BRENDA CARR, et al.,

Grievants,

v. **Docket No. 98-HHR-460**

WEST VIRGINIA DEPARTMENT
OF HEALTH & HUMAN RESOURCES
and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants (See footnote 1) are employed in various classifications by the Department of Health & Human Resources (DHHR) at the West Virginia Children's Home (WVCH). This was originally two separate grievances, i.e., Carr, et al., v. DHHR, Docket No. 98-HHR-460, and Bosserman, et al., v. DHHR, Docket No. 98-HHR-459, which were consolidated at level four due to common questions of fact and law. Grievants allege that a pay raise granted to employees of the Division of Juvenile Services (DJS) should have also been granted to Grievants, and they allege discrimination. Grievants seek as relief to be granted similar pay raises, retroactive to September 1, 1998. After denials at the lower levels, both groups of grievants appealed to level four on November 12, 1998. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on February 3, 1999. After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 21, 1999. Grievantsrepresented themselves; DHHR was represented by Allen Campbell, Assistant Attorney General; and the Division of Personnel (DOP) appeared by Lowell Basford of the Classification and Compensation Unit.

The following findings of fact are made from a preponderance of the evidence submitted at all levels of the grievance procedure.

Findings of Fact

1. The “Carr” Grievants are employed by DHHR as Juvenile Detention Officers I and II (JDOs), and the “Bosserman” Grievants are employed as support staff in various classifications, including Cook, Laundry Worker, Housekeeper, and Office Assistant. All Grievants are assigned to the WVCH.

2. Prior to 1997, DHHR operated regional juvenile detention centers in various parts of the state, along with the WVCH, which is located in Elkins, West Virginia.

3. In 1997, DJS was created by an act of the West Virginia legislature as a division of the Department of Military Affairs and Public Safety. All juvenile detention centers were transferred to the jurisdiction of DJS, and WVCH remained under the control of DHHR.

4. WVCH is a holding facility for troubled minors, and the juvenile detention centers are correctional centers for juvenile criminal offenders.

5. The JDO classification title was created by DOP in 1998. All employees previously classified as Youth Service Workers I and II were reclassified as JDOs I and II, effective September 1, 1998, including both DHHR and DJS employees. All of the reclassified employees were also placed in higher pay grades. 6. Phyllis Carter, Director of DJS, requested that the JDOs assigned to all DJS facilities be granted a pay differential of $1,400 and that the support staff of the DJS facilities be granted a pay differential of $1,000, in addition to any salary increases upon reclassification. DOP approved this request, also effective September 1, 1998, and the legislature specifically appropriated funds for the DJS salary increases.

7. The DJS facilities are located in Princeton, Martinsburg, and Parkersburg, and have historically suffered recruitment and retention problems, due to job competition with bordering states.

8. Section 5.04(f)(4) of the Administrative Rule of the DOP, 143 C.S.R. 1 § 5.04 (1995) contains the following provision authorizing pay differentials:

> The Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay differentials for specified work periods, and temporary upgrade problems. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving

each element of 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); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants contend that, because they hold the same job classifications as DJS employees, they are entitled to the pay differentials granted to DJS personnel. They alsocontend that they perform the same job duties as the DJS employees and have been subjected to discrimination by Respondents for numerous years.

Respondents do not dispute that pay differentials were granted for DJS employees that employees of WVCH did not receive. However, they contend that these salary increases were justified and were accomplished in accordance with applicable rules and regulations. In support of her request for the pay differential, DJS Director Carter provided to the State Personnel Board salary data from Virginia, Maryland, Ohio and Kentucky, showing that the DJS facilities were at a significant disadvantage, due to their inability to offer similar salaries for similar job titles. In addition, the legislature had specifically appropriated the funding for the DJS salary increases.

Further DOP contends that the DJS employees' pay differentials were accomplished in accordance with Section 5.4(f)(4), due to recruitment and retention problems, and that the DJS employees in the Martinsburg, Parkersburg and Princeton facilities constitute a “reasonably defined group of employees” in accordance with the Rule. As DOP has noted, Michael McCabe, Director of Personnel Services for DHHR, testified at level four that WVCH has not experienced any significant recruitment and retention problems in any of the pertinent job classifications.

This Grievance Board has previously recognized that DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995). Further, the rules promulgated by DOP pursuant to itsdelegated authority 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. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Moreover, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va.

775, 277 S.E.2d 613 (1981); appeal dismissed, 454 U.S. 1131 (1982). This principle has been specifically extended to DOP's exercise of its discretionary judgment in matters involving classification and compensation. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). Indeed, DOP's interpretations in such matters as compensation and classification must be reviewed under a "clearly erroneous" standard. Blankenship, supra. See, e.g., Shahan v. W. Va. Bureau of Commerce, Docket No. 95-DNR-146 (Aug. 31, 1995); Page v. W. Va. Dept. of Transp., Docket No. 94-DMV-240 (Nov. 23, 1994); Arthur v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 93-BEP-527 (July 13, 1994).

Respondents have justified the pay differentials granted to DJS employees, which were accomplished in accordance with DOP's Administrative Rule. As noted by this Grievance Board in Pishner v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998), the “granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority.” The undersigned administrative law judge is unable to substitute her judgment for that of the State PersonnelBoard and DOP where the decision at issue has a rational basis. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); See generally Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Grievants also contend that they have been subjected to discrimination. Discrimination is defined by W. Va. Code § 29-6A-2(d) 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 by the employees." This Grievance Board has determined that grievants, seeking to establish a prima facie case of discrimination under § 29-6A-2(d), must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievants establish a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievants may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying the above standards, the undersigned finds that Grievants have not established a prima facie case of discrimination. They are not similarly situated to DJS employees, who are employed by a totally separate agency of state government, along with being employed at institutions along the state's borders, which have suffered recruitment and retention problems. Moreover, the evidence submitted at level four establishes the differences between the job duties of WVCH employees from those employed at DJS facilities, due to the nature of the institutions. Children are sent to WVCH by the court system because of abuse, neglect, substance abuse, and criminal involvement. However, the juvenile detention centers of DJS house children who have committed serious crimes, including murders, and employees are allowed to use severe, prison-like mechanisms such as restraints and lock downs, which the WVCH does not use. WVCH also does not accept children who have committed crimes as serious as murder. As explained by Mr. McCabe, WVCH is a holding facility, while the juvenile detention centers are correctional facilities. Accordingly, for all of these reasons, Grievants are not similarly situated to DJS employees, and the differences in treatment are clearly related to their differing circumstances and the nature of their job duties. (See footnote 2) Grievants have not alleged that they are not being compensated within the appropriate pay grades for their classifications. It has been long recognized that even employees who are performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent, supra; W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993);

Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). The evidence of record indicates that Grievants are all being compensated at or above the minimum salary within the pay grades assigned to their respective classifications.

As has been emphasized by Respondents throughout this proceeding, Grievants are protesting the fact that they were not granted a pay raise which was given to employees of a separate agency. As noted in Travis v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998), a case very factually similar to the instant one, the employing agency, and no other entity, is responsible for compensating its employees, and "the money for pay raises comes from the employing agency." All parties agree in this case that, in 1998 when DJS was formed, DHHR did not make any similar request from either the legislature or DOP for funding or establishment of pay raises for WVCH employees. While it is understandably frustrating for state employees to stand by and watch while similarly classified employees at other agencies receive pay raises, nowrongdoing on the part of either DOP or DHHR has been established in this case. Hopefully, DHHR and DOP will make good on their representations, as discussed at level four, that pay raises are "in the works" for DHHR employees in the near future.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a grievance that does not involve a disciplinary matter, Grievants have the burden of proving each element of 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); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The West Virginia Division of Personnel (DOP) has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995).

3. The granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority, pursuant to the provisions of DOP's Administrative Rule, Section 5.04. Pishner v. W.

Va. Dept. of Health and Human Resources, Docket No. 97- HHR-478 (May 21, 1998).

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

5. In order to establish a prima facie case of discrimination under § 29-6A-2(d), Grievants must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Grievants have failed to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d).

7. Grievants have failed to prove by a preponderance of the evidence that they are being compensated contrary to the provisions of any statute, policy, rule, regulation, or written agreement applicable to their employment situation.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to theCircuit Court of Kanawha County or 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 (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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon

the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 14, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The named grievants are Brenda Carr, Joe Carr, Allen Harris, Jeff Gumm, Delores Simmons, Patricia Simmons, Susan Chewning, Patricia Davis, Patty White, Delores Louk, Edna Elsa, Judy Roy, Mildred Echard, Joyce Bosserman, Naomi Corder, Hoy Ferguson, Dora Ferguson, Ronald Boserman, Gayle Scott and Mary Scott.

Footnote: 2

Grievants also introduced evidence in support of their allegations that employees in other classifications have, in the past, also been subjected to discrimination at WVCH. However, those individuals are not part of the instant grievance, and those claims are not sufficiently related to the instant grievances concerning the 1998 pay raises to beconsidered relevant to this claim.