LOU HAMMOND, et al. ,

Grievants,

v. **Docket No. 98-HHR-222**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

HUNTINGTON STATE HOSPITAL, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Pat Franz, Robin Walton, and Lou Hammond, (See footnote 1) are employed as nurses by the West Virginia Department of Health and Human Resources ("HHR") at Huntington State Hospital ("HSH"). This grievance was filed on November 3, 1997, and Grievants allege they were discriminated against when they were not given a pay equity award in 1993. Grievants seek as relief the granting of the pay increase, plus interest, from 1993.

This grievance was denied at all lower levels, appealed to Level IV, and a hearing was held on September 1, 1998. This case became mature for decision on October 5, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Findings of Fact

1. Grievants, who are classified as Nurse IVs, are employed at HSH, but they are not under the direction of the Director of Nursing, nor are they employed in the Nursing Department.

2. The positions that they fill are: Grievant Franz - Director of Quality Assurance; Grievant Walton - Director of Staff Development; and Grievant Hammond - Assistant to the Clinical Director.

3. Although the selection of a nurse to fill these positions is preferable, and indeed appears to be the best choice due to a nurse's experience and education, the positions do not have to be filled by a nurse. (See footnote 3)

4. Grievants are not involved in direct patient care in any way.

5. In the early 1990's, HSH experienced difficulty in recruiting nurses to fill vacant positions. In order to obtain nurses to fill these positions HSH was required to pay these new nurses considerably more than the presently employed nurses were receiving. This resulted in pay inequity and an unhappy nursing staff.

6. In approximately 1993, then Hospital Administrator Joe Mulloy started working on a process to correct this problem. He worked with then Secretary Ruth AnnPanepinto, then Commissioner Garrett Moran, (See footnote 4) and HSH Director of Nursing Rebecca Dunn. (See footnote 5)

7. Mr. Mulloy surveyed the surrounding area to learn what current nursing salaries were. He compiled data on the salaries of direct patient care nurses and on Directors of Nursing. He did not compile data on the salaries of nurses who worked in Grievants' positions or on any nursing positions not involved in direct patient care.

8. In his first proposal he identified the benchmark salaries for Nursing Staff per their position, tenure and experience. He also identified the salaries that specific individuals would receive.

9. In his second proposal, Mr. Mulloy repeated much of the same data, but he also included a recommendation for pay equity awards for the Director of Nursing and the Assistant Director of Nursing. In this same proposal he also specifically excluded nurses in the types of positions held by Grievants and referred to these employees as those "who perform other administrative duties". Mr. Mulloy also specifically stated in this

proposal that the Director of Nursing was being included because an equity problem existed there as well. He noted that Ms. Dunn's salary was $11,000 less than the Director of Nursing at Weston State Hospital.

10. Grievants were told that only direct patient care nurses would receive the pay equity award. Grievants do not remember when in the process they were given this information by Mr. Mulloy. 11. All Nursing Department staff, who were eligible pursuant to their tenure experience, and credentials, received the pay equity award. Nursing staff who received this pay equity award included not only nurses who gave direct patient care, but also Nurse Managers (shift supervisors), the Director of Nursing, and the Assistant Director of Nursing. (See footnote 6)

12. Grievants are not in the Nursing Department, are not involved in the giving or directing of patient care, and did not receive the pay equity award.

13. Grievants never asked if Ms. Dunn was to receive the pay equity award. They assumed she would not because they were told at some point in the process that no nurse administrators, such as themselves, would be included. Grievants view Ms. Dunn as a nurse administrator. They did not discuss the issue again with Mr. Mulloy, nor did they ever ask anyone if Ms. Dunn received the increase.

14. Grievants and Ms. Dunn are not in similar positions. Grievants are not involved in patient care. Ms. Dunn is involved in patient care as she has the total and final authority to direct the quality of care given by nurses under her direction and control. Granted, she is not frequently involved in administering to the needs of a specific patient, but then neither are the Nurse Managers who supervise a shift and/or make sure the coverage is sufficient to provide proper care. Thus, Grievants are not direct patient care nurses and Ms. Dunn is. 15. In October 1998, Grievant Hammond asked Ms. Kieth Anne Dressler, the Human Resources Director, if she could see her pay equity award file. Ms. Dressler gave the file to Grievant Hammond, and after Grievant Hammond reviewed it, she discovered Ms. Dunn had received the pay equity

award. Shortly thereafter this grievance was filed.

16. By the date that this grievance was filed, key witnesses, such as Secretary Panepinto, Commissioner Moran, and Mr. Mulloy were no longer available to testify as to the intent, purpose, and methodology of the pay equity award because they no longer work for the state and no longer live in West Virginia. (See footnote 7)

17. The award sought by Grievants, plus the requested interest, would result in tens of thousands of dollars.

18. Other nurses besides Grievants did not receive the pay equity award. One example given was an evening supervisor, who was scheduled to receive the raise, but who changed positions and transferred to a staff development position. In the latter position he did not receive the increase.

19. Grievants Franz and Walton (See footnote 8) are in the same positions they held at the time of the pay equity award. Indeed, Grievant Franz is the only Director of Quality Assuranceever employed at HSH. Grievant Hammond held substantially the same position she held in 1993 at the time of her death. Grievant Hammond assumed additional duties in 1994, for which she received a merit increase.

Issues and Arguments

Grievants argue they were discriminated against when they were not included in the pay equity award and other Nurse IV's and Nurse Administrators were. While they acknowledge they knew they were not included in the increase at the time it occurred, and they knew other nurse managers were, they explained their late filing by stating they did not learn Ms. Dunn received the pay equity award until shortly before they filed. In essence, Grievants argue that if the Director of Nursing was included in the pay equity award, it was discriminatory not to include them in the pay equity award because they are all Nurse IVs, and Ms. Dunn is a nurse administrator.

Respondent argues that the grievance should be barred by laches, dismissed as

untimely, and denied on the merits. Respondent points out that the time between the event and the filing of the grievance was approximately four years, and within that time period the individuals who wrote and designed the pay equity plan are no longer available to discuss or defend their decision not to award Grievants the increase. Further, Respondent noted Grievants knew they did not receive the pay equity award in 1993, and did not file until late 1997.

On the merits, Respondent explained Mr. Mulloy designed the pay equity award to help retain and recruit nurse involved in direct patient care. Grievants were never intended to receive the increase, as clearly pointed out in the proposal submitted to the various authorities for approval. Respondents noted the salaries for all the types of nurses whoreceived increase were studied and benchmarked prior to the increase being given, and that Grievants' positions were not studied and, thus, not intended to be included.

Discussion

The arguments made by Respondent that the grievance should be dismissed because of laches and timeliness will be discussed before addressing the merits of the case.

I. Laches and Timeliness

Grievants filed this grievance in a timely manner, when they found out a fact unknown to them; Ms. Dunn received the pay equity award. Laches is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances caus[es] prejudice to [an] adverse party." Black's Law Dictionary 453 (abr. 5th ed. 1983). Here, Grievants filed as soon as they knew that an employee they considered similar to them received the pay equity award. Thus, it does not appear that Grievants "slept" on their rights. However, it is also clear that Respondent has been prejudiced by the passage of time because no one is currently available to testify who

was directly involved in the decisions as to who would receive the increases. However since laches requires an element of neglect and such is not found in this case, the Motion to Dismiss based on this argument cannot be granted. Id. See Maynard v. Bd. of Educ., 178 W. Va. 53, 357 S.E.2d 246, 255 (1987); Flint v. Harris v. Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). Respondent contends this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have agrievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 403 S.E.2d 566 (1997).

In this case Grievants filed in a timely manner after they found out Ms. Dunn received the pay equity award, and they did not. Although reasonable minds could differ on this issue, the undersigned Administrative Law Judge finds that the interest of equitywould not be served by a rigid interpretation of the standard. See Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

II. **Merits**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23- 174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

In addressing the merits of the case the key question is whether Grievants were discriminated against by HHR's failure to include them in the pay equity award when the Director of Nursing was. (See footnote 9) W. Va. Code § 29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

It is clear Grievants do not have the evidence to support their case for two reasons. First, Grievants were not and are not similarly situated to Ms. Dunn. Second, even if Grievants were able to prove they were similarly situated to Ms. Dunn, Respondent has presented a legitimate, nondiscriminatory reason for its action; there were retention and recruitment problems with direct care nurses, and Grievants were and are not direct care nurses. Indeed, their positions do not have to be filled by nurses at all.

The similarly situated issue will be discussed first. (See footnote 10) Grievants are classified as Nurse IV's, Ms. Dunn is classified as Nurse Director II. Clearly, the duties each perform are different. Grievants are not in the Department of Nursing, while Ms. Dunn is Director of the Nursing Department. Ms. Dunn is responsible for directing the nursing care of allpatients as is required by her position. Grievants are not responsible for the care of any patients or for the supervision of any nurses who perform direct patient care. (See footnote 11) In essence, Ms. Dunn's position is the same as the Nurse Managers, who also received the increase, she is just one more step up the supervisory ladder than they are.

Additionally, Grievants did not demonstrate there was a recruitment and retention or pay inequity problem with their positions. The positions that were granted the pay

increase were those which had severe problems in that area. (See footnote 12) There was limited research conducted on the Director of Nursing position, and it was found that there was a substantial pay inequity for the Director of Nursing position. The fact that the position could not be filled supports this finding. (See footnote 13) Accordingly, Grievants have not demonstrated they were similarly situated to Ms. Dunn.

Even if Grievants were found to be similarly situated to Ms. Dunn, Respondent has demonstrated a legitimate, nondiscriminatory reason for their action. There was no difficulty filling Grievants' positions. (See footnote 14) Grievants have held these positions for many years and have not sought employment elsewhere for additional money. They did not conduct a survey and prove they were underpaid in their positions. Unless Grievants demonstratedthat Respondents had a known pay inequity in their positions at the time the pay equity awards were granted, Respondents' actions must be taken as appropriate and not arbitrary and capricious. (See footnote 15) Accordingly, Grievants have failed to demonstrate they were discriminated against when they were not awarded the pay equity award and Ms. Dunn was.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondents have not met their burden of proof and demonstrated that this grievance should be barred by laches or dismissed as untimely.

3. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievants have not met their burden of proof and demonstrated that they were treated differently than other similarly situated nurse when they were intentionally not granted a pay equity award, when the Director of Nursing did receive one.

Accordingly, this grievance in **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 30, 1998

Footnote: 1

Ms. Hammond died after the original grievance was filed. Both at Level III and at Level IV, Respondent moved to dismiss her as a party from these proceedings, but stated no legal precedent for this action. Since Ms. Hammond instituted this grievance prior to her death, the grievance represents a property interest, and her interests are represented by her son, her estate will continue to have standing to pursue this grievance.

Footnote: 2

HHR was represented by Assistant Attorney General B. Allen Campbell, the Division of Personnel was represented by Mr. Lowell Basford, and Grievants were represented by Mr. Robert Nida, a co-worker.

Footnote: 3

Some evidence was presented that the West Virginia Nurses Association required a Registered Nurse to give some of the staff development information. In is noted that the West Virginia Nurses Association does not control the state licensure of nurses. This statement was unclear, and this requirement did not appear to be mandated by the Hospital, HHR, or the State of West Virginia. This requirement may be necessary to obtain approval for nursing continuing education programs, but whether continuing education was required by the state of West Virginia for nurses, as well as additional questions, were unanswered.

Footnote: 4

Mr. Moran was second-in-command within HHR.

Footnote: 5

During the pay equity award process, Ms. Dunn was Ms. McVey.

Footnote: 6

At some point in time unclear from the record, Ms. Dunn asked to be demoted to the position of Assistant Director of

Nursing. This request was granted, and a search was conducted to fill her vacant position. After a considerable period of time, HSH was unable to fill the position and since Ms. Dunn had continued to perform the duties pf the position, she was reinstated to the position of Director of Nursing.

Footnote: 7

Representative Nida insisted that all data needed in this regard was present in the transcript of his 1993 grievance. Two things are noted about this statement, first Mr. Nida's grievance dealt with whether or not his Unit, the Substance Abuse Unit, was intended to be included in the pay equity award, and second Secretary Panepinto, Commissioner Moran, and Mr. Mulloy did not testify at this Level IV hearing. Thus, key data about the process and thinking during the pay equity award discussion would not be contained in those proceedings. Additionally, Respondent objected to the submission of this transcript on the above identified grounds. Given this state of affairs the request to utilize the transcript in Mr. Nida's grievance was denied.

Footnote: 8

Grievant Walton is in a part-time position. Respondent did not argue that she could not file a grievance.

Footnote: 9

The general issue of pay inequity is time barred, as Grievants were aware of the pay increase and that they were not to receive it, and yet did not file until now.

Footnote: 10

An issue that should be addressed is Grievants' statement that they were Nurse IV's, and other Nurse IV's received the increase, this was information they possessed to 1993, and if this fact was the only basis for their filing a grievance this filing would be untimely. Additionally, it was very clear from the record that this was never meant to be a classification increase. The increase related to duties performed, not classification.

Footnote: 11

Testimony was presented that all new employees, not just nurses, are under the direction of staff development during their orientation.

Footnote: 12

There was no research conducted on Grievants' positions, and Grievants did not demonstrate there was a pay inequity with their compensation vis a vis other similarly situated nurses. Certainly Grievants could have grieved Respondents' failure to study their positions at the time the pay equity award were granted.

Footnote: 13

See n. 6, infra.

Footnote: 14

Limited information was presented that Grievant Hammond left HSH for a period of time, but returned shortly thereafter. It is unknown if this was before or after 1993.

Footnote: 15

If Grievants had known of a pay inequity at the time and did not file until now, that grievance would, of course, be untimely.