LAWRENCE ANDREW MOORE, JR. .

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Grievant, .

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v. . Docket No. 94-HHR-126

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES at LAKIN STATE .

HOSPITAL and WEST VIRGINIA DIVISION .

OF PERSONNEL, .

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Employer. .

D E C I S I O N

Lawrence Moore, Jr. (hereinafter Grievant) filed this grievance pursuant to West Virginia Code §29-6A-1 et seq., against his employer, the West Virginia Department of Health and Human Resources (hereinafter Health) and against the West Virginia Division of Personnel (hereinafter Personnel), on August 2, 1993. Grievant claims that as a result of the statewide reclassification project conducted by Personnel he was assigned a position which does not match the job duties he performs and which lacks pay equity in relation to other positions where he works, Lakin StateHospital. (See footnote 1) His complaint was denied at the lower three levels and an appeal was perfected at level four on April 4, 1994. A hearing was held at the Grievance Board's office in Charleston, West Virginia on May 5, 1994, and the case became mature for decision on May 27, 1994, as both parties were given until that date to file post-hearing briefs.

The following findings of fact are properly deduced from the evidentiary record developed in the

case.

Findings of Fact

1. Grievant is employed as a Therapeutic Programs Director at Lakin State Hospital (hereinafter Hospital).

2. Grievant's immediate supervisor is the Hospital's Administrator.

3. The pay grade assigned to Grievant's position is 13.

4. A summary of Grievant's responsibilities as derived from a Personnel Position Description Form submitted by Grievant and approved by the Hospital Administrator is as follows:

> To develop, supervise and coordinate resident programming services to maximize resident benefits. Areas involved include: Recreation/Activities; Special Needs Programs; Social Work Service; Restorative Nursing Program; Resident Advocate; Volunteer Services; clerical support; contract professionals. To ensure facility compliance with applicable programming/client service standards. Including developing/revising client care programs and policies procedures as needed. To provide both direct and indirect support services to residents, their families/representative, staff and other agencies, including case management.

Gr. Exhibit #8.

5. Grievant directs the following programs, services or activities at the Hospital: Social Services, Patient Advocate, Resident Council, Volunteer Program, Chaplain, Physical Therapy, Special Needs Program, Occupational Therapist, Speech Therapist/Audiologist, Psychologist.

6. Grievant is currently acting as the Facility's Functional Administrator, responsible for coordinating, implementing and troubleshooting the AIMS and ARMS computer case management programs at the Hospital. These computer systems standardize all of the Hospital's record keeping and billing.

7. Grievant's position on the Hospital's organizational chart is parallel to the Director of Nursing and Assistant Administrator. The pay grades for these two positions are 17 and 15 respectively.

8. The Hospital does not employ a Clinical Director.

9. Grievant functions as a Clinical Director with the exception of being responsible for directing the medical programs of the Hospital.

10. Personnel derived the pay grade for Grievant's position from the Southeastern Salary Schedule. This salary study used by Personnel and other state personnel offices in the southeastern

states represents a comparison of salaries to job responsibilities of various classified public employees.

11. Personnel establishes pay grades for nursing positions partly based upon recruitment and retention problems experienced in the marketplace.

Parties' Positions

Grievant alleges that the classification specification of Therapeutic Programs Director neither adequately describes nor contemplates the exact nature of the duties which he is required to perform. He contends that one major example of this is that he does not report to a clinical director as anticipated by the specification but reports to the Hospital Administrator. He asserts that an individual who performs the duties contemplated by this specification should be at an organizational level lower than where he currently is at the Hospital. Grievant does not allege that there currently exists a classification specification which would adequately describe his duties and responsibilities; therefore, he asserts that Personnel should be required to create such a specification. Finally, Grievant avers that the pay grade assigned to his current position does not correspond to the doctrine of equal pay for equal work when the duties, responsibilities and educational requirements of his position, along with the location of his position on the Hospital's organizational chart, are all compared to the same attributes of other administrative positions within the Hospital.

Personnel simply contends that the classification specification of Therapeutic Programs Director adequately reflects the duties and responsibilities of Grievant's position at theHospital. It supports this argument by asserting that the reporting requirement in said specification is only a small part of the nature of the job and that all class specifications are to be considered general descriptions of the kinds of duties and responsibilities an incumbent is to perform. With regard to the issue of assigned pay grade, Personnel contends that the position's pay grade was properly established consistent with the Southeastern Salary Survey and correctly takes into consideration the factors of recruitment and retention.

Discussion

The West Virginia State Personnel Board, a part of Personnel, was created in 1989 to replace the former Civil Service Commission. W.Va. Code §29-6-6 (1989). The duties and responsibilities of the

former Director of the Civil Service System were also transferred to the Director of Personnel. Code §29-6-9 (1989). Pursuant to Code §29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend or appeal legislative rules governing the

> preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. Code §29-6-10(2). The Personnel Board has wide discretion in performingits duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See, Callaghan v. West Virginia Civil Service Comm'n, 273 S.E.2d 72 (W.Va. 1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. St. Health Planning, 328 S.E.2d 164 (W.Va. 1985).

The major issue in this case is whether Personnel properly classified Grievant's position as that of a Therapeutic Programs Director or whether it abused its discretion in taking said action. The answer to this question can be derived from a review of the language of that classification specification in connection with the administrative regulations promulgated by Personnel. The specification's text is reproduced herein as follows:

THERAPEUTIC PROGRAMS DIRECTOR

Nature of Work

Under general direction, performs advanced compliance work developing and overseeing therapeutic client services. Directs the work of multi-disciplinary treatment units such as psychiatric or physical rehabilitation, recreation, arts therapy and occupational therapy. Ensures that the facility meets state licensure and accreditation standards in programming and client services. Reports to the facility's clinical director and exercises the latitude to develop and implement client care programs.

Performs related work as required.

Distinguishing Characteristics

This position is intended for use by health care facilities of moderate to large size which have a relatively stable client/patient population. This position coordinates and reviews services to clients, attends staffings [sic], and discusses treatmentmodalities. The position supervises some staff directly; however, much of the work involves functional supervision exercised over several units.

Examples of Work

Develops and implements specific treatment modalities for the rehabilitation of the physically/mentally/ emotionally ill or for the treatment of the elderly.

Oversees the work of the treatment units; meets with subordinates to evaluate the effectiveness of methods.

Researches new techniques and resources in rehabilitation or patient care; adopts new methods if the physical and/or behavioral results are positive.

Meets with the directors of other departments such as nursing, psychology and social services to ensure that patient treatment is consistent with the patient's individualized treatment plan.

Schedules the work for the units and wards on a weekly basis to insure that the daily program activities and goals are met for all patients.

Develops policies and procedures as necessary for the Therapeutic Programming

Department to meet state licensure and accreditation requirements.

Monitors therapeutic activities to ensure that the activities meet specific treatment criteria.

Provides training for all program staff and coordinates on-going in-service training for all employees involved in therapeutic programming.

Attends daily, weekly and monthly administrative meetings and advises staff of all changes in policies and procedures.

Completes functional job descriptions and performance appraisals; conducts quality assurance audits.

Writes monthly reports outlining the department's activities.

Knowledge, Skills and Abilities

Knowledge of rehabilitative therapy techniques and philosophies.

Knowledge of management techniques.

Knowledge of program design and evaluation.

Knowledge of federal and state laws, regulations and policies related to the area of assignment.

Knowledge of sheltered workshops, recreational programs, social services, vocational training or other programs related to the area of assignment.

Ability to organize and coordinate the work of several independent units with the work of other units of the hospitals.

Ability to communicate effectively with a wide variety of people both orally and in writing.

Minimum Qualifications

TRAINING Master's degree with an accredited college or university in education, recreation, sociology, nutrition or a related behavioral science or health science field.

SUBSTITUTION A bachelor's degree in one of the above fields or a closely related field, plus one additional year of the described experience, may substitute for the master's degree.

> EXPERIENCE Three years of full-time or equivalent part-time paid professional experience in a hospital setting in rehabilitation, psychiatric, recreation, physical, or occupational therapy, including responsibility for program desk and evaluation.

Section 4.04 of Personnel's Administrative Regulations, describing how class specifications are to be interpreted, contains the following relevant subsections:

> (a)
> Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

> (b)
> In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. Consideration shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.

> (c)
> A class specification shall be construed as a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of any position.

> (d)
> The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

These legislative rules are helpful and instructive as to how classification specifications are to be interpreted. After a thorough review of the evidence of record, it is determined that Personnel did not

abuse its discretion in classifying Grievant's position as it did.

Grievant is responsible for managing the therapeutic programs relating to patient care at the Hospital. He works under the general supervision of the Hospital's administrator in directing the works of various "multi-disciplinary treatment units" at the facility. When reading the Nature of Work, Distinguishing Characteristics and Examples of Work sections of the Therapeutic Programs Director specification, in correlation to Grievant's description of his routine duties and responsibilities set out in his Position Description Form, it is clear that the classification specification, as a whole, is a "general description of the kinds of work characteristics" assigned to his position. Further, Grievant does allege that the examples of work contained in the classification specification are typical of the types of duties he performs.

The fact that Grievant does not report to a clinical director does not necessitate a finding that his position was allocated tothe wrong class. The statement in the classification specification that therapeutic program directors report to clinical directors is just one of the many general methods used by Personnel to describe the nature of the position. The fact that Grievant's job is adequately described by the rest of the language in the classification specification mitigates against a finding that this one requirement is class-controlling. In fact, it is very possible that if the Hospital had a clinical director, Grievant would still be on the same level in the organizational flow chart. Given the evidence, it cannot be found that Personnel abused its discretion in allocating Grievant's position to the classification of Therapeutic Programs Director in light of this one fact. Again, in determining whether Personnel has abused its discretion in making a position allocation, the classification specification at issue must be viewed as a whole.

Finally, Grievant's argument that the classification specification is not written in such a manner as to adequately describe the nature and complexity of his duties is not supported by the evidence. The specification is established as a director's position. Further, within the two main sections, the terms "oversees," "directs," "ensures," "coordinates," "reviews" and others are used to describe the position at issue. These terms refer to the types of responsibility normally associated with administrative positions and to duties which are hands-on, supervisory and administrative. In conclusion, it is determinedthat the classification, when read as a whole, adequately describes the nature of Grievant's duties and responsibilities.

Grievant's second argument concerning the establishment of his position's pay grade shall now be

addressed. Grievant argues that based upon the doctrine of equal pay for equal work the pay grade for his position should be at least the same as for the Hospital's Director of Nursing, pay grade 17. He contends that the educational and experience requirements, along with the duties and responsibilities of his position, equate to or are superior to that of the position of Director of Nursing; therefore, he should be paid at least consistant with that position's pay grade. Personnel explained that the pay grade for Grievant's position was derived from the Southeastern Salary Schedule. Secondly, in comparison to the position of Director of Nursing, Personnel averred that that position is assigned a higher pay grade because State employers have experienced recruitment and retention problems in filling nursing positions. Grievant did not refer to the doctrine of equal pay for equal work until the end of the level four hearing; however, the facts presented will be considered in light of such a claim.

The West Virginia Supreme Court of Appeals referred to the doctrine of equal pay for equal work in a series of cases all styled American Federation of State, County and Municipal Employees v. Civil Service Commission of West Virginia, commonly referred toas the A.F.S.C.M.E. cases. (See footnote 2) In essence, the Court in these cases declared that persons performing like tasks are entitled to wages based upon the same civil service system classification pay grade and scale as opposed to identical dollar amounts. The A.F.S.C.M.E. cases stemmed from a number of civil service employees claiming that their positions were improperly classified under the civil service commission's classified plan and, along with this argument, the employees claimed that they were entitled to back pay for the period of the time they had performed duties associated with a higher classification. The Court in A.F.S.C.M.E. granted the petitioners claim for back pay based upon the language of W.Va. Code §29-6-10 (1977), while only referring to the doctrine of equal pay for equal work.

It is obvious from the Court's rulings in the A.F.S.C.M.E. cases that the doctrine of equal pay for equal work comes into play when comparing employees' salaries who are classified in the same positions. A presumption is created that employees within the same classification perform duties of a substantially similar if not the same nature, therefore, those employees should be paid equally. The term "equal" in this context has been interpreted by this Board and by Personnel to mean that employees *within the same classification* must receive a salary within the range established for that position's pay grade. See, Ruble, et al. v. W.Va. Dept. of Health, Docket No. 92-HHR-298 (Jun. 10, 1993); Campbell et al.v. W.Va. Dept. of Commerce, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991); Largent, et al. v. W.Va. Dept. of Health, Docket No. H-88-012 (Sep. 15, 1989). (See footnote 3)

Grievant asks that this Grievance Board further expand the doctrine of equal pay for equal work to require that all employees who perform like work and have like responsibilities be paid within the same pay grade even though they do not possess the same classification title.

Regardless of whether this Board agrees that the doctrine of equal pay for equal work should be expanded as Grievant suggests, he has not established by a preponderance of the evidence that his duties, responsibilities and working conditions are substantially similar to those persons with whom he seeks to compare himself. Grievant makes reference to the positions of Director of Nursing and Assistant Administrator. His position shall not be compared to that of Assistant Administrator as it is determined that those two positions are so inherently different that such a comparison is not warranted. Grievant's position shall be compared to that of Director of Nursing as both positions "direct" programs and supervise employees engaged in providing health care of one form or another.

Grievant has presented very little testimony or documentation which describes the position of Director of Nursing to establish that the Director of Nursing "directs" the nursing programs of the hospital via supervising the nursing staff. The Director ofNursing's place on the Hospital's organizational chart does not establish that said position requires the same or substantially similar skill, duties, and effort as that of Therapeutic Programs Director. Indeed, the two positions direct programs and supervise employees with different educational levels, different skills and abilities, different techniques and goals, and within differing working environments. The only similarity is that the employees supervised by both Grievant and the Director of Nursing have a common goal which is to positively impact upon the health and welfare of the Hospital's clients. These two groupings of individuals met their respective goals in different manners.

It is accepted that administrators who "direct" programs must generically focus on the same administrative functions, i.e., supervise employees, assure compliance with established standards, evaluate the effectiveness and efficiency of the programs, research, plan and administer program changes, attend various meetings and seminars, etc. However, the knowledge of subject matter, skills and effort needed to accomplish established program goals are not equal or substantially similar across the spectrum of positions. In the instant case, Grievant's position obviously requires a different educational degree than that required for the Director of Nursing. The subordinates of these two positions must have achieved different educational levels in distinctly different subject areas. Further, Grievant and the Director of Nursing, along with their subordinates often interact with the

Hospital's patients within a different setting and at different times. Inconclusion, Grievant has failed to establish by a preponderence of the evidence that his position is required to be compensated at the same pay grade as that of the Director of Nursing.

For all practical matters, Grievant's argument is not actually one based upon the doctrine of equal pay for equal work. He is not comparing himself to other employees within his classification who perform substantially similiar work through exerting the same effort and by utilizing the same skill level within a substantially similar working environment. Grievant is actually relying upon the theory of comparative worth. His concern is that he is the victim of discrimination, via a disparate impact, because he is not being paid equally to other employees within comparable positions.

Most comparative worth litigation concerning an employer's establishment of pay scales has been handled by federal courts in cases brought by employees within the context of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2a. See, IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd. Cir. 1980), cert denied, 452 U.S. 967 (1981); Gunther v. County of Washington, 602 F.2d 882 (9th Cir, 1979), reh'g denied with supplemental opinion, 623 F.2d 1303 (9th Cir, 1980), Aff'd 452 U.S. 161 (1981); Gerlach v. Michigan Bell Tel. Co., 501 F.Supp. 1300 (E.D. Mich. 1980); Taylor v. Charley Brothers. Co., 25 F.E.P. 602 (W.D. Pa. 1981). In Briggs v. City of Madison, 536 F.Supp. 435 (W.D. Wis. 1982), the district court found that the employees who were nurses had established a prima facie case ofdiscrimination under a theory of comparable worth after comparing their skills, efforts, responsibilities and working conditions to those of a group of sanitarians. In accepting the plaintiff's showing of discrimination on its face, the court in Briggs stated that the employees would have been paid similarly absent the employer's discriminatory treatment. Ultimately however, the Briggs court found in favor of the city as it demonstrated that the existing market conditions justified the differences in the two positions' pay ranges.

However, the other federal courts have expressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. See, Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983); Power v. Berry County, 539 F.Supp. 721 (W.D. Mich 1982). In 1987, the Ninth Circuit overruled a district court's decision in American Federation of State, County and Municipal Employees (AFSCME) v. Washington, 578 F.Supp. 846 (W.D. Wash. 1983), which ruled that the State of Washington had discriminated against female employees through adoption of its job classification system. The district court determined that comparability of jobs was determined

by the State's own evaluation studies. The Circuit Court reversed the District Court and stated as follows:

> Disparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process. . . . A compensation's system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs; such a compensation system, the result of a complex array of market forces,does not constitute a single practice that suffices to support a claim under disparate impact theory.

770 F.2d 1401 (9th. Cir. 1985), reh'g denied, 813 F.2d 1034 (9th Cir. 1987). Most federal courts have been reluctant, if not expressly unwilling, to strike down an employer's pay system on the basis of a pure comparative worth theory, absent a companion showing of intentional discrimination.

The undersigned is not aware of any previous Grievance Board decisions in which an argument based upon a comparative worth doctrine has been addressed. However, intentional discrimination need not be shown in this forum as the applicable definition of discrimination does not contemplate such a requirement. (See footnote 4) Without requiring a showing of intentional discrimination, Grievant's argument must be viewed as a theory that Personnel has arbitrarily and capriciously established the pay grades for the positions in question, thereby creating a disparate impact.

Just as the majority of federal courts are unwilling to substitute their judgment for that of the various employers in the comparative worth Title VII cases dealing with the issue of numerous positions' value to their employers, so to is this Grievance Board reluctant to act as an expert in matters of classification of positions, job market analysis and compensation schemes. Personnel's position is that it relied upon the Southeastern Salary Schedule in setting the pay grades for thepositions in question. It is inferred that Personnel has utilized this salary schedule to establish pay grades for the positions within its classified plan based upon the fact that this schedule is a model derived from a comparative worth analysis of public sector positions. There is no evidence to the contrary. There was also no evidence which could lead the undersigned to conclude that the Southeastern Salary Schedule does not adequately compare and contrast the worth of various positions within a classified scheme.

While it may be possible to find that many of the requirements of Grievant's position are comparable to those of the position of Director of Nursing, the evidence does not establish that it is more likely than not that both positions are of the same worth to the Hospital, and therefore, that

Personnel abused its discretion in assigning different pay grades to these positions. The one reason established for the difference in the pay grades is that the State employers have a difficult time recruiting and retaining anyone to work within the nursing profession because the private sector salaries are generally higher than those paid by public employers. This is one justification which establishes that the difference in pay grade herein was not based upon an arbitrary or capricious reason. In conclusion, it is not sufficient under a comparable worth theory to demonstrate that two positions are similar; it must be demonstrated that both positions are of equal value to the employer. This showing has not been made in this case.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving his case by a preponderance of the evidence. Howell v. W.Va. Dept. of HHR, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. Pursuant to the Division of Personnel's Administrative Regulations, Section 4.04, the classification specification of Therapeutic Programs Director adequately describes the nature of Grievant's job duties and responsibilities.

3. Grievant has failed to prove that the Division of Personnel violated W.Va. Code §29-6-10(2) in establishing the title, classification specification or pay grade for his position.

4. Grievant has failed to establish that the Division of Personnel abused its discretion in establishing the title, classification specification or pay grade for his position.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

August 26, 1994

Footnote: 1Personnel was not represented at any of the lower levels of this grievance. Pursuant to the Undersigned's statutory authority, Personnel was joined as an indispensable party at level four.

Footnote: 2324 S.E.2d 363 (W.Va. 1984); 341 S.E.2d 693 (W.Va. 1985); #17929 (unpublished, May 20, 1988); and 380 S.E.2d 43 (W.Va. 1989).

Footnote: 3Largent is currently pending before the Supreme Court of Appeals.

Footnote: 4Discrimination is defined in W.Va. Code §29-6A-2(d) as "any differences in treatment of employees unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."