VERMONT LABOR RELATIONS BOARD
Before MICHAEL C. RYAN, FACTFINDER

In the matter of the
Factfinding between:

VERMONT STATE EMPLOYEES'
ASSOCIATION

-and-

JUDICIARY DEPARTMENT OF THE
STATE OF VERMONT

FACTFINDER'S DECISION

For the Judiciary Department

Joseph E. McNeil, Esq.
Susan Gilfillan, Esq.

For the VSEA

Timothy Belcher, Esq.

I. BACKGROUND

This is a factfinding pursuant to 3 V.S.A. § 1018 ("Statute") concerning the collective bargaining agreement ("CBA") effective July 1, 2016–June 30, 2018 between the Vermont State Employees Association ("VSEA" or "Union") and the Judiciary Department of the State of Vermont ("Judiciary" or "Employer").

The parties entered factfinding with some 29 issues unresolved. There were four days of hearing on May 5, June 13, June 16, and August 10, 2016, during which the parties

presented their proposals and positions, examined and cross-examined witnesses, and submitted abundant documentary evidence. In the course of the ongoing hearing, the parties met with a federal mediator on June 6, 2016, and voluntarily met and negotiated on June 22, 2016.

Ultimately, the parties succeeded in reaching tentative agreements on many of the disputed issues. Eight issues remain to be resolved. Both parties filed extensive briefs and reply briefs on those issues.

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The VSEA represents a bargaining unit of approximately 200 nonsupervisory employees of the Judiciary. They work in courthouses across the state. About 80 percent of the unit occupies five job titles: Docket Clerk B, Court Officer B, Family Case Manager, Deputy Clerk, and Probate Register. Over half the unit consists of Docket Clerk Bs.

The bargaining unit's pay grid (attached to this decision) derives from the statewide Classified Bargaining Unit Pay Plan, which covers employees of the Executive Branch (whom the VSEA also represents). The statewide grid runs from Grade 5 to Grade 32. The titles within the Judiciary unit occupy a band in the middle of the grid, covering Grades 12 to 23.

By far the greatest concentration of employees – currently, the 102 Docket Clerk Bs and the 14 Court Officer Bs – are at Grade 15. Grade 15 ranges from $14.11/hr. at Step 1 to $21.78/hr. at Step 15. Almost every other title in the unit is at a higher grade. (There appear to be few, if any, employees currently occupying Grades 12 through 14.) None of the positions in the unit requires a college degree, although a degree is preferred for some positions.

II. THE PARTIES' PROPOSALS AND POSITIONS

Three of the unresolved issues are tightly intertwined: the contractual reclassification procedure; a Memorandum of Agreement ("MOA") concerning the classification of certain positions; and temporary assignment to a higher classification. I will first lay out the parties' proposals and positions on these three, and then make my recommendations in a single discussion.

ISSUE 1: RECLASSIFICATION PROCEDURE

ARTICLE 15
CLASSIFICATION PLAN AND REVIEW PROCEDURE

VSEA'S PROPOSAL:

1. Classification Plan -

(a) Classification Plan Scope: Positions included in the classification plan are all covered employees.

(b) Definitions

i. A classification review is defined as a request for a review of a new or existing position to determine the proper class assignment.

ii. A reconsideration of classification determination is defined as a request by the Judiciary, the VSEA or the employee for the ~~classification committee as a whole~~ Court Administrator or his/her designee to review a classification determination that resulted from a review performed under Section 1 hereof.

iii. A classification grievance is defined as an appeal of a classification determination ~~which has been reconsidered by the classification committee~~ from the Court Administrator to the Vermont Labor Relations Board.

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(c) Classification Review Procedure

i. The classification methodology for the Judiciary will be based on the Willis Classification System. The Judiciary will maintain a classification plan for all covered employees based on the analysis of a position's duties and responsibilities performed at a satisfactory level as they relate to the factors of the Willis Classification System. The plan shall group positions that have common characteristics and assign them to a class. For each class, a title shall be assigned, a general description prepared and minimum qualifications established. A copy of the "Willis Guide to Classification" will be available on the Judiciary website.

ii. Classification Review - Step 1

If a significant change occurs in a position or classification that alters its duties or responsibilities in a manner that justifies a change in classification based on the principles underlying the Judiciary classification plan, the Court Administrator, the VSEA or the affected employee may request in writing that a classification review of the position occur to ascertain if it is assigned to the proper class. ~~On or after July 1, 2011,~~ ~~t~~The VSEA may submit

a class action "RFR" on behalf of employees in the same class, filing one (1) package of the same information as required herein.~~; however, employees will be required to submit individual RFR forms for classification verification.~~ If a request for class review is made, an employee within the affected class may elect via written notification to the Court Administrator not to have the results of the class review applicable to him/her until after such employee's next step increase occurs.

The application shall be considered~~—complete when the Human Resources Manager certifies that the record is complete.~~ filed upon submission to the Human Resources Manager. ~~Notice that the record is complete shall be sent to the employee(s) or in the case of a class action request, the VSEA, within five (5) business days. A classification committee of Judicial Branch employees to be chaired by the Human Resources Manager shall be maintained to review requests for classification review. The classification committee shall consist of twelve members, nine of whom shall be appointed by the Judiciary and three of whom shall be Judicial Bargaining Unit members appointed by the VSEA. There shall also be two alternate members, one appointed by each of the parties hereto.~~

~~The VSEA appointed members shall serve three (3) year terms. The Human Resources Manager shall preside over meetings of the committee relating to policy, training and procedures. The Human Resources Manager shall designate a panel of three committee members to conduct any requested classification review. For positions within the bargaining unit, one of such panel members shall be one of the three VSEA committee members. If requests for classification are pending, the panel shall meet on a bimonthly basis and review the classification material, make a site visit when necessary or appropriate, conduct interview(s) as appropriate and make a written determination within 15 business days of the date the panel review is completed. The Judiciary, the VSEA or the employee may appeal~~

~~this determination by using procedures set forth in Section 2 hereof. If a request for classification review is made by a member of the Classification Committee, the Committee Chair shall conduct the review within 45 business days of receipt of the request and make a written determination within 15 business days of the review.~~

The Human Resources Manager shall conduct an analysis of the position or positions that are the subject of the request, based on the duties performed at the time of submission, gathering such information and relying on such expertise or other input as he may deem fit, and shall make the initial determination, within 120 calendar days of submission, as to whether to grant or deny the request. If the Human Resources Manager concludes that the request is inadequate or deficient, he may return the request within 10 work days to be amended.

2. Reconsideration of Classification Determination - Step 2

~~The full Committee shall meet on a bimonthly basis to determine reconsideration requests, if any such requests are pending. Such reconsideration shall occur at the first full Committee meeting following the request for reconsideration.~~

i. A request to reconsider a classification determination shall be filed in writing within thirty ~~fifteen (15)~~ business days of the Step 1 determination or else shall be deemed withdrawn. ~~An electronic filing which is not accompanied by a paper filing meeting the requirements of this subsection shall not be considered as properly filed.~~ The request shall minimally include:

A. the name of the employee~~,~~/employees submitting the request or a notation that it is submitted by the Judiciary or the VSEA;

B. the class title, pay grade equivalent and work unit of the position under review;

C. ~~the specific~~ a general description of the issues which require reconsideration with a ~~detailed~~ rationale why the classification determination was not appropriate;

D. ~~a copy of the classification report and the job description form upon which the classification review was based;~~

~~E. the specific remedial action requested, including class to which reassignment is sought;~~

~~F.~~ appropriate signature and date.

ii. Procedure

The request to reconsider a classification determination shall be sent to ~~the Human Resources Manager at~~ the Court Administrator's Office. If the reconsideration request relates to a bargaining unit position and is made by the Judiciary or the employee, the VSEA shall be promptly notified of the request and shall have the opportunity to represent the employee. ~~before the committee. Reconsideration requested by a member of the Classification Committee covered by this Agreement for his/her position shall be conducted by an individual appointed by the Chief Justice from outside the Judiciary on the basis of a recommendation made by the Court Administrator and the VSEA.~~

Upon receipt of a request for reconsideration, the ~~Human Resources Manager~~ Court Administrator or his or her designee shall meet with the VSEA and the Human Resources Manager concerning the dispute, and shall make a decision on the appeal within thirty days of the appeal unless the deadline is extended by agreement of the parties. ~~schedule such request at the next regularly scheduled meeting of the classification committee. A non-management member outside of the Judicial Bargaining Unit shall not be authorized to vote should a vote be taken to resolve the reconsideration request made by or on behalf of an employee covered by this Agreement, nor shall the Judicial Bargaining Unit members~~

~~be authorized to vote concerning any employee not covered by this Agreement.~~

~~However, all members of the classification committee shall be qualified to participate in the review and any discussion related thereto. A majority of the classification committee shall constitute a quorum and the Human Resources Manager shall act as chair except in the instance where the Human Resources Manager participated on the initial classification panel. In that instance, the committee will select a member who was not involved in the initial review as acting chair.~~

~~The Judiciary, the VSEA or the employee shall be allowed to make a presentation of the issues to the committee or, in the alternative, may rely on the written submission. The committee may require further information from the parties and may interview other personnel to obtain or confirm relevant information. If any of the parties wish to rely upon information which was not considered by the panel, all other parties will be provided such information at least forty eight hours in advance of the classification committee meeting.~~

~~The committee shall review the classification report in light of the original and supplemental information presented and attempt to reach a consensus on an appropriate classification determination. If a consensus cannot be reached, the matter shall be resolved by a vote of the committee, and a majority vote of those present, authorized to vote and voting shall constitute the committee's determination. The committee shall maintain a file of all materials and documents relating to this RFR and the committee proceedings, constituting the record of the case. The committee shall reach a determination and notify the Court Administrator, the employee and the VSEA of the committee's determination within ten (10) business days of the classification committee meeting. The committee and the parties may agree to extend any of the time frames set forth in this~~

~~subsection. Any meetings shall be scheduled during working hours if possible. Any changes in the classification determination shall be deemed to be effective upon the same date of the original classification determination.~~

3. Classification Grievance Procedure - Step 3

i. Within thirty (30) ~~thirteen (13)~~ business days of the notification of the reconsideration determination, the Judiciary, or the VSEA or the employee may file a classification grievance with the Vermont Labor Relations Board. The grievance shall be filed in writing and shall include: ~~all materials submitted during the reconsideration phase plus:~~

A. a written description of the issues with rationale why the reconsideration determination is clearly erroneous;

B. the specific remedial action requested, including class to which reassignment is sought;

C. the name of a representative, appointed by VSEA, or an employee of VSEA, where the matter involves a covered employee.

D. appropriate signature and date.

The Vermont Labor Relations Board shall hear the appeal de novo and determine whether the moving party has proved a significant change has occurred in the duties of the position that justifies reclassification based on the principles underlying the Judiciary compensation plan. If the Board determines that the moving party has met that burden, it may impose such remedy as it deems just and proper.

The parties shall retain the right to present expert testimony on the Willis classification system or on other technical matters, and the VLRB shall give appropriate deference to such experts on technical matters. In addition, the parties agree to offer a training for members of the VLRB on the Willis system, to be provided by

an expert selected by agreement of the parties, and whose fee, if any, shall be paid equally by both the VSEA and the Judiciary.

In the alternative, the parties may by mutual agreement submit the dispute to arbitration before a neutral arbitrator with experience in reclassification disputes, selected either through the American Arbitration Association or through such other process as the parties may adopt.

~~E. the grievance shall include a completed job description and any supporting written information, arguments or documentation.~~

~~F. all other information which the party filing the grievance believes the Step 3 Panel should review in connection with the grievance. Evidence and/or testimony which is not pre filed as required by subsections A-F hereof shall be excluded from consideration.~~

~~ii. Procedure~~

~~A. The grievance shall be filed with the Deputy State Court Administrator and General Counsel acting in the capacity as secretary of the Step 3 Judicial Branch Classification Grievance Panel. The Deputy State Court Administrator and General Counsel shall notify the parties of the grievance and of the date set for the Step 3 Panel's consideration thereof. Upon receiving a classification grievance the secretary shall notify the Chief Justice.~~

~~B. The Step 3 Judicial Branch Classification Grievance Panel shall consist of a chairperson appointed by the Chief Justice from outside the Judiciary from lists separately submitted by the parties, the Deputy State Court Administrator and General Counsel shall also act as secretary to the Panel, and a person appointed by VSEA. The Step 3 Panel shall be formed within fifteen (15) days from such submission of names. No person shall be appointed a member of the Panel who will~~

~~personally benefit from the outcome of the grievance. The chairperson shall not be actively connected with the parties or the grievance. The chair shall be a person knowledgeable in classification procedure and labor relations. The chair shall be compensated for time and necessary expenses at rates established and approved by the Chief Justice.~~

~~C. The Step 3 Classification Grievance Panel shall thoroughly review the grievance and meet to hear the grievance within thirty (30) business days from the date a chairperson was appointed. The procedure for the hearing shall be established by the Step 3 Panel's chairperson. It shall involve a review of the record of the committee's work and determination, consideration of the arguments of the parties and of any newly discovered evidence which was not reasonably available for presentation to the committee in the judgment of the Step 3 Panel. The Step 3 Panel shall issue a decision to the parties within (20) business days of the date of the hearing. The parties and the Step 3 Panel may agree to extend these time limits prior to their expiration where circumstances warrant. The committee's determination shall be affirmed unless the Step 3 Panel finds that such determination was clearly erroneous. If the committee is found to have been clearly erroneous, the matter shall be remanded to the committee for reconsideration with appropriate instructions unless there is a unanimous decision by the Step 3 Panel as to the appropriate outcome, which shall in such cases be final and binding. A grievance that is remanded to the committee shall be heard within the timeframes established under (b)ii above. Otherwise, the Step 3 Panel's decision shall be by majority vote.~~

~~D. The Step 3 Panel shall base its decision upon the criteria set forth in "Willis Guide To Classification" as it was applied by the classification committee. The burden shall be on the appellant to establish that the classification decision was clearly erroneous.~~

(d) Pay Adjustments

In the event of an appeal at any level, any classification pay adjustment shall be deferred until final disposition of the request. All reassignments are effective at the beginning of the next pay period following the date of the original classification request submission to the CAO Human Resources Division. Notwithstanding any other provisions of this agreement, any pay adjustment resulting from a classification review initiated by one or more bargaining unit employees or by VSEA pursuant to this Article shall be implemented upon funding by the Legislature retroactive to the date the request was initially filed with the Human Resources Director.

(e) Rights and Restrictions

i. The employee has the right to the assistance of the VSEA or private counsel of his/her choosing to prepare the written grievance and to represent the employee at the employee's expense in the grievance proceedings. The parties must notify each other in advance of any meeting in which a party intends to have a representative present. In those cases where the VSEA is not representing the employee, the VSEA shall have the ~~reserves~~ the right to participate in all ~~of the classification panel, grievance committee and grievance Panel~~ the grievance proceedings, and shall have access to all records and documents relating to the RFR or subsequent ~~committee~~ proceedings.

ii. The employee may present the grievance on work time. ~~If schedules do not permit the presentment to occur within the time constraints, a waiver of the time constraints should be obtained from the Panel.~~ The grievant and all other participants shall be granted release time for the purpose of presenting the grievance.

~~iii. If the Panel decides to receive newly discovered evidence, witnesses may be called by the parties.~~ Judicial Branch employees called as witnesses may attend grievance hearings during work time.

iii. Any material, document, note, or other tangible item which is to be entered or used by any party in any grievance proceeding held in accordance with this section is to be provided to the other party at least forty eight hours prior to the proceeding at no cost.

~~3. Classification Plan/Procedures, Information and Training~~

~~The Judiciary shall disseminate to all work sites written materials that describe the classification criteria and procedures. Additionally the Judiciary shall, on at least an annual basis, offer in service educational programs at various regional work sites which covered employees may attend concerning such criteria and procedures, with emphasis upon how to present a classification request most effectively.~~

~~4. Classification Procedures Applicable to New Judiciary Positions~~

~~The classification process outlined above shall be applicable to all current and any new Judiciary positions covered by this Agreement.~~

VSEA'S POSITION: The VSEA's fundamental issue is the low pay of Docket Clerks and Court Officers. For years, the VSEA has sought to address this disparity through the reclassification procedure, the grievance procedure, and negotiations, with no success. The Judiciary has used its control of the reclassification process to prevent these lowest wage unit members, who are overwhelmingly female, from securing an upgrade. The evidence shows that Docket

Clerk Bs cannot make ends meet on their wages, even while their job has become more complex. Consequently, about a quarter of the Docket Clerks left their jobs during the past fiscal year.

Article 15 has lost all legitimacy among unit members. The reclassification procedure is unnecessarily cumbersome, intimidating, and secretive. The employee must submit voluminous documentary evidence and an unduly legalistic argument (none of which may be sent electronically). She must procure documents from HR in Montpelier, and then submit them to the same office. Deadlines are tight and rigorously enforced. It is impracticable to obtain class-wide reclassification, because under the Judiciary's current interpretation of the "class action" language, every individual employee must submit a complete reclassification application.

Furthermore, decision-making is heavily weighted in favor of management.[1] The three-stage procedure is controlled at each stage by managers who report directly or indirectly to the Court Administrator. The reclassification committee consists of nine management representatives and only three VSEA representatives. Each

1 This contrasts with the classification system in the Executive Branch, which is managed by HR professionals, who are generally insulated from internal political pressures.

three-member reclassification panel consists of two managers and one VSEA member.

The reclassification panel may seek whatever information it chooses, with no obligation to disclose it to the VSEA or the employee. No record is kept of any of this evidence. When the full reclassification committee makes its decision, there is no record, so the VSEA members of the committee hear only the "facts" as reported by the management members or the HR Manager, and have no basis for challenging them.

On reconsideration, a tripartite panel, led by a so-called neutral who is actually selected by the Chief Justice, hears appeals under the "clearly erroneous" standard. It routinely affirms management's recommendation. While the panel is supposed to follow the Willis system, VSEA witnesses testified that managers on the panel discuss and consider the financial impact of their decisions, and often accord it dispositive weight. The net result is that Docket Clerk B requests are consistently denied.

The VSEA's proposal accommodates the Judiciary's wish to control the first two stages of the procedure, to make sure that any upgrade will become effective only upon funding. However, it also ensures that a neutral body, the

VLRB, will make the final determination, based on a written record. The current classification committee need not be retained.

Classification issues are well within the jurisdiction of the VLRB. Under § 1013(1) and/or (9) of the Statute, the Union may negotiate a wage classification system and grieve its provisions, and that grievance will fall under the VLRB's general jurisdiction to decide contractual grievances. Even if one accepts the Judiciary's assertion that the Judiciary is not subject to the statewide classification system, 3 V.S.A §310, then classification of Judiciary personnel is purely a matter of collective bargaining, not a statutory function. Therefore, the statutory deficiency identified in *In re McMahon*, 136 Vt. 512 (1978)("There is no authority in the legislative scheme [of 3 V.S.A. § 310] for reclassification by the Labor Relations Board") does not exist for Judiciary employees. If 3 V.S.A. §310 does apply, then the post-*McMahon* amendment also applies. 3 V.S.A. §310(i).

JUDICIARY'S POSITION: There is room for improvement in Article 15, but any changes to this complicated, nuanced procedure should be by mutual agreement, not imposed by a third party. The VSEA's proposal is a radical departure

from the existing language, and contains several areas of significant disagreement.

The Judiciary strongly opposes the VSEA's proposal to have the VLRB or an arbitrator make the final decision. The VSEA presented no evidence that the VLRB has either the interest or resources for this additional workload. Furthermore, while the VLRB has jurisdiction to hear classification appeals of employees of the Executive Branch, under *In re McMahon*, it is doubtful whether that authority extends to employees of the Judiciary.

The Judiciary adamantly opposes *de novo* review of classification decisions, rather than the "arbitrary and capricious" standard that the VLRB applies to the Executive Branch. The VSEA's proposal contemplates an adversarial proceeding before the VLRB, rather than the Willis methodology, which is designed to develop consensus. Moreover, the VLRB lacks the necessary working knowledge of the Judiciary, the job duties of bargaining-unit positions, and Willis methodology. This cannot be remedied by a one-time training. In any event, the parties are unlikely to agree on a trainer, and the Union's proposal contains no mechanism for resolving that disagreement. The VSEA did not propose arbitration as an alternative to the final decision-maker until after the third day of factfinding.

The VLRB will almost certainly disfavor this proposal where the parties had no opportunity at all to discuss it.

The Judiciary also disagrees with the VSEA's proposals to change the burden of proof from "clearly erroneous" to "significant change of duties"; to remove critical aspects of class-action requests for reclassification; and to expand the scope of the final decision-maker's remedial authority.

ISSUE 2: MOA RE DOCKET CLERKS, COURTROOM OPERATORS AND COURT OFFICERS

VSEA PROPOSAL:

The VSEA and Judiciary agree to conduct a joint study of the Docket Clerks A, B and C, Courtroom Operators and Court Officer classifications to determine whether a reclassification or upgrade of these classifications is appropriate.

1. The study shall be conducted by a consultant who will be selected and hired by both VSEA and the Judiciary for a fee not to exceed $20,000, paid in equal part by both parties.

2. The consultant will hear and consider evidence from both parties, and may conduct his or her own additional investigation.

3. The study shall be completed on or before November 15, 2016.

4. If the Study recommends anything less than a three pay grade range increase, the VSEA may reopen the contract immediately on the issue of the proper compensation to be paid to the employees in these classifications, and any impasse in such negotiations shall be resolved through the impasse procedures set forth in the Judicial Employees

Labor Relations Act.

5. If the parties agree to accept the consultant's recommendations, or otherwise reach agreement on this matter, both parties shall cooperate to secure funding from the Legislature during the 2017 legislative session.

6. Implementation of the report shall be retroactive to July 1, 2016, and both the implementation and the retroactivity shall be contingent upon funding.

JUDICIARY PROPOSAL:

The Judiciary commits, on a one-time basis, to undertake a review of the Docket Clerk B and C and Courtroom Operator position classifications under the following parameters:

1. The VSEA will suspend its current class action reclassification request dated February 8, 2016 and/or any associated grievance for Docket Clerks B and C and Courtroom Operator.

2. Following the ratification and execution of the collective bargaining agreement between the Judiciary and the Judiciary Unit of the VSEA which shall succeed the parties' collective bargaining agreement expiring on June 30, 2016, the Judiciary and the VSEA will select a Consultant whom they believe is qualified to conduct a classification review using the Willis Plan. If the parties can agree on a Consultant, the parties shall share equally in the cost of the Consultant, up to $10,000 each. If the parties cannot agree on a Consultant by October 1, 2016, then the Judiciary will select the Consultant and pay the full fee, up to $20,000.

3. The Consultant will conduct a review of the Docket Clerk B and C and Courtroom Operator positions using the Willis Plan standards and any information that the Consultant believes is necessary to conduct an appropriate review. The Consultant shall produce its report recommending whether the Docket Clerk B and C and Courtroom Operator positions are properly classified, over classified or under classified.

If the Consultant determines that the Docket Clerk B and C and Courtroom Operator are either under or over classified, it shall recommend the pay grade at which each of these positions should be classified. The Consultant's report shall be completed in time to present a request for funding to the Legislature for the FY18 budget process.

4. Should the Consultant recommend that any one of Clerk B and C and Courtroom Operator positions is overclassified, the position shall transition to the appropriate pay grade as provided for by the current contract. See Article 16, para. 2 (d) at page 56.

5. If the Consultant recommends a higher pay grade for any of the Docket Clerks B and C and Courtroom Operator Positions, then during the Legislative session following the Judiciary's receipt of the Consultant's report, the Judiciary shall request from the Legislature in the FY18 budget the funding necessary to implement the Consultant's recommended increased pay grades for the particular position(s).

6. Due to the fact that the Docket Clerk B and C positions and the Courtroom Operators together make up more than 50% of the bargaining unit positions, any increase in their pay grade will have a significant financial impact on the Judiciary. Therefore, it is agreed that the Judiciary shall have no obligation to begin any increase in pay until the date the Judiciary actually receives the additional funding from the Legislature for the requested increase. Further, in the event the Judiciary only receives partial Legislative funding, the Judiciary shall have no obligation to provide any increase in pay for which it does not receive additional funding.

7. If the Consultant recommends an increase of one pay grade or more in a position's pay grade and the Judiciary secures additional legislative funding for that increase, the VSEA and the employees shall be barred from filing any reclassification request for that position until July 1, 2018. If the Consultant recommends an increase of one pay grade

or more and additional legislative funding is secured for anyone or more of the Docket Clerk B, C or Courtroom Operator Position(s), then the VSEA shall withdraw with prejudice its reclassification request filed on February 8, 2016 for that particular position(s). If the Consultant recommends no increase in the pay grade of anyone or more of the Docket Clerk B, C or Courtroom Operator Position(s), then the VSEA may resume its current class action reclassification request filed on February 8, 2016 for that particular position(s).

8. Once the Judiciary has obtained the Consultant's report, sought any funding, increased pay grades and made any payments, if appropriate, all as described above, the Judiciary's obligations under this side letter shall cease and no new obligations shall arise without additional bargaining and a written and executed agreement. The prohibition of VSEA and/or the employees' filing new reclassification requests as described above shall continue until it expires by its own terms. Once all the commitments under this Side Letter by the Judiciary, the VSEA and the bargaining unit employees have expired, this Side Letter will be removed from the parties' bargaining agreement.

9. This Side Letter between the parties shall supersede any provision in the current contract that is inconsistent with the terms of this Side Letter.

VSEA'S POSITION:

If the consultant's report does not fully and finally resolve this problem, there should be meaningful recourse to a neutral party. The VSEA therefore proposes that it have the right to reopen negotiations, including statutory impasse procedures, if the consultant recommends less than a 3-grade upgrade for Docket Clerk Bs. The Judiciary's

proposal would curtail the VSEA's right to seek any further relief, even if the consultant recommends an increase of only a single grade. If the recommendation is no increase, the VSEA would be left to revive the class-action reclassification request that is stalled at the VLRB. The Judiciary's proposal would also impair members' rights to seek redress for misclassifications occurring after the date of the consultant's report.

With regard to Court Officers, the Employer's proposal is contingent on the VSEA withdrawing its proposal on temporary assignment pay. The benefit accruing to the VSEA from such a *quid pro quo* is highly speculative, if not illusory. There is no guarantee that the consultant will recommend any upgrades. Even if he or she does, the upgrades will be delayed by many months.

The Judiciary should not have the right to act unilaterally if the parties cannot agree on a consultant. The Judiciary's proposal contains no guarantee that the consultant will receive and consider the Union's evidence and arguments. The Judiciary's proposal contains no firm deadline for the consultant's report, merely completion in time to submit any funding requests to the Legislature.

JUDICIARY'S POSITION: *(See the Judiciary's related proposal regarding Article 16(2)(i)(i), immediately below.)*

The Judiciary is prepared to jointly select and fund an independent consultant, qualified in Willis, to review the pay grades of Docket Clerks B and C and Courtroom Operators. The critical difference between the parties is the consequence of a recommendation for less than a three-grade increase for Docket Clerk B. The Judiciary would implement the recommended increase, subject to funding. It absolutely opposes the Union's proposal to reopen the CBA and renegotiate the pay grades through impasse procedures.[2] That would make the parties' expenditure of time, effort, and money on the consultant completely pointless. The VSEA's proposal also presents a timing problem. If the parties go through bargaining, mediation, factfinding, and LBOs, the legislature will have adjourned before the VLRB makes its decision.

The Judiciary's proposal includes a default option if the parties cannot agree on a consultant. The VSEA's does not. The Judiciary's proposal contains a reasonable completion date for the consultant's report, which allows adequate time for the Judiciary to request funding in the upcoming legislative session. The VSEA's proposed

2 The Judiciary calculates the VSEA's proposed 3-grade minimum increase as a 16% raise, totaling some $750,000 in the first year.

completion date, November 15, 2016, is obviously unrealistic.

The Judiciary's proposal conserves the parties' resources by suspending the current reclassification grievance, requiring its withdrawal as to any position that does not increase at least one pay grade, and preventing any new classification requests for such positions until after July 1, 2019.[3]

ISSUE 3: TEMPORARY ASSIGNMENT

ARTICLE 16
Compensation/Benefits

VSEA PROPOSAL

(2)(i) Temporary Assignment

i. Alternate Rate Pay

> Employees may be specially assigned by the Court Administrator to assume the duties of a position assigned to a higher pay classification than the employee's own within the bargaining unit. … If this occurs the employee may be eligible for alternate rate pay as described below.
>
> The alternate rate pay shall be the step in the new pay grade equivalent that is the promotion rate for the employee under subsection (e) above. … Alternate rate pay will apply only for the duration of the reassignment.…
>
> Special assignment justifying alternate rate pay shall occur only when an employee is required by the Court Administrator to perform a majority of those duties of

3 There is currently a class-action reclassification request pending on behalf of the Docket Clerks, which the Judiciary refused to accept because class members did not each file an individual request. The VSEA grieved the refusal, and that grievance is also pending.

the specially assigned position which are substantially different from the employee's own normal duties for a period of ~~eleven (11)~~ five (5) or more consecutive full work days. If special circumstances warrant, the Court Administrator may approve alternate rate pay for a shorter period of time. Court officers assigned to perform security screening shall be entitled to higher assignment pay as Court Security and Screening Officers for every hour worked in the higher classification. … If all of the above conditions are met, the Employee shall receive the alternate rate of pay during the special assignment retroactive to the first day of such assignment.

JUDICIARY PROPOSAL

If the VSEA withdraws in its entirety its proposal regarding Article 16, Alternate Rate Pay, the Judiciary commits, on a one-time basis, to undertake a review of the classification of the positions of Court Officer and Court Security & Screening Officer under the following parameters:

1. Following the ratification and execution of the collective bargaining agreement between the Judiciary and the Judiciary Unit of the VSEA which shall succeed the parties' collective bargaining agreement expiring on June 30, 2016, the Judiciary and the VSEA will select a Consultant whom they believe is qualified to conduct a classification review using the Willis Plan. If the parties can agree on a Consultant, the parties shall share equally in the cost of the Consultant up to $2,500 each. If the parties cannot agree on a Consultant by October 1, 2016, then the Judiciary will select the Consultant and pay the full fee, up to $5,000.

2. The Consultant will conduct a review of the Court Officer and the Court Security & Screening Officer positions using the Willis Plan standards and any information that the Consultant believes is necessary to conduct an appropriate review. The sole questions to be answered by the Consultant are whether the Court Officer position should increase by two paygrades (from a paygrade 15 to 17) or should, from an operational perspective, the Court Officer position be merged with the Court Security &

Screening Officer position to form a single position at a paygrade 17.

3. The Consultant shall produce its report recommending whether the Court Officer position's paygrade should increase to paygrade 17 and or [*sic*] the Court Officer position be merged with the Court Security & Screening Officer position to form a single position at a paygrade 17. The Consultant's report shall be complete in time to present a request for funding to the Legislature for the FY18 budget process.

4. Should the Consultant recommend either that [the] Court Officer position's paygrade should increase to a pay grade 17 and or the Court Officer position be merged with the Court Security & Screening officer position to form a single position at paygrade 17, then during the legislative session following the Judiciary's receipt of the Consultant's report, the Judiciary shall request from the Legislature in the FY18 budget the funding necessary to implement the Consultant's recommended increased pay grades or merging of the particular position(s).

5. It is agreed that the Judiciary shall have no obligation to begin any increase in pay until the date the Judiciary actually receives the additional funding from the Legislature for the requested increase. Further, in the event the Judiciary only receives partial Legislative funding, the Judiciary shall have no obligation to provide any increase in pay for which it does not receive additional funding.

6. If the Consultant recommends that the Court Officer position receive a two step paygrade increase (from a pay grade 15 to 17) or that the Court Officer and the Court Security & Screening Officer positions be merged into one position at paygrade 17, and the Judiciary secures funding for that increase, the VSEA and the employees shall be barred from filing any reclassification request for the Court Officer and the Court Security & Screening Officer positions until July 1, 2018.

7. Once the Judiciary has obtained the Consultant's report, sought any funding, increased pay grades and

made any payments, if appropriate, all as described above, the Judiciary's obligations under this side letter shall cease and no new obligations shall arise without additional bargaining and a written and executed agreement. The prohibition of VSEA and/or the employees' filing new reclassification requests as described above shall continue until it expires by its own terms. Once all the commitments under this Side Letter by the Judiciary, the VSEA and the bargaining unit employees have expired, this Side Letter will be removed from the parties' bargaining agreement.

8. This Side Letter between the parties shall supersede any provision in the current contract that is inconsistent with th[e] terms of this Side Letter.

VSEA POSITION. Under the current language, employees do not receive the higher rate until they have worked 11 days in a higher classification. Court Officers are routinely assigned to work as Court Security Officers & Screeners, but since the assignments rarely last 11 days, Court Officers seldom receive the higher compensation.

The VSEA's proposal would allow Court Officers who are assigned as Screeners to collect the higher assignment pay hour-by-hour. Alternatively, the VSEA proposes a more reasonable 5-day waiting period.

The Judiciary's contention that it is difficult to code two pay classifications in a given pay period is nonsensical. Since there is no requirement that the assignment coincide with a pay period, it is already

necessary to code two classifications in at least part of one pay period.

JUDICIARY'S POSITION. The Judiciary does not dispute that some temporary assignments are for less than 11 days. But in general, they are to replace employees on longer-term leaves, or to fill temporary vacancies. The VSEA's proposal includes no calculation of its cost, nor any means of securing additional funds. The Judiciary has already allocated the funds authorized by the Legislature for step and wage increases, and it would be imprudent to expect additional funding from a new administration, especially since the state has a $17 million deficit.

The Union's proposal would create a considerable administrative burden. The statewide payroll system cannot automatically enter two different pay rates in any given two-week pay period. If the waiting period were reduced to five days, payroll would have to manually calculate the employee's pay, and enter it as a special transaction.

Allowing an hour-for-hour alternate rate for one position will open the door for other positions to request the same. The Judiciary also strongly opposes decreasing the waiting period from 11 days to 5. It is often not possible to perform a majority of the duties of the higher classification, as the contract requires, within five days.

The CBA already allows the Court Administrator to approve the higher pay for assignments of less than 11 days in special circumstances.

If the VSEA drops its alternate pay rate proposal, the Judiciary proposes a Willis study of the positions of Court Officer and Security & Screening Officer, which could be combined with the study of the Docket Clerk positions in the MOA. The sole question would be whether the Court Officer position should increase from Grade 15 to Grade 17, or merged with the Court Security & Screening Officer at Grade 17. If so, the Judiciary will request the additional funding. A funding request supported by an independent study will have a far greater likelihood of success.

DECISION ON ISSUES 1, 2, AND 3:
RECLASSIFICATION PROCEDURE;
MOA RE DOCKET CLERKS, etc.;
TEMPORARY ASSIGNMENT

Taken together, these three proposals would affect every title in the unit, at least potentially. However, their wellspring, and the VSEA's primary focus in this factfinding, is the Docket Clerks' years-long effort to obtain a higher classification.

In simple terms, a Docket Clerk B's job is to prepare the court for each day's business, execute the court's rulings and decisions, and keep detailed records of the

proceedings in every case. Within each of these broad functions are a plethora of duties. Some are routine, but many require knowledge, judgment, and experience. Docket Clerks must be familiar with a substantial number of procedural statutes, rules, and Supreme Court policies, including the rules of civil, criminal, and family-court procedure. Every Docket Clerk must be able to function in all five dockets of the court system: criminal, family, environmental, civil, and probate.

A substantial part of the job is serving and advising the public, including attorneys, litigants, criminal defendants, private citizens, and law enforcement personnel. This constituency shows up every day that court is in session, sometimes in large numbers. Many are in the midst of a crisis and under extreme stress. Docket Clerks must maintain a calm and professional demeanor in dealing with these individuals.

Docket Clerks are careful not to stray into the realm of legal advice, but the matters they address are often far from trivial. Experienced attorneys, as well as members of the public, question the Docket Clerks concerning how, when, and before whom to initiate proceedings, file motions, pay fines, post bail, appear before a judge, and obtain orders. Douglas DiSabito, the Grand Isle State's

Attorney (and a former Court Officer in Grand Isle County) testified that when he was in private practice, "I couldn't get the work done if it wasn't for the docket clerks." DiSabito further testified:

> [W]hen you need service from the court, you need to get ahold of a Docket Clerk, and so they're vital to not only the public getting justice…but the attorneys as well….
>
> [I]t's not like [they're]…passing out forms. …[They're] trying to classify what these people's needs are, and if they're filing for divorce, what type of divorce is it? Are there kids, are there no kids? Is it contested, is it uncontested? So they need some background in the law.

Docket Clerks are also responsible for keeping matters moving in the courtroom. They call the cases, provide the judge with the necessary paperwork, look up information if the judge requests it, and remind the judge if he has forgotten an important procedural step.

Court proceedings generate an enormous quantity of paper and electronic records and files. Docket Clerks are responsible for maintaining these records with a high degree of precision, because mistakes can lead to procedural delays or even substantive errors. The Clerks cannot allow a backlog to build up. As one exhibit stated, "They feel great pressure to clear their inbox and keep cases moving, but are constantly frustrated in their efforts to do so."

In sum, Docket Clerks keep the judicial system running and are a significant public face of the Judiciary. It is in the interests not only of the clerks themselves, but of the Judiciary as a whole, the public, and the State of Vermont that they receive appropriate compensation.

It should not be necessary for them to have a second job to pay their bills, yet many do. Of 66 Docket Clerk Bs who responded to a recent VSEA survey, 21 have second jobs including waitressing, cashiering, and bookkeeping. (This does not include those who volunteer for after-hours Relief for Abuse ["RFA"] duty.) Moreover, the VSEA's expert pointed out that among a hypothetical population of Docket Clerks who are the sole earners in a three-person household, a majority (and for some types of assistance, a very large majority) would be eligible for public assistance, such as food stamps, reduced school lunches, and childcare assistance.[4]

4 The Judiciary's expert, Matthew Barewicz, the economic and labor market information chief for the Vermont Department of Labor, compared the wages of the Docket Clerk Bs with the wages of "Court, municipal and license clerks" (a federal occupational code) in Vermont. With due respect to the expertise of Mr. Barewicz and the Bureau of Labor Statistics, the code lumps together some very disparate jobs. Based on my 40 years of experience with all types of state and municipal jobs in New England, I can safely say that these three titles include jobs with a very wide range of knowledge base, discretion, and judgment. The Docket Clerk Bs are at the upper end of that range, and grouping them with clerks that perform purely

The parties' have negotiated a reclassification procedure, the purpose of which is, or should be, to determine the aforementioned appropriate level of compensation. Yet the Docket Clerk Bs were last upgraded about 15 years ago, before the parties negotiated their first CBA. According to Shannon Bessery, a Docket Clerk B for 22 years, a member of the VSEA bargaining team for every CBA, and a past member of the reclassification committee, not a single Docket Clerk has ever been granted an upgrade under Article 15. Nor have they had any success at the bargaining table or through the grievance procedure. This is despite the opinions of a number of judges and lawyers who submitted letters to the factfinder, stating their belief that the Docket Clerks are underpaid.

As a factfinder, I ordinarily refrain from recommending novel and/or complex resolutions of issues on which the parties have reached impasse. Difficult problems are best left to the parties to solve, since they are much more familiar with the circumstances than an outside neutral. In this instance, however, the parties have been grappling with this issue for years on end, with no result. In my opinion, it will best serve the parties, the

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ministerial duties would tend to drag down the wage used as a comparator.

employees, and the public to recommend a substantially revised reclassification procedure.

The parties envision a two-part framework for this task: an MOA, which creates an immediate, one-time examination of the classifications of the Docket Clerk B and certain other positions; and the Article 15 reclassification procedure going forward from there. That two-phase structure is worth retaining, but I recommend revisions to both.

Issue 1: Reclassification Procedure

The current reclassification procedure is inefficient, unduly complicated, and lacks many of the basic attributes of due process. A reclassification procedure should be clear, relatively simple, transparent, and based on neutral, objective standards. To the extent possible, it should be investigatory rather than adversarial. The goal should be to collect as much reliable information as is necessary to produce an accurate picture of the position at issue, and to decide on its proper classification based on that information.

Neither party proposes abandoning their current standard for classifying jobs: the Willis system, which has long been in use in both the Judiciary and the Executive Branch. Like the more familiar Hay Point Factor

system, the Willis system assigns point values to job components such as such as knowledge, skills, problem-solving, and accountability. The total point value of a job determines its placement on the pay grid.

However, the existing contractual classification system comes up short in many other areas. Procedurally, it is cumbersome, inefficient, and difficult to understand:

- The date a request for reclassification is filed should be clearly ascertainable and objectively established. The current system leaves that date both indefinite (because in an investigatory process, it may not be clear when "the record is complete") and subjective (because declaring the record "complete" is solely within the HR Manager's control).

- In a class-action request for reclassification, it serves no purpose to require every member of the class to submit an individual request. It clogs the system with unnecessary paperwork and defeats the entire purpose of a class action.

- Excluding electronic filing at any stage of the procedure is unnecessarily burdensome, particularly in a statewide bargaining unit.

- Much of the Step 2 reconsideration procedure is redundant, continuing the information-gathering function of the Step 1 investigation.

- Reconstituting a panel for each reclassification, and retaining and compensating an outside chair, is inefficient and costly.

- The deadlines for both parties are unrealistically short, without producing prompt resolutions. The reclassification request of one Docket Clerk B took over two years to work its way through the system.

Turning to the substantive shortcomings, the absence of a neutral decision-maker at any stage tends to undermine the legitimacy of the procedure, certainly in the eyes of employees, and hence its overall utility. The current reclassification committee, and its sub-panels, have an overwhelming majority of management representatives, leaving both the initial and reconsideration decisions in the Employer's hands.

The Judiciary argues vigorously that the Chief Justice, who selects the chair (who has the deciding vote) of the Step 3 grievance panel, has no bias in favor of management. Judges are professional neutrals, and I have no doubt that the Chief Justice keeps an open mind while making his choice. But the fact remains that the Chief Justice has a definite stake in the outcome of reclassification requests, particularly requests that would affect half the bargaining unit. They may well clash with the Chief Justice's own budgetary priorities. Indeed, VSEA witnesses testified that under the current system, budgetary considerations have greatly influenced some management representatives, at times outweighing the Willis factors that are supposed to be the basis of the reclassification decision.

It is beneficial to the entire system for employees to have some opportunity to present their case to a neutral who has no stake in the matter. Even if they do not receive everything they wanted, employees will be more accepting of the outcome if they do not have a sense that "the deck is stacked," to use one witness's expression.

I must also disagree with the Judiciary's opposition to review before the VLRB. The Judiciary's doubts about whether the VLRB has the necessary experience and expertise seem overly pessimistic. The VLRB already hears reclassification appeals from the Executive Branch, so it seems beyond question that these appeals are well within the VLRB's competence. In addition, "wages" are a mandatory subject of bargaining. In the event of an impasse on wages, of which classification is a subset, the impasse procedure would include a final and binding determination.

I have carefully reviewed the Judiciary's argument that the VLRB lacks jurisdiction to hear the classification grievances of employees of the Judiciary. In my opinion, that is far from clear. It is questionable whether *In re Grievance of McMahon*, 136 Vt. 512 (1978) applies to these parties. Article 15, the parties' negotiated reclassification system, has been part of successive

collective bargaining agreements for some time. It appears to be their only reclassification system. Unlike McMahon's grievance, a grievance arising under Article 15 would seem to meet the statutory definition of a grievance, 3 V.S.A. §1011(11), and fall within the VLRB's jurisdiction to "hear and make final determination on a grievance" of Judiciary employees, 3 V.S.A. § 1017.

Finally, the current procedure lacks transparency. Neither the reclassification committee nor its subpanel maintain or disclose any record of its investigation, nor is there any provision for VSEA or employee participation in that process. There is no provision for detailed, written decisions. It is therefore impossible for an employee to determine the basis for the conclusions of those bodies, or to mount an effective challenge.

Such an enigmatic procedure does not comport with elementary principles of due process. It also produces a purely practical problem: even under the very narrow "arbitrary and capricious" standard, the VLRB must have a record to review. I have therefore recommended modifications to the Union's proposal that will create such a record.

As the foregoing comment suggests, I cannot recommend the VSEA's proposal for *de novo* review by the VLRB. As the

Judiciary points out, that would go beyond what is currently available to Executive Branch employees. The CBA covering nonsupervisory employees of the Executive Branch expressly denies *de novo* review before the VLRB, and specifies instead the "arbitrary and capricious" standard. I am reluctant to recommend in factfinding a benefit that other groups of employees have not received at the bargaining table.

My recommended revisions to Article 15 is as follows:[5]

1. Classification Plan -

(a) ~~Classification Plan Scope:~~ This classification plan covers all positions in the bargaining unit. ~~Positions included in the classification plan are all covered employees~~.

(b) Definitions

i. ~~A c~~ Request for classification review~~:~~ ~~is defined as~~ a request for a review of a new or existing position to determine the proper class assignment.

ii. ~~A~~ Request for reconsideration~~:~~ ~~of classification determination is defined as~~ a request by the Judiciary, the VSEA, or the employee for the ~~classification committee as a whole~~ Court Administrator or his/her designee to review a Step 1 classification decision. ~~classification~~

5 Strike-throughs and underlines in black are the standard "delete" and "add" in the parties' final proposals. When the text, strike through, and underline appear in red, however, it represents the Factfinder's modification of the particular party's final proposal used to create the Factfinder's recommended language.

~~determination that resulted from a review performed under Section 1 hereof.~~

iii. ~~A c~~ Classification grievance~~:~~ ~~is defined as~~ an appeal of a Step 2 reconsideration decision ~~classification determination which has been reconsidered by the classification committee~~ to the Vermont Labor Relations Board ("VLRB).

* * *

(c) Classification Review Procedure

i. The classification methodology for the Judiciary will be based on the Willis Classification System. The Judiciary will maintain a classification plan for all ~~covered~~ employees in the bargaining unit based on the analysis of each ~~a~~ position's duties and responsibilities, as performed at a satisfactory level, as they relate to the factors of the Willis Classification System. The plan shall group positions that have common characteristics and assign them to a class. For each class, a title shall be assigned, a general description prepared and minimum qualifications established. All class descriptions shall be provided to the VSEA, and upon request to employees. A copy of the "Willis Guide to Classification" will be available on the Judiciary website.

ii. Request for Classification Review - Step 1

If a significant change occurs in a position or classification that alters its duties or responsibilities in a manner that justifies a change in classification based on the principles underlying the Judiciary classification plan, the Court Administrator, the VSEA or the affected employee may request in writing that a classification review of the position occur to ascertain if it is assigned to the proper class. The request shall be submitted to the Human Resources Manager, and shall

consist of a form containing the applicant's name and other identifying and contact information, accompanied by a written statement of the facts upon which the applicant's request is based, together with any documents supporting reclassification. The request shall be deemed filed on the date that it is received by the office of the Human Resources Manager.

~~On or after July 1, 2011,~~ ~~t~~The VSEA may submit a class action request for classification review on behalf of employees in the same class, filing one (1) request that applies to the entire class.~~; however, employees will be required to submit individual RFR forms for classification verification. If a request for class review is made,~~ ~~a~~ Any employee within the affected class may elect via written notification to the ~~Court Administrator~~ Human Resources Manager not to have the results of the class review applicable to him/her until after such employee's next step increase occurs.

~~The application shall be considered complete when the Human Resources Manager certifies that the record is complete. Notice that the record is complete shall be sent to the employee(s) or in the case of a class action request, the VSEA, within five (5) business days. A classification committee of Judicial Branch employees to be chaired by the Human Resources Manager shall be maintained to review requests for classification review. The classification committee shall consist of twelve members, nine of whom shall be appointed by the Judiciary and three of whom shall be Judicial Bargaining Unit members appointed by the VSEA. There shall also be two alternate members, one appointed by each of the parties hereto.~~

~~The VSEA appointed members shall serve three (3) year terms. The Human Resources~~

~~Manager shall preside over meetings of the committee relating to policy, training and procedures. The Human Resources Manager shall designate a panel of three committee members to conduct any requested classification review. For positions within the bargaining unit, one of such panel members shall be one of the three VSEA committee members. If requests for classification are pending, the panel shall meet on a bimonthly basis and review the classification material, make a site visit when necessary or appropriate, conduct interview(s) as appropriate and make a written determination within 15 business days of the date the panel review is completed. The Judiciary, the VSEA or the employee may appeal this determination by using procedures set forth in Section 2 hereof. If a request for classification review is made by a member of the Classification Committee, the Committee Chair shall conduct the review within 45 business days of receipt of the request and make a written determination within 15 business days of the review.~~

The Human Resources Manager or his/her designee shall conduct an analysis of the position or positions that are the subject of the request, based on the duties performed on the date the request was filed, gathering such information as it necessary to properly classify the position. The VSEA and/or the employee shall have the right to present documentary and other information to the Human Resources Manager, and shall have access to all information gathered by him/her, including participating in any site visit and the opportunity to hear any interviews or other oral statements, and shall be provided copies of any documents presented to or considered by the Human Resources Manager.

Within 120 calendar days of filing of the request, the Human Resources Manager shall

issue a written decision concerning the proper classification of the position(s), stating with specificity the facts and reasoning upon which the decision is based. The decision will be final on the thirtieth day following its receipt by the VSEA and the employee(s), unless the VSEA and/or the employee(s) file a request for reconsideration during that period.

2. Reconsideration of Classification Determination - Step 2

~~The full Committee shall meet on a bi monthly basis to determine reconsideration requests, if any such requests are pending. Such reconsideration shall occur at the first full Committee meeting following the request for reconsideration.~~

i. A request to reconsider a Step 1 decision shall be filed in writing with the Court Administrator within thirty ~~fifteen (15) business~~ days of the Step 1 decision ~~determination. or else shall be deemed withdrawn~~. ~~An electronic filing which is not accompanied by a paper filing meeting the requirements of this subsection shall not be considered as properly filed.~~ The request for reconsideration shall be deemed filed on the date that it is received in the Office of the Court Administrator.

ii. The request for reconsideration shall ~~minimally~~ include:

A. the name of the employee~~,~~/employees, ~~submitting the request or a notation that it is submitted by the Judiciary or the VSEA;~~

B. the class title, pay grade equivalent and work unit of the position under review;

C. a statement of the specific reasons that the ~~specific issues which require reconsideration with a detailed rationale why the~~ Step 1 decision was incorrect; ~~determination was not appropriate~~;

D. a copy of the Step 1 decision;

E. ~~the specific remedial action requested, including class to which reassignment is sought;~~ the remedial action requested, including the class or classes to which reassignment is sought;

F. appropriate signature and date.

iii. If the reconsideration request relates to a bargaining unit position and is made by the Judiciary or the employee, the Court Administrator shall promptly notify the VSEA of the request. The VSEA shall have the opportunity to represent the employee(s).

iv. The employee(s) shall promptly file a copy of the request for reconsideration with the Human Resources Manager. Within ten business days of receipt of the request, the Human Resources Manager or his/her designee shall forward to the Court Administrator all of the information, documents, and other evidence gathered or submitted during the Step 1 analysis of the position. ~~The request to reconsider a classification determination shall be sent to the Human Resources Manager at the Court Administrator's Office. If the reconsideration request relates to a bargaining unit position and is made by the Judiciary or the employee, the VSEA shall be promptly notified of the request and shall have the opportunity to represent the employee before the committee. Reconsideration requested by a member of the Classification Committee covered by this Agreement for his/her position shall be conducted by an individual appointed by the Chief Justice from outside the Judiciary on the basis of a recommendation made by the Court Administrator and the VSEA.~~

v. Within sixty days of a request for reconsideration, the ~~Human Resources Manager~~ Court Administrator or his/her designee shall issue a written decision on the request for reconsideration. The decision shall be in writing, and shall state with specificity the facts and reasons upon which it is based. The Court Administrator shall send the decision to the employee(s) and to the VSEA.

At the option of any party to the dispute, the Court Administrator or his/her designee may meet with the VSEA and/or the employee before issuing the decision. ~~schedule such request at the next regularly scheduled meeting of the classification committee. A non-management member outside of the Judicial Bargaining Unit shall not be authorized to vote should a vote be taken to resolve the reconsideration request made by or on behalf of an employee covered by this Agreement, nor shall the Judicial Bargaining Unit members be authorized to vote concerning any employee not covered by this Agreement.~~

~~However, all members of the classification committee shall be qualified to participate in the review and any discussion related thereto. A majority of the classification committee shall constitute a quorum and the Human Resources Manager shall act as chair except in the instance where the Human Resources Manager participated on the initial classification panel. In that instance, the committee will select a member who was not involved in the initial review as acting chair~~

~~The Judiciary, the VSEA or the employee shall be allowed to make a presentation of the issues to the committee or, in the alternative, may rely on the written submission. The committee may require further information from the parties and may interview other personnel to obtain or~~

~~confirm relevant information. If any of the parties wish to rely upon information which was not considered by the panel, all other parties will be provided such information at least forty eight hours in advance of the classification committee meeting.~~

~~The committee shall review the classification report in light of the original and supplemental information presented and attempt to reach a consensus on an appropriate classification determination. If a consensus cannot be reached, the matter shall be resolved by a vote of the committee, and a majority vote of those present, authorized to vote and voting shall constitute the committee's determination.~~ ~~The committee shall maintain a file of all materials and documents relating to this RFR and the committee proceedings, constituting the record of the case.~~ ~~The committee shall reach a determination and notify the Court Administrator, the employee and the VSEA of the committee's determination within ten (10) business days of the classification committee meeting. The committee and the parties may agree to extend any of the time frames set forth in this subsection. Any meetings shall be scheduled during working hours if possible. Any changes in the classification determination shall be deemed to be effective upon the same date of the original classification determination.~~

3. Classification Grievance Procedure - Step 3

i. Within thirty (30) ~~thirteen (13)~~ business days of the notification of the reconsideration determination, the Judiciary, or the VSEA or the employee may file a classification grievance with the Vermont Labor Relations Board ("VLRB"), using the VLRB's rules and procedures that apply to grievances within the Judiciary. ~~The grievance shall be filed in writing and shall include: all materials submitted during the reconsideration~~

~~phase-plus:~~ In addition, the grievance shall include:

A. a written statement of the reasons that ~~description of the issues with rationale why~~ the decision(s) below were ~~reconsideration determination is~~ arbitrary and capricious ~~clearly erroneous~~;

B. The entire record of the proceedings below, including the decisions at Step 1 and Step 2 and all documents and other information presented to the decision maker(s) below.

~~B. the specific remedial action requested, including the class to which reassignment is sought;~~

~~C. the name of a representative, appointed by VSEA, or an employee of VSEA, where the matter involves a covered employee.~~

~~D. appropriate signature and date.~~

ii. The VLRB shall decide the grievance based on the record of the proceedings below, and determine whether the reclassification decision was arbitrary and capricious. There shall be no hearing de novo.

iii. The parties agree to offer a training for members of the VLRB on the Willis system, to be provided by an expert selected by agreement of the parties, and whose fee, if any, shall be paid equally by both the VSEA and the Judiciary.

~~E. the grievance shall include a completed job description and any supporting written information, arguments or documentation.~~

~~F. all other information which the party filing the grievance believes the Step 3 Panel should review in connection with the grievance. Evidence and/or testimony which is not pre filed as required by subsections A-F hereof shall be excluded from consideration.~~

ii. Procedure

A. The grievance shall be filed with the Deputy State Court Administrator and General Counsel acting in the capacity as secretary of the Step 3 Judicial Branch Classification Grievance Panel. The Deputy State Court Administrator and General Counsel shall notify the parties of the grievance and of the date set for the Step 3 Panel's consideration thereof. Upon receiving a classification grievance the secretary shall notify the Chief Justice.

B. The Step 3 Panel shall be formed within fifteen (15) days from such submission of names. No person shall be appointed a member of the Panel who will personally benefit from the outcome of the grievance. The chairperson shall not be actively connected with the parties or the grievance. The chair shall be a person knowledgeable in classification procedure and labor relations. The chair shall be compensated for time and necessary expenses at rates established and approved by the Chief Justice.

C. The Step 3 Classification Grievance Panel shall thoroughly review the grievance and meet to hear the grievance within thirty (30) business days from the date a chairperson was appointed.

The procedure for the hearing shall be established by the Step 3 Panel's chairperson.

It shall involve a review of the record of the committee's work and determination, consideration of the arguments of the parties and of any newly discovered evidence which was not reasonably available for presentation to the committee in the judgment of the Step 3 Panel. The Step 3 Panel shall issue a decision to the parties within (20) business days of the date of the hearing. The parties and the Step 3 Panel may agree to extend these time limits prior to their expiration where circumstances warrant. The committee's determination shall be affirmed unless the Step 3 Panel finds that such

~~determination was clearly erroneous. If the committee is found to have been clearly erroneous, the matter shall be remanded to the committee for reconsideration with appropriate instructions unless there is a unanimous decision by the Step 3 Panel as to the appropriate outcome, which shall in such cases be final and binding. A grievance that is remanded to the committee shall be heard within the timeframes established under (b)ii above. Otherwise, the Step 3 Panel's decision shall be by majority vote.~~

~~D. The Step 3 Panel shall base its decision upon the criteria set forth in "Willis Guide to Classification" as it was applied by the classification committee. The burden shall be on the appellant to establish that the classification decision was clearly erroneous.~~

(d) Pay Adjustments

In the event that the employee(s) is reclassified to a higher classification, the new rate of pay will be retroactive to the next pay period following the date the reclassification request was filed. ~~All reassignments are effective at the beginning of the next pay period following the date of the original classification request submission to the CAO Human Resources Division.~~ Notwithstanding any other provisions of this Agreement, any such pay adjustment shall be implemented only upon funding by the Legislature.

(e) Rights and Restrictions

i. The employee has the right to the assistance of the VSEA or private counsel of his/her choosing to prepare the classification ~~written~~ grievance and to represent the employee at the employee's expense before the VLRB. ~~in the grievance proceedings. The parties must notify each other in advance of any meeting in which a party intends to have a representative present.~~ In those cases where the VSEA is not representing the employee, the VSEA

shall have the ~~reserves~~ the right to participate in all proceedings under this article, ~~of the classification panel, grievance committee and grievance Panel~~ the grievance proceedings, and shall have access to all records and documents relating to the request for reclassification or subsequent ~~committee~~ proceedings.

ii. The employee may present information relevant to the reclassification request or request for reconsideration ~~the grievance~~ on work time. ~~If schedules do not permit the presentment to occur within the time constraints, a waiver of the time constraints should be obtained from the Panel. The grievant and all other participants shall be granted release time for the purpose of presenting the grievance.~~

~~iii. If the Panel decides to receive newly discovered evidence, witnesses may be called by the parties.~~ Other Judicial Branch employees who are asked to present information in connection with the reclassification request may do so ~~called as witnesses grievance hearings~~ during work time.

~~iii. Any material, document, note, or other tangible item which is to be entered or used by any party in any grievance proceeding held in accordance with this section is to be provided to the other party at least forty eight hours prior to the proceeding at no cost.~~

iii. All time periods under this Article may be extended by agreement of the parties.

~~3. Classification Plan/Procedures Information and Training~~

~~The Judiciary shall disseminate to all work sites written materials that describe the classification criteria and procedures. Additionally the Judiciary shall, on at least an annual basis, offer in service educational programs at various regional work sites which covered employees may attend concerning such criteria and procedures, with emphasis upon how to present a classification request most effectively.~~

~~4. Classification Procedures Applicable to New Judiciary Positions~~

~~The classification process outlined above shall be applicable to all current and any new Judiciary positions covered by this Agreement.~~

Issue 2: Memorandum of Agreement

The parties agree that they should jointly retain an outside consultant to evaluate the classifications that cover most of the employees in the unit, using the Willis system. Beyond that, they part company.

One problem with both proposals is that they lack finality. They envision a purely advisory process, which the parties can accept or reject. The VSEA's proposal, in particular, would not only keep its pending reclassification request and grievance alive, but would re-open the CBA if the consultant did not reach the Union's preferred result.

Unless the consultant is going to finally settle this longstanding and divisive issue, I see no the point in going through the time, effort, and expense involved. The evidence reveals that the parties already retained one consultant to undertake a "classification study" in 2008,

which produced no concrete results.[6] There is no point in repeating that fruitless exercise. If the parties go the consultant route, I strongly recommend that the consultant's decision be final and binding.

The balance of my recommendation is based primarily on the Judiciary's proposal. In particular, the Judiciary's suggestion to merge the analysis of the Court Officer and Security & Screening Officer classes into the MOA is sensible, and I have adopted it.

I have not adopted the Judiciary's proposal to unilaterally select and pay the consultant in the event the parties cannot agree on a candidate. Neutrality is the key to both the legitimacy of this procedure and its acceptability to employees. The parties were able to jointly select a consultant in 2008 so I am confident they will do the same here. However, I do recommend an increase in the proposed compensation for the consultant on the two projects from $20,000 and $5000 to $30,000, which in my view is more realistic, and will give the parties a wider choice.

I also recommend eliminating the Judiciary's proposal restricting the consultant to three options respecting the

[6] The question addressed in that study was "whether there is an appropriate classification correlation between Judicial Branch classes and equivalent classes in the Executive Branch."

Court Officers: not upgrading them, upgrading them to Grade 17, or merging them with the Security & Screening Officers into a single position at Grade 17.

The VSEA argues that the Docket Clerks' low pay is gender-based. Whether or not that is true, the proposal tends to exacerbate that perception by guaranteeing the Court Officers, who are all or mostly men, a two-grade upgrade, if they get an upgrade at all. There is no such guarantee for the Docket Clerks.

Finally, I have included the Docket Clerk A and C and Court Officer A classes in the MOA. Even though there may currently be no employees occupying those classes, their inclusion will give the consultant more flexibility in crafting his or her decision.

My recommended language for the MOA is:

MEMORANDUM OF AGREEMENT
DOCKET CLERKS A, B & C; COURT OFFICERS A & B;
COURTROOM OPERATORS; AND
COURT SECURITY & SCREENING OFFICERS

The parties agree to undertake a one-time review of the Docket Clerk A, B, and C; Courtroom Operator; Court Officer A and B; and Court Security & Screening Officer classes under the following parameters:

1. Following the ratification and execution of the parties' collective bargaining agreement effective July 1, 2016, the Judiciary and the VSEA will jointly select a Consultant who is experienced in labor relations and qualified to conduct a classification review using the Willis

classification system. If the parties agree on a Consultant, they shall share equally in the cost of the Consultant, up to $15,000 each.

2. The Consultant shall analyze the classes listed above, using the Willis system standards, based on the duties performed as of the date the analysis begins.

   The Judiciary, the VSEA, and the affected employee(s) shall promptly provide such information as the Consultant requests, and shall have the right to present documentary and other information to the Consultant. The Judiciary, the VSEA, and the employees shall have access to all information obtained by or presented to the Consultant, including participating in any site visit and the opportunity to hear any interviews or other oral statements.

   The Consultant shall issue a written report and decision concerning the proper classification and pay grade of Docket Clerk A, B, and C; Courtroom Operator; and Court Officer A and B, setting forth the facts and reasoning that are the basis of his decision. Included in the report and decision will be whether the Court Officer A and B classes should be merged with the Court Security & Screening Officer position to form a single position.

   The Consultant shall issue the report and decision in time for the parties to present a request for funding to the Legislature during the FY18 budget process.

   The Consultant's decision will be final and binding on the parties.

3. Any reclassification resulting from the Consultant's decision shall be effectuated in accordance with Article 16(2)(d), "Reassignment of Pay Grades Due to Classification Review," except that the effective date of any upgrades shall be the date of execution of the collective bargaining agreement effective July 1, 2016.

4. During the Legislative session following the date of the Consultant's report and decision, the Judiciary shall request from the Legislature the funding necessary to implement the decision.

5. The Judiciary shall have no obligation to pay any increases until the date the Judiciary actually receives the additional funding from the Legislature for the requested increases. In the event the Judiciary only receives partial Legislative funding, the Judiciary shall only be obliged to pay the corresponding proportion of the increases for that fiscal year.

6. Pending the funding and implementation of any increases as a result of the Consultant's decision, the VSEA's request for reclassification of certain Docket Clerks filed on February 8, 2016, and any associated grievance(s) shall be held in abeyance. Upon the funding and implementation of the increases, the VSEA shall withdraw the request and grievance(s) with prejudice, and neither the VSEA nor any employee in the affected positions shall file any reclassification request until July 1, 2018.

7. Once all the commitments under this Memorandum of Agreement have been fulfilled, it shall be removed from the parties' collective bargaining agreement.

Issue 3: Temporary Assignment

David Wortheim, a Court Officer B in Chittenden County, described the job of court officer as "basically a facilitator." The Court Officer prepares the courtroom for the judge, brings in counsel and witnesses, transports records to the judge's chambers, and controls the security and order of the courtroom during the proceedings.

Wortheim was also a Security & Screening Officer for two years. He testified that these Officers are the courthouse's "first line of defense." They screen or scan people and their possessions at the entrance doors, and take control of dangerous or disorderly individuals.

Like Docket Clerk Bs, Court Officer Bs are at Grade 15. Wortheim testified that he cannot take care of his family on those wages, even with the addition of a small monthly severance or retirement payment from a former private employer. A year and a half ago, Wortheim had to visit a food pantry. Since then, he has taken a second job, working sixteen to twenty additional hours per week.

Screening & Security Officers are at Grade 17, with an hourly rate ranging from $15.58 to $24.11. According to John McGlynn, Human Resources Manager, Court Officers are typically assigned to the higher classification for periods exceeding eleven days four or five times per year.

The Judiciary proposed that the VSEA withdraw its temporary assignment proposal in exchange for including the Court Officers in the MOA. If the consultant decides to upgrade or merge the Court Officers, Article 16(2)(i) may become moot. But unless and until that happens, Article 16(2)(i) will continue to provide a significant source of extra income for Court Officers.

To increase that income slightly, **I recommend the Union's proposal to decrease the waiting period from eleven days to five.** One of the grounds of the Judiciary's opposition was the administrative inconvenience of effectuating the temporarily increased rate. McGlynn testified that the statewide payroll system does not automatically accommodate two different rates for the same employee, so it is necessary to hand-calculate the amount owing and manually enter it into the system as a one-time transaction. With a shorter waiting period, it may be necessary to do this more often, but frankly the slight increase in administrative inconvenience does not seem that burdensome.

I am not convinced of the necessity for the Union's proposal that Court Officers "shall be entitled to higher assignment pay…for every hour worked in the higher classification." If the intent is to avoid the five-day waiting period, there is no reason for that benefit to accrue only to Court Officers. If it is only to ensure payment for every hour after the five-day waiting period, which the CBA already provides, it is equally unclear why only Court Officers should receive that extra layer of assurance.

ISSUE 4: UNION LEAVE

ARTICLE 3
VSEA Rights

JUDICIARY PROPOSAL:

* * *

8. VSEA Business: subject to the efficient conduct of Judiciary business, which shall prevail in any instance of conflict, permission for reasonable time off during normal working hours without loss of pay and without charge to accrued benefits shall not be unreasonably withheld in the following instances to:

(a) Members of the VSEA Board of Trustees to attend 12 regular Trustee meetings and up to two special Trustee meetings a year.

(b) Up to eight (8) ~~M~~members of the Legislative Council for attendance at any of the four regular ~~c~~Council meetings per year. The Judiciary may grant permission for attendance at not more than one additional special meeting.

(c) Officers/Delegates, up to a maximum of one for every fifty bargaining unit employees shall be allowed reasonable time off, not to exceed the limits established [in] (h) below ~~in any calendar year~~ to attend national or regional meetings of the VSEA national affiliate.

(d) Unit Chairperson or Chapter Officer, up to a total of four (4) judiciary employees statewide, up to 40 hours per year, subject to the operating needs of the Judiciary for conduct of unit Labor Relations/Contract Administration business.

(e) Members of VSEA standing committees will be permitted to attend ten (10) meetings per year. The maximum number of Standing Committees that Judiciary employees may serve on shall be three (3) and no more than one (1) Judiciary employee may serve on any one of the three (3) standing committees.

(f) Up to five (5) Unit executive committee members will be given time off to attend five meetings

per year.

(g) Up to ten (10) stewards for the processing and handling of complaints and grievances…up to 40 hours per steward per year shall be considered a reasonable time…and may be extended by mutual agreement in any instance. In addition, during the July 1, 2014 – June 30, 2016 contract years, stewards shall be entitled to an additional 24 hours per year of release time for training purposes.

(h) Any of the above listed categories and chapter officers for the purpose of attending training sessions approved in advance by the Judiciary. Approval shall not be unreasonably withheld. However, no employee will be permitted more than a total of 136 hours, 210 for Unit Chairpersons, of time off in any fiscal year under section 8, subsections a-6 above.

(i) Up to five (5) ~~M~~members of Labor Management Committee~~s~~ for meetings scheduled by the Judiciary and the VSEA.

(j) Up to seven (7) ~~M~~members of the bargaining team on any day when time off under this section is granted in their capacity as a member of the team. Consistent with past practice, members of the bargaining team will be granted up to one (1) day of training, up to two (2) days for meeting to prepare for bargaining prior to its start. In addition, members of the bargaining team will have time off under this section for a reasonable number of days to attend bargaining sessions scheduled with management and to prepare for such sessions. Release time to prepare for bargaining shall not occur prior to the October 1st prior to the expirations of the contract. Except in the instance of conflicting Judiciary business, the Judiciary shall make a reasonable effort to assist employees who are scheduled for bargaining meetings with the Judiciary, by accommodating a request by the employee to readjust his/her schedule in order to preserve days off. Normally, the rescheduling will take place within the same pay period, with no guarantee of back-to-back days

> unless by mutual agreement of the employee and supervisor. VSEA reserves the right to cancel the meeting when the absence of three (3) or more ~~of a~~ bargaining team members results from inability to reschedule. VSEA agrees to hold the Judiciary harmless from VSEA grievances relating to any complaint(s) due to rescheduling of a team member.
>
> In any such instances, under this Section, such employees shall coordinate their absences from work to minimize the adverse impact on the efficient conduct of Judiciary business and in all cases must secure advance permission from appropriate supervisors and permission may be denied to more than one VSEA Officer to be absent from the same work site at any one time if such multiple absences will have an adverse impact on the efficient conduct of Judiciary business. The employee shall also give the Judiciary as much prior notice of any such meetings as possible, including concurrent written notice to the appropriate manager when VSEA sends a notice of meetings to its own representatives. …

JUDICIARY'S POSITION: Article 3, §8 grants paid release time for nine types of Union business. Currently, only §8(c)(officers/delegates) and §8(g)(stewards) limit the number of employees entitled to release time.

McGlynn testified that he receives more complaints from managers about Union release time than any other subject:

> …[T]hey'll have employees asking for release time and they can't quite figure out which activity it is or how often the person's allowed to attend or are they part of a committee or not, so we're trying to come up with a more predictable process that allows managers to properly give people release time. … [W]hen managers have people not working, they're liable for doing it correctly, and they're just not getting enough information or it's not specific enough.

> …[T]he contract already had some of these nine categories where it spelled out the number of VSEA members who could be on a committee, the number of days they could take, and the amount of training. We wanted to do that for all nine categories and make this consistent, and we attempted to match the numbers we put in here…with what we thought was the current level of VSEA members. We attempted to meet what was the current practice….[7]

Regarding cancellation of bargaining sessions, it is unreasonable and inefficient to allow bargaining to be cancelled if even one of the seven members of the VSEA's bargaining team cannot be present.

VSEA POSITION: The Judiciary produced no evidence that employees have abused any type of Union leave, or that the leaves have hindered the operation of the Judiciary in any way. To the extent the proposal would dictate the membership of internal VSEA committees, it interferes with the Union's and employees' right to self-governance.

The Employer's proposals concerning the bargaining team would create a burden affecting only the Union. There are no limits on paid time for management to prepare for bargaining, or on the Judiciary's choice to cancel a bargaining session. The rules governing bargaining should be symmetrical. The Judiciary seeks to compel bargaining even where the representative of a critical Union subgroup

[7] The proposed deletion of the words "any calendar year" is to conform to §8(h), which measures hours in fiscal years.

is unable to attend. The Judiciary already has some control over the composition of the Union's team at any given bargaining session, because it can refuse leave for bargaining where the "efficient conduct of Judiciary business" so requires.

Delegates to the VSEA Council are elected by geographical district and by bargaining unit. Members of the Judiciary unit have been elected in both capacities, leading to a slight increase in employees entitled to leave. The unit benefits from having a stronger voice in the VSEA, as does the Judiciary, since their interests are often congruent. There is no evidence that this slight increase has caused any actual problem. VSEA has no national affiliate, so is indifferent to this proposal.

The proposals regarding chapter officers, standing committees, and the Executive Committee are intrusions into the VSEA's internal governance. Unit Chair Margaret Crowley has never assigned more than one employee to any standing committee. Both the unit and the Judiciary benefit from having a strong voice within the statewide organization. Crowley, who is also chair of the VSEA's Legislative Committee, has coordinated legislative work in support of joint priorities with Court Administrator Patricia Gabel.

Unless management representatives are subject to the same restrictions, Union representatives should continue to attend labor-management committee meetings on paid time. Any limitation is counterproductive and contrary to the purpose of the committees.

The proposed limit on bargaining team preparation is consistent with past practice, but future CBAs may present difficult issues that require more preparation time. There is no reason to limit the Union's paid preparation time, unless management is subject to the same limitation. The Employer cannot dictate when the VSEA begins preparing for bargaining.

DECISION ON ISSUE 4: UNION LEAVE

The Judiciary's proposal is generally reasonable and I recommend it, with some modifications. Although the current language mirrors the provision in the Executive Branch CBAs, this is a much smaller bargaining unit with very high customer-service needs, so it is appropriate to reduce the number of employees who are entitled to Union leave at any given time. Moreover, it is undisputed that the proposal is consistent with past practice, and not a decrease in the actual Union leave usage.

Also, on the one hand it is simply not a given that bargaining must be conducted on paid time. On the other

hand, the fact that it is convenient for both parties to do so during the work day does not imply that management should be able to control the details of when the Union thinks it is best to cancel a bargaining meeting. The general obligation to meet and bargain in good faith is an overwhelmingly successful guide to actual bargaining.

In sum, **I recommend the following modifications**:

- Subparagraph (e), delete the proposed second sentence, beginning "The maximum number…". I agree with the VSEA that this encroaches too far into internal Union governance.
- Subparagraph (j), delete the third sentence, beginning "Release time to prepare…." The scheduling of preparation for negotiations is primarily an internal Union matter.
- Subparagraph (j), delete the three-person requirement in the Judiciary's proposed second to last sentence, beginning "VSEA reserves the right…". It is overly restrictive.

ISSUE 5: RETROACTIVITY

ARTICLE 16
Compensation/Benefits

The parties have agreed to across-the-board ("ATB") increases of 2% the first year and 2.25% effective 7/1/17.

JUDICIARY POSITION:

ATB for FY17 will be paid as of the first payroll period after July 1, 2016, provided the parties reach a settlement before they are obligated by the statute to submit their last best offers to the VLRB.

Any other monetary items will take effect prospectively only.

Parties agree that any payments resulting from modifications to Article 16 or Article 17 will be prospective only.

No payments under the CBA until the parties have executed it.

The Judiciary's proposal regarding the retroactivity of the ATB responds to the unanticipated extreme delay in settling this CBA. It will encourage the parties to reach a settlement sooner rather than later. All other financial items should be prospective. Retroactive payment of those items would be an administrative nightmare.

In 2014, the Judiciary began paying the ATB after ratification, only to be told by the VSEA that certain items required further bargaining. To avoid a recurrence, the Judiciary proposes payment upon execution.

VSEA'S POSITION:

ATB to be fully retroactive to the effective date of the CBA, with no conditions, and paid upon ratification.

The dispute over the retroactivity of the ATB is not trivial. The legislature has already funded these raises, and they should be paid upon ratification of the CBA,

retroactively to July 1, 2016. If they are not retroactive, the Judiciary will reap a windfall at the employees' expense, and the VSEA will be penalized for resorting to lawful impasse procedures.

DECISION ON ISSUE 5: RETROACTIVITY

For the most part, the Judiciary's proposal is not recommended. Economic items, and in particular ATB increases, are ordinarily retroactive to the effective date of the CBA. The Judiciary's argument that this case warrants an exception is not convincing. The "incentive" that the Judiciary advocates would work only against the Union. In fact, it would create a corresponding *disincentive* for the Employer to settle, since the longer it delayed, the more money it would save.

The Judiciary's proposal for payment upon execution of the CBA, rather than upon ratification, is reasonable, and I recommend it.

ISSUE 6: RFA Pay

ARTICLE 17
Overtime and Call-In Pay

VSEA PROPOSAL

1(b)(iii) After Hours RFA Stipend or rate of Standby Pay

Unless and until the Standby Pay provision set forth below is funded by the Legislature, a ~~A~~ fifty-five dollar ($55) ~~$45~~ per pay period stipend shall be paid

to any bargaining unit employee who is solely responsible for responding to requests for after-hours RFA assistance, providing that the following criteria are met:

(1) the employee was solely responsible to respond for at least 48 hours of coverage during the pay period and received no call-in pay compensation; or

(2) the employee was solely responsible to respond for at least 96 hours of coverage during the pay period and received no more than 1 (one) call-in pay compensation;

(3) In all cases the jurisdiction for stipend eligibility is 1 (one) bargaining unit employee per county, except by permission of the Court Administrator.

The parties agree to convert the RFA Stipend to a Standby Pay provision effective July 1, 2017, but only if the Legislature approves funding for this provision. The parties agree to cooperate to secure such funding. Once this provision becomes effective, one dollar ($1.00) per each hour of duty of Standby Pay shall be paid to any bargaining unit employee who is solely responsible responding to requests for after-hours RFA assistance. Standby Pay shall not be accrued concurrently with either the one (1) hour pay earned by handling an RFA call, nor the four (4) hours of pay earned through being called out to deal with a domestic abuse matter.

(iv) Call-In Pay

When a full-time employee eligible for overtime is called in and required to work at any time other than the normally scheduled shift, the employee shall receive compensation at overtime rates for all hours worked. Any eligible employee called in under this section shall receive a minimum of four (4) hours of overtime compensation. …

(v) Call-In Pay, Domestic Abuse

An individual may volunteer to be subject to call and call-in for domestic abuse matters. Such individuals will be eligible for the after hours RFA stipend as outlined about. … Once an employee has volunteered for such list, however, the employee may not remove himself/herself from such list without thirty (30) days advance written notice to the appropriate court manager. When such a full time employee eligible for overtime is called outside the hours of his/her normal shift to consider a domestic abuse matter, such employee shall receive a minimum of one hour's pay for handling the call and a minimum of four hours' pay if actually called out to deal with the domestic abuse matter, inclusive of the call. … Each Court Manager shall establish a system in consultation with the impacted employees that is as equitable as possible in terms of distribution of on call assignments for domestic abuse matters. …

JUDICIARY PROPOSAL

1(b)(iii) After Hours RFA Stipend

A ~~$45~~ $75 per pay period stipend shall be paid to any bargaining unit employee who is solely responsible for responding to requests for after hours RFA assistance, providing that the following criteria are met:

(1) employee was solely responsible to respond for at least ~~48~~ 75 hours of coverage during the pay period and received no call-in pay compensation; ~~or~~

~~(2) the employee was solely responsible to respond for at least 96 hours of coverage during the pay period and received no more than 1 (one) call-in pay compensation;~~

~~(3)~~(2) In all cases the jurisdiction for stipend eligibility is 1 (the one) bargaining unit employee per county, except by permission of the Court Administrator.

(iv) Call-In Pay

When a full-time employee eligible for overtime is called in and required to work at any time other than

> the normally scheduled shift, the employee shall receive compensation at overtime rates for all hours worked. Any eligible employee called in under this section shall receive a minimum of four (4) hours of overtime compensation. …
>
> **(v) Call-In Pay, Domestic Abuse**
>
> An individual may volunteer to be subject to call and call-in for domestic abuse matters. Such individuals will be eligible for the after hours RFA stipend as outlined about. … Once an employee has volunteered for such list, however, the employee may not remove himself/herself from such list without thirty (30) days advance written notice to the appropriate court manager. When such a full time employee eligible for overtime is called outside the hours of his/her normal shift to consider a domestic abuse matter, such employee shall receive a minimum of one hour's pay for handling the call and a minimum of four hours' pay if actually called out to deal with the domestic abuse matter, inclusive of the call. … Each Court Manager shall establish a system in consultation with the impacted employees that is as equitable as possible in terms of distribution of on call assignments for domestic abuse matters. …

VSEA'S POSITION. The Relief From Abuse ("RFA") program operates 365 days per year, whenever the courts are closed. About one-fifth of the bargaining unit volunteers to be on a standby list, making themselves available after hours to assist persons seeking RFA orders. Currently, employees receive $45 per pay period, plus one hour of overtime pay (time and a half) for each phone call taken, and a minimum of four hours of overtime pay if called back to court.

The VSEA proposes a modest increase in the stipend in the first year, transitioning to a $1/hr. standby payment. Regardless of whether employees receive calls, RFA duty imposes significant restrictions. Employees cannot go to movies, drink, or travel beyond the area that permits them to respond promptly if called out. Under the Executive Branch CBAs, employees under similar restrictions, such as snowplow drivers and state police troopers, receive standby pay. The Judiciary attempted to differentiate the VSEA unit members by pointing out that their duty is voluntary, but the restrictions on employees' personal lives are exactly the same. Furthermore, employees on the RFA list can only opt out with 30 days' notice, so in a sense they are less "voluntary" than employees who can refuse assignments.

JUDICIARY'S POSITION. The current RFA provision costs approximately $90,000 in overtime and $8,000 in stipends annually. The VSEA's proposal would cause that cost to nearly double to $178,000 (not including the proposed $10 increase in the stipend), to benefit only 20% of the bargaining unit. This is not financially viable for the Judiciary, and the Judiciary opposes seeking additional funding from the legislature, especially for a program that benefits only 20% of the bargaining unit.

Voluntarily making oneself available to respond to calls, if any, is not "work" in its ordinary sense. Employees can do most normal activities while on call.

The Executive Branch CBAs categorize employees who must be available after hours are categorized as "on-call," "stand-by," or "available," in order of decreasing likelihood that they will be activated. On-call employees receive their hourly rate for every hour in that status. Employees on stand-by receive 1/5 of their hourly rate for each hour. Employees on available status are paid only for every phone call they take, or for call-outs. Judiciary employees who volunteer for RFA are analogous to those on available status.

The Judiciary's proposal simplifies the process and responds to employees' complaints about the inequity of the current stipend, which is the same amount whether the employee's shift is 48 hours or some higher number. For employees who are available for 75 hours in a pay period, who receive no more than one call-in, the stipend will be $75. Many employees, such as those in Chittenden County, can control the number of hours of RFA duty because they choose their shifts; those who sign up for fewer than 75 hours will accept the risk of receiving no compensation if they receive no calls.

DECISION ON ISSUE 6: RFA PAY

I recommend an increase in the stipend to $55.00 per pay period, but no other change.

The Judiciary's analogy between RFA duty and "available" status under the CBA covering non-management employees of the Executive Branch is imperfect. Article 27(3) of that CBA provides that employees on "available" status "shall not be restricted in his/her movements within any geographic radius of his/her workplace." That is not true of Docket Clerks on RFA duty, who must be able to show up at the courthouse at any moment, in an appropriate condition to assist the judge. The stipend should reflect that restriction. On the other hand, the VSEA's proposed hour-for-hour compensation is not warranted at this time.

The Judiciary's proposal to impose "the risk of receiving no compensation" on employees who sign up for fewer than 75 hours of RFA duty seems punitive, and is not recommended.

ISSUE 7: SICK LEAVE BANK

ARTICLE 23
Sick Leave

JUDICIARY PROPOSAL:

1. Sick Leave

* * *

(c) Sick Leave Banks

(i) An employee who is unable to perform his or her duties because of an extended, non-job-related illness or injury of more than ten (10) work days duration, and who has exhausted all accrued sick leave may apply to use the sick leave bank as established below. ~~be allowed to borrow up to ten (10) days of future sick leave accrual, with the approval of the Court Administrator or designee. Employees who borrow sick leave shall not accrue additional sick leave shall not accrue additional sick leave until the negative leave balance has been eliminated. Use of other types of accrued leave shall not be unreasonably denied if an employee with a negative sick leave balance is subsequently unable to perform his or her duties because of illness or injury. Any loan unpaid at time of termination of employment will be deducted from the employee's final two (2) paychecks.~~ Factors considered when reviewing a request for leave time, including but not limited to: years of service, other leave balances, rate of leave accrual and past leave usage.

* * *

(E) Criteria for Applying to the LTD Bank

A long-term disability is defined as a physical or mental condition causing the employee to be unable to perform his or her duties, and resulting in his or her absence from work for more than 30 continuous calendar days. The applicant must have previously exhausted all of his or her sick leave or anticipate exhausting his or her remaining balance during the absence. ~~The applicant must also have previously borrowed the authorized ten (10) days of future sick leave accrual before becoming eligible to access the Long Term Disability Sick Leave Bank.~~

JUDICIARY'S POSITION: The requirement that employees borrow ten days of sick leave before accessing the sick leave bank is an administrative burden. The employee asks permission to borrow from her supervisor, who conveys the request to HR, which determines whether it is reasonable and approves or disapproves it. The approval is sent to the HR office of the Executive Branch, which overrides the system to allow the employee to "go negative."

The proposal mirrors the sick bank provisions of the Executive Branch CBAs, and has no detrimental effect on employees. It would not change the accrual capacity or employee usage of the sick leave bank. If the bank balance is low, employees may replenish the sick leave bank at any time.

VSEA'S POSITION: Compared to the thousands of employees in the Executive Branch, the 200 employees in this unit are a small pool for a sick bank. This unusual borrowing provision has worked well to ensure that sick employees do not go without pay. There is no evidence that any employee has abused borrowed sick leave or failed to repay it.

DECISION ON ISSUE 7: SICK LEAVE BANK

I do not recommend this proposal. It is true that the Judiciary's proposal would not change the accrual *capacity*

of the sick leave bank. But it would certainly affect the *rate* of accrual, by shifting ten days of an employee's absence from the employee's sick leave to the bank. That would reduce the available cushion for everyone in this relatively small unit.

There is no evidence that any employee has abused the sick leave bank, or failed to repay borrowed sick leave. The administrative inconvenience of borrowing the time does not seem that great, particularly since the State performs most of the Judiciary's payroll function.

ISSUE 8: PROCEDURE FOR NEGOTIATING SUCCESSOR

ARTICLE 31
Duration and Procedure for Negotiating Successor Agreement

The parties have agreed to a two-year CBA ending on June 30, 2018.

JUDICIARY PROPOSAL

> The duration of this Agreement shall be from July 1, ~~2014~~ 2016 to midnight June 30, ~~2016~~ 2018. The parties agree to meet not earlier ~~later than February 1, 2016~~ January 8, 2018 to commence negotiations concerning the successor agreement to commence July 1, ~~2016~~ 2018.

JUDICIARY'S POSITION: Vermont has a two-phase budget procedure. The various agencies submit "base budget" requests, covering operational costs, toward the end of the calendar year, and the Governor submits a proposed overall

budget to the legislature in January. The Governor's budget includes a "placeholder" for negotiated increases. The actual negotiated increases are submitted later, via the Pay Act, and are reviewed by a different legislative committee (Government Operations, rather than Appropriations) and appropriated separately.

Bargaining earlier than January 8 would be unproductive, because until then there are significant uncertainties concerning key pieces of the Judiciary's base budget, which are not resolved until December. The Judiciary would be forced to take an extremely conservative bargaining position, and would be reluctant to agree to any proposal. Nothing in *VSEA v. Judiciary Department,* 15 VLRB 253 (2015), supports the Union's assertion that the parties must complete bargaining by January, when the Governor submits the budget.

Since the "placeholder" is hypothetical and not binding, starting bargaining in January in no way prevents the parties from obtaining sufficient appropriations via the Pay Act during the legislative session. If bargaining proceeds efficiently in January, February and March, the

Judiciary could submit its Pay Act request in accordance with the required timing of that act.[8]

VSEA'S POSITION: *Except* for this bargaining unit, *every* constituency within the Judiciary is able to identify its needs and request funding before the court sets its priorities in December. By insisting on beginning negotiations in January or February of the contract expiration year, the Judiciary obstructs any economic gains beyond the amount the Judiciary has already earmarked for ATB increases under the Pay Act, claiming that it has no money beyond the "placeholder." By starting negotiations in February or March, the Judiciary ensures that by the time it submits the compensation package to the legislature, the legislature will already have made the critical funding decisions. This historic pattern has prevented the VSEA from addressing significant, longstanding economic concerns.

By contrast, the Executive Branch begins bargaining in the summer of the year preceding the June 30 expiration of their CBAs. Once the parties reach agreement, the Governor submits a Pay Act to secure any funding that was not included in the budget. Even if impasse procedures are

[8] Vermont budgets annually, but enacts a biannual Pay Act to fund cost increases resulting from collective bargaining.

necessary, there is time to complete them before submitting the Pay Act. In 2016, the VLRB imposed, and the State funded, a CBA that cost the State hundreds of thousands of additional dollars.

The Statute provides that either party may commence negotiations during the year preceding the expiration of the CBA. If the Employer complied with that mandate, the Court Administrator could present the Union's wage proposal to the court and then to Finance & Administration for inclusion in the budget before submitting it to the legislature. Under the current language, the Judiciary will not even talk to the VSEA until it knows precisely what it will spend on everything else. Thus the Judiciary retains the option to use economic force as leverage: if the VSEA does not accept the Judiciary's offer by the expiration date, employees are denied budgeted raises and step increases. The VSEA is then forced to use its bargaining leverage to regain the compensation it lost due solely to the Judiciary's delay.

DECISION ON ISSUE 8: PROCEDURE FOR NEGOTIATING SUCCESSOR

I discern no reason to recommend the Judiciary's proposal. According to the Judiciary, the Chief Justice establishes the Judiciary's budget priorities (except for collectively bargained items) in early fall, based on

funding requests from its various courts and departments. In late October or early November, the Court Administrator presents these to the Secretary of Finance and Administration, who in turn presents the Governor's budget to the legislature in early January. Under the Judiciary's proposal, the VSEA could have no role in any of this.

I admit to some difficulty in understanding how the Chief Justice can establish budgetary priorities without knowing the Union's proposals concerning some of the biggest items in the budget. Apparently the "placeholder" is intended to save some space for the outcome of negotiations, but experience apparently teaches that once a "placeholder" becomes part of the Governor's budget, it tends to harden into a "foregone conclusion." This handicaps the Union right from the outset of negotiations.

Section 1036(e) of the Statute provides: "Upon request of either party, negotiations for a new agreement…shall be commenced at any time during the year preceding the expiration date of the agreement." In *VSEA v. Judiciary Department,* 15 VLRB 253 (2015), the VLRB held that the current language of Article 31 did not waive the VSEA's statutory right to request the commencement of negotiations before February 1. 15 VLRB at 253. Nor does it limit how early negotiations can begin. *Id.*

However, the Statute did not give the VSEA "the unilateral right to decide on the commencement date of negotiations." 15 VLRB at 266. Instead, the parties were subject to a joint obligation to "make expeditious and prompt arrangements within reason to meet for bargaining." *Id.* (citations omitted). The VLRB went on to state:

> It is "reasonable" in establishing a negotiations timeframe under the Judiciary Act to account for the possibility of invoking these dispute resolution procedures [i.e., mediation, fact-finding, and last-best-offer] and still have negotiations completed in a timely manner. A timely manner means allowing the Court Administrator to request sufficient funds from the Legislature, and for the Legislature to appropriate funds, to implement the agreement reached by the parties or the terms imposed on the parties by the Labor Relations Board or an arbitrator. It would not be unreasonable under this statutory scheme for either party to seek to begin negotiations prior to February 1.

Ultimately, the VLRB did not reach the question whether the VSEA's July 1, 2015, demand to commence bargaining was "reasonable." But since the VSEA unquestionably has the statutory right to seek to begin negotiations before February 1, I am confident that the Judiciary's proposal to foreclose negotiations prior to January 8 is *not* reasonable, and cannot be recommended.

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Michael C. Ryan
Factfinder
November 22, 2016

CLASSIFIED BARGAINING UNIT PAY PLAN - GRADES HELD BY JUDICIARY BARGAINING UNIT

Pay Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10	Step 11	Step 12	Step 13	Step 14	Step 15
12	12.87	13.44	13.88	14.33	14.73	15.24	15.76	16.23	16.75	17.2	17.64	18.15	18.59	19.13	19.66
13	13.45	14.05	14.56	15.01	15.46	15.94	16.46	16.96	17.52	18.03	18.51	19.01	19.53	20.06	20.61
14	14.09	14.7	15.25	15.77	16.24	16.77	17.27	17.83	18.39	18.9	19.42	19.92	20.52	21.09	21.65
15	14.75	15.43	15.98	16.48	17.03	17.6	18.15	18.71	19.31	19.84	20.44	20.97	21.54	22.12	22.77
16	15.47	16.22	16.78	17.29	17.85	18.44	19.04	19.65	20.26	20.83	21.43	22.04	22.63	23.27	23.92
17	16.29	17.03	17.64	18.2	18.8	19.41	20.01	20.62	21.31	21.94	22.53	23.19	23.85	24.55	25.2
18	17.2	17.95	18.57	19.2	19.82	20.48	21.15	21.79	22.52	23.17	23.82	24.5	25.13	25.84	26.59
19	18.08	18.94	19.62	20.25	20.94	21.6	22.29	23	23.76	24.43	25.11	25.8	26.53	27.26	28.06
20	19.08	19.92	20.66	21.33	22.08	22.78	23.52	24.31	25.1	25.78	26.49	27.25	28.04	28.86	29.64
21	20.15	21.09	21.84	22.54	23.3	24.06	24.83	25.66	26.49	27.25	28.04	28.86	29.64	30.52	31.37
22	21.29	22.29	23.1	23.87	24.65	25.49	26.31	27.19	28.06	28.87	29.65	30.54	31.4	32.29	33.23
23	22.53	23.59	24.52	25.27	26.1	26.94	27.85	28.83	29.71	30.6	31.45	32.33	33.28	34.23	35.19