14] 21 V.S.A. § 495b(a).
[15] Id.
[16] 21 V.S.A. §495(a)(8)(B).

II. STATE ASSERTS A LACK OF A PRIMA FACIE CASE

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

> 1. The two employees at issue, Mr. Doe and the Complainant, do not perform equal work on jobs requiring equal skill, effort, and responsibility.
>
> 2. Mr. Doe and the Complainant do not perform their jobs under similar working conditions.

In order to determine the validity of the State's superficially asserted[17] defenses, 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 Ms. Bertrand, Mr. Doe and Ms. Silloway as Business Manager's A 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 the other five ASCIII's aggrieved by the unequal pay were reviewed:

- Lynne Silloway- Marble Valley Regional Correctional Facility, (MVRCF) – hired **2002.**
- P.J. - Northeastern State Correctional Facility (NERCF) in St. Johnsbury and was hired in August of **1982**.
- B.G., - 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.
- D.L. – Northern State Correctional Facility (NCSF) hired in **2005**.

[17] No substantive reasons for these defenses were provided as has been noted.

Since the Equal Pay Act is a "broadly remedial" statute, it cannot have been 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 reasons for and sources of past pay inequities. If the drafters of the Equal Pay Act had 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, not the complainant/employee since the nature of the statute obviates the element of intent.

The EEOC Compliance Manual[18] 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."[19] These three categories are defined in the Compliance Manual as follows:[20]

a. Skill -experience, ability, education, and training required are substantially the same for each job;

[18] 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.
[19] Id. (emphasis added).
[20] Id.

b. <u>Effort</u> -Effort is the amount of physical or mental exertion needed to perform a job. Job factors that cause physical or mental 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. **<u>Responsibility</u> - 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. <u>Working Conditions</u> - 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.

a. Reclassification of Business Manager's A to Administrative Service Coordinator's III

Several sources of information provided convincing proof to this investigation that Ms. Bertrand can establish a prima facie case under VFEPA. The most convincing proof came from the State's own records. This investigation requested and received the personnel files of Ms. Bertrand, Mr. Doe and other ASCIII's cited above, however Mr. Doe's file was heavily redacted and essentially useless. This investigation also reviewed the records of the 2006-2008 statewide reclassification process of all Business Manager's A. At that time, Ms. Bertrand and Mr. Doe were both Business Manager's A and each was assigned to their own correctional facility – Ms. Bertrand to SESCF 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. Bertrand and Mr. Doe and the other ASCIII's.[21] It required both DOC and DHR to consider the proposed new positions for the Business Manager's 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. 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 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:

[21] See notes 17-19 above.

Knowledge & Skills; Mental Demands; Accountability; and Working Condition. Each of the four components has an additional two or three dimensions.[22]

The guide itself is twenty-six (26) pages in length but the critical parts of the guide that explain how the system is used to evaluate job classes are set forth in Part II of the guide.[23] 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.[24] State records showed that in 2006 when the reclassification effort commenced, DOC had eleven (11) Business Manager's A assigned to all the then existing[25] correctional facilities. Two other DOC Business Manager's A were assigned to probation and parole.[26]

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 Manager's A assigned to the various correctional facilities. This meant the reclassification request was by "management" and not an "employee(s)" request.

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[22] http://humanresources.vermont.gov/services/classification/process_employees
[23] Id.
[24] 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.
[25] At the time the Dale Correctional Facility was still operational with its own separate business managers. While Woodstock Correctional Facility had closed, NESCF was divided into a work camp and a detainment facility with two separate business managers, three of which overlapped. Ultimately the work camp and facility became one unit, under one Business Manager A – P.J. who is still there as an ASCIII.
[26] These Business Manager's A were reclassified and got only a new job title – Administrative Services Coordinator I – but they stayed at PG 21.

This demonstrated that DOC saw the Business Manager A's 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 Manager 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 Manager's 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 Manager's 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 Manager's A in probation and parole.[27]

  - All facility Business Manager's A were required to meet the same licensing, registration and certification requirements whereas other Business Manager's A in other agencies or departments had different

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

requirements.[28] 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 Manager's A was the same. All facility Business Manager's 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. [29]

- Once the requests were submitted, DHR initially failed to assign pay grade 23. At that point all of the Business Manager's 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 Manager's 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 them time to "disagree" and respond. On August 20, 2008, an email from DOC to DHR directed DHR to go ahead with the upgrade.

- Records showed that outside of the DOC, Business Manager's A statewide were reclassified in an inconsistent manner, even within the same Department or Agency.

- Inside of DOC, two Business Manager's 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.

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[28] 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.

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

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 facility-assigned group, which included Ms. Bertrand 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 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. Bertrand 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 Business Manager's 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 as well as the collective concept of the position itself and one which identified the overall core similarities of all of the DOC Business Manager's A. The fact that one facility might house more inmates than another, that one budget might be greater than another facility'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 and with knowledge of AHS and AoA. In making this determination, all aspects of skill sets, effort, responsibility, and working conditions were considered as set forth by the EEOC guidelines.

b. Interview with Anita Carbonell

Ms. Carbonell worked for the DOC over a thirty (30) year period until she retired in 2011. In 2006, while Superintendent of Marble Valley Correctional Facility[30] (MVRCF), Ms. Carbonell hired and supervised Lynne Silloway while Ms. Silloway was a Business Manager A for three years. 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 Manager's 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

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

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[31] and the departmental business manager (now called the "Financial Director" and currently held by Sarah Clark) was situated there. 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 Manager's A/ASCIII's performed based on her experience with Ms. Bertrand, Mr. Doe and Ms. Silloway. She emphasized the departmental expectation that the Business Manager's 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 involved 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 facilities are relative from the point of view of the ASCIII and affects their particular job 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

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

level of responsibility. In sum, based on her experience at three different facilities of different sizes and budgets, she believed that the ASCIII position was essentially fungible in nature, thus making all ASCIII's proper comparators. The reclassification process bore out the information she provided.

Ms. Carbonell was asked if she had authorized or asked for a hire into range for any position. She did not recall asking for or authorizing a hire into range 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 general DOC policy and she was not aware of a hire into range in a "field level" position.[32]

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

This investigation now moves to 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 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.[33] 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

[32] Meaning not in Central Office – i.e. it would be unheard of even to hire a Business Manager A into range even if they were part of the executive staff.
[33] 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

given that it is not VFEPA defense. However the State may be making an effort to define the 8% increase he received when he became a Business Manager A as "merit." However the 8% increase was due to a provision in the CBA which awarded this increase to all first time supervisors – not just Mr. Doe and the State's records show that even without the 8% increase, Mr. Doe still made more than Ms. Bertrand.[34] Thus, attempting to tie the 8% increase to merit pay or making it into a kind of stand-alone merit pay does not work. Additionally, while the union contract also contains the hire-into-range provision,[35] unions are not exempt from adherence to the federal[36] or state[37] equal pay acts and a collective bargaining agreement cannot trump the mandate of equal pay for equal work.[38]

Nor does seniority apply. Ms. Bertrand was hired in 1998 whereas Mr. Doe was hired in 2003. Furthermore, Ms. Bertrand had been a Business Manager A since 1999, whereas Mr. Doe became a Business Manager A in 2006. When Mr. Doe became a Business Manager A, he entered at pay grade 21 step 12 at $24.42 because he had been hired into range originally, three years earlier. However Ms. Bertrand, who had already been a Business Manager for seven (7) years, was only pay grade 21, step 8 making $21.72. Had Mr. Doe not been hired-into-range, Ms. Bertrand logically would have made more money due to her years of state service. In sum, none of the proffered State defenses applies.

IV. THE "ANY FACTOR OTHER THAN SEX" DEFENSE

The state asserts that Mr. Doe was hired pursuant to a state personnel policy, §12.2 – the "hire-into-range" policy. (**Attachment 1**). This is

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[34] The 8% bump raised his salary from $24.42 to $25.10.
[35] Currently Article 45, §14(a) of the Non-Management Collective Bargaining Agreement and Article 50 § 14(a) of the Corrections Contract.
[36] 29 U.S.C. §206(d).
[37] 21 V.S.A. §495(a)(8).
[38] 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.").

accurate: Mr. Doe was hired pursuant to state personnel policy §12.2 which is still in the policy manual today. The State also asserts that DOC and DHR properly followed this policy and that the hiring of Mr. Doe did not contribute to the unlawful pay disparity with Ms. Bertrand and that it qualifies as an "any factor other than sex" defense. This is inaccurate: the State failed to follow the policy when it hired Mr. Doe and this failure led to the current equal pay violation. Thus, it does not qualify as the "any factor other than sex" defense. It is the State's burden to produce proof legitimating the defense <u>and</u> persuade the finder of fact that the proof offered is valid. The State cannot carry this burden.

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 it is appropriate and necessary. 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. Thus, the structure of §12.2 is embedded with preventatives – that is – it requires information gathering by appointing and hiring authorities in order to ensure that laws such as equal pay are not violated. However when the policy is not followed, as it was not in Mr. Doe's case, a host of problems arise. 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. 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. 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."[39] Interestingly, there was enough awareness about pay disparities resulting from the hire-into-range policy that the CBA contains a "fix"[40] 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 and the like.[41] In any event, equal pay act violations resulted both at the time he was hired as an FSS and later as a Business Manager A and a comparator to Ms. Bertrand and 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 Ms. Bertrand ended up being paid less than Mr. Doe. In September of 2003, when Mr. Doe was hired, there were thirty-two (32)[42] pay grades with minimum and maximum pay rates established for each pay grade.[43] The pay rates within the particular pay grade are assigned a "step" and all pay grades contain fifteen (15) steps.[44] 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.

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[39] See Attachment 1.
[40] 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.
[41] Letter from General Counsel Steve Collier to Investigator Nelson Campbell, dated November 4, 2011.
[42] POLICIES AND PROCEDURES MANUAL §12.1. The manual says there are 28, but the pay chart reflected 32 pay grades.
[43] Id. at §6.0
[44] Id. at §12.1.

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 grade throughout his or her career, and have satisfactory job performance, it would take approximately twenty-four and half years to reach step 15.[45] 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.[46]

An employee's pay grade can also increase if he/she is promoted or reclassified. When this occurs, the employee does not start at step 1 in the new pay grade. Instead, the employee takes the rate of pay they had at their then current step to their new position. A complex provision from the bargaining contract provides the calculation performed by personnel to set the new step when a higher pay grade is achieved.[47] Usually, the step is adjusted down one or two steps. Thus, each time Mr. Doe moved to a new pay grade, his pay reflected the financial advantage attached to the step he was originally hired into - the higher the original step the greater the new

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[45] 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.

[46] 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.

[47] 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."

rate of pay. [48] This is the framework that reflected the pay inequity with Ms. Bertrand. Supervisory employees may utilize a step acceleration program through a provision of the CBA to increase their step, but not their pay grade.[49]

b) DOC and the DHR hire Mr. Doe into-range

In September 2003, Mr. Doe, an external applicant, was hired as a "Facility Food Services Supervisor," PG 18 step 13 at the then newly constructed Southern State Correctional Facility (SSCF) in Springfield, Vermont. (**Attachment 2**). In spite of his title he was not actually classified as a "supervisor" pursuant to the collective bargaining agreement. As noted, 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."[50] Chart A shows the difference in pay between an employee typically hired at PG 18 step 1 and Mr. Doe who was hired at PG 18 step 13:

CHART A

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

It should be noted that the State's records show a female FSS was hired the year before Mr. Doe at a pay grade 18, step 1. Additionally, his

[48] 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.
[49] Accelerated Step Advancement Program – Article 81 Supervisory Bargaining Unit.
[50] See §12.2.

salary resulted in his making more than another female FSS with thirteen (13) years of seniority and more experience as an FSS. Chart B illustrates these differences:

CHART B

	Female FSS hired in 1988	Female FSS hired in 2002	Mr. Doe Male FFS
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 which was $28,392.00/yr. and $13.65 an hour)	PG 18, Step 13 at hire
Hourly/Yearly	**$18.89** **$ 39,291.20**	**$14.76** **$30n700.80**	**$19.94** **$41,475.20**
			difference in pay not including retirement and FICA

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 but was much higher than it would have been had he not originally been hired-into-range at step 13.[51]

In 2006, Mr. Doe successfully applied for a competitive posting for a supervisory position at SSCF as the Business Manager A. Ms. Bertrand had held this same position at SESCF since 1999 – seven (7) prior to Mr. Doe and had eight (8) years of state seniority having been hired in 1998. In spite of Ms. Bertrand's seniority and greater experience in the same position, records show that Mr. Doe's hourly rate as a new Business Manager A was $24.42 as opposed to Ms. Bertrand's hourly rate of $21.72. Chart C reflects the impact that Mr. Doe's hire-into-range at PG 18, step 13 had on Ms.

[51] 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.

Bertrand's base earnings which does not include contributions to retirement and social security.

CHART C

	Years of State service	Years classified as a supervisor	Years as a Business Manager A	Wage at time of Mr. Doe's promotion
Ms. Bertrand	**8**	**7**	**7**	**$21.72**
Mr. Doe	**3**	**0**	**0**	**$24.42**[52] *(+$2.70)*

This investigation asked the State to release records for intra-departmental 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. 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.[53] 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).[54]

This investigation then compared the hire-into-range requirements of §12.2 with the practices used when Mr. Doe was actually hired. Mr. Doe's

[52] Mr. Doe also received an 8% raise because the new job represented a promotion into the supervisory bargaining unit which brought him up to $25.10 an hour. While the Human Rights Commission does not have jurisdiction over the Vermont State Employees Union (VSEA) in an employment case it could be argued that bargaining contract compounded the pay inequity between Ms. Silloway and Mr. Doe by giving him an 8% raise when he first came into her unit as a supervisor. *See supra* note 42.

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

[54] 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).

hiring file showed that DOC (the appointing authority) failed to supply specific information required by §12.2 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 – **See Chart B above.**

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 or other future co-workers. **See Chart A-C 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. 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.
    - 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 are 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, whatever, 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. When Mr. Doe was hired, records showed that 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 two individuals responsible for hiring Mr. Doe, Keith Tallon from DOC, and Molly Paulger from DHR.

c. Interview with the DOC Appointing Authority – Keith Tallon

The person responsible for requesting that Mr. Doe be hired was Keith Tallon who was the new superintendent[55] of SSCF in the fall of 2003. Mr. Tallon wrote the hire-into-range letter recommending that Mr. Doe be hired-into-range to Cynthia LaWare,[56] who was then the Commissioner of

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

[56] 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

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 which is information 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.

During the interview, Mr. Tallon noted that two correctional facilities – Woodstock and Windsor - were in transition[57] 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.[58] 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

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cover memo from Sister Ryan/Mr. Gold, there is no other evidence of their, or Ms. LaWare's involvement.

[57] 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.

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

candidate. The scoring chart he sent to the 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.[59] 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 points, while two other interviewed candidates each scored 32.75.[60] 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 B** 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.[61] 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

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[59] 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.

[60] 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.

[61] 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.

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. This acknowledgement by both witnesses undermines the assertion that 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.

d. 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 hire and 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 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" for 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 of 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"[62] 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 two candidates with scores close to Mr. Doe's did not cause her to question Mr. Tallon or consider disapproving his request.

[62] This paraphrases the question and answer, but this was the example used.

As noted above, Ms. Paulger acknowledged that existing staff could have been brought from other facilities to run the Springfield kitchen if DOC had not been able to hire someone for the job or if the hire had been delayed, but she had not discussed 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."[63] In sum, Ms. Paulger failed to hold Mr. Tallon accountable for the information that §12.2 required him to provide as the appointing authority. 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. The State would have then been presented with options which might have been not only more fiscally sound, but which also might have avoided basic unfairness and legal problems.

The State offered no evidence that would allow either the hiring authority or the appointing authority to 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),

[63] STATE POLICY AND PROCEDURES MANUAL §12.2 – this is a quotation from the hire-into-range policy.

Grievance of Hooper,[64] 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.[65] 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.[66]

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[64] 27 VLRB 167 (2003).

[65] 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.

[66] 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.

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

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.[67]

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. Bertrand's present day pay inequity is the result of a hiring decision made in 2003. There is no evidence that Ms. Bertrand was intentionally targeted however the decision to hire Mr. Doe into-range operated like a time-traveling wrecking ball: it crashed (albeit without notice) into the orbit of the female FSS workers first, then swung out through the employment stratosphere and crashed into the female Business Manager's A/ASCIII's when Mr. Doe moved into that position in 2006. Theoretically speaking, if Mr. Doe moves to a new job, he will likely start at a higher salary than more experienced female comparators because of the manner he was originally hired and equal pay violations will continue.

The second point made in Knight is the importance of the Equal Pay Act's remedial nature – that it remedies pay inequities between males and females even when the reason for the inequity is unintentional or is the

[67] 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.

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.

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.[68] Other circuit courts have interpreted the "any factor other than sex" defense as one that reflects a "legitimate business reason" for the pay disparity.[69] Some courts have required the employer to articulate the reason[70] and some have given the employer *carte blanche* to come up with any reason whatsoever.[71] 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

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[68] 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).

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

[70] 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").

[71] 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").

Second Circuit's strict interpretation of the "any factor other than sex" defense.[72]

In Aldrich v. Randolph Central School District[73], Cora Aldrich, a female cleaner at an elementary school, alleged that she performed the same work as male custodians for less pay, and sued pursuant to the EPA.[74] 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.[75] Custodians were paid higher wages than cleaners.[76] In order to be eligible for a custodian position, an individual had to place in the top three applicants on a civil service examination.[77] 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.[78] 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.[79] 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*

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[72] 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."
[73] 963 F.2d 520 (C.A. 2 NY 1992).
[74] Aldrich 963 F.2d at 522-23. She also sued under Title VII but that is not relevant to this case.
[75] Id. at 522.
[76] Id.
[77] Id.
[78] Id. at 524.
[79] Id. at 526-27.

many pretexts for discrimination would be sanctioned."[80] 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.*"[81] 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 assertions of facially-neutral job classification systems as valid factor-other-than-sex defenses to EPA claims."[82]

Ryduchowski v. The Port Authority of New York and New Jersey,[83] 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.[84] 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."[85] 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

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[80] Id. at 525. (emphasis added).
[81] Id. (emphasis added).
[82] Id. at 524.
[83] 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.
[84] 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.
[85] Id. at 142-43 (quoting EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980)).

structured system based on predetermined criteria."[86] In addition, it also had to prove that it "*systematically* administered its plans for a merit system."[87] The Court found there was "ample evidence that the Port Authority had failed to meet this burden"[88] and opined that "[w]ithout systematic evaluation, a *valid* merit system cannot be said to exist."[89]

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.[90]) 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."[91] 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."[92]

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."[93]

Both Aldrich and Ryduchowski emphasize the necessity of systematically following policies and procedures where those policies and

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[86] Id. at 143.
[87] Id. (emphasis in the original).
[88] Id.
[89] Id. (emphasis in original).
[90] Id.
[91] 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).
[92] 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...").
[93] Id. at 145.

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.

PART V: SUMMARY

The respondents were charged with the proper implementation of policy §12.2. Section 12.2, which if followed, does not represent a per se objectionable personnel policy and may serve a necessary function to draw talented expertise into State government. The HRC has not taken issue with the policy itself. However when the policy is not followed in critical ways by agencies appointed to administer it, then it cannot prevent unlawful outcomes such as this one and the end result is unlawful pay discrimination against Ms. Bertrand.

RECOMMENDATION

The Respondents' failure to follow state laws and policies resulted in a significant salary differential between Ms. Bertrand and Mr. Doe, despite Ms. Bertrand's greater seniority and experience in the position they both hold. 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 E13-0005, 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).

5/7/13

Nelson M. Campbell
Investigator

5/7/13

Karen L. Richards
Executive Director

ATTACHMENT 1

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.

FACILITY FOOD SERVICE SUPERVISOR

Job Code: 711800

Salary Plan: Classified

ATTACHMENT 2

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