PATRICIA QUEEN,

Grievant,

v. **Docket No. 98-HHR-238**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, HUNTINGTON HOSPITAL,

Respondent.

D E C I S I O N

Patricia Queen (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on October 16, 1997, alleging that Respondent Department of Health & Human Resources (DHHR) had improperly refused to compensate her at the agreed salary of $29,160 upon her promotion to Nurse IV on July 1, 1997. Her grievance was waived at Levels I and II to Level III, where an evidentiary hearing was conducted on June 9, 1998. Jonathon D. Boggs, Commissioner of DHHR's Bureau for Behavioral Health and Health Facilities, denied the grievance at Level III, in a decision issued on June 23, 1998. Grievant appealed to Level IV and, following a continuance which was granted for good cause shown, a Level IV hearing was held in this Grievance Board's office in Charleston, West Virginia, on October 6, 1998. (See footnote 1) The parties agreed to a briefing schedule at theconclusion of the hearing, and this matter became mature for decision on November 10, 1998, following receipt of the parties' written arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance are made.

FINDINGS OF FACT

1. Grievant is employed by DHHR as a Nurse IV at Huntington Hospital in Huntington, West Virginia.

2. Grievant was first employed by Huntington Hospital as a Nurse III on October 4, 1994. See

G Ex A at L IV.

3. Sometime before July 7, 1997, Grievant applied for a vacant position in Huntington Hospital's Staff Development department as the Coordinator of Nursing Education, which is classified as a Nurse IV position.

4. Grievant was selected for the vacant position and promoted to Nurse IV, effective August 1, 1997. See G Ex A at L IV. At the time Grievant was selected for promotion her annual salary was $25,944, the minimum salary for a Nurse III. See G Exs A, B & C at L IV.

5. The West Virginia Division of Personnel Pay Plan Implementation Policy, dated August 1, 1996, provides:

> A. Appointments above the minimum salary established for a classification may be made at the discretion of the appointing authority. When making appointments above the minimum salary, the appointing authority may pay an increment of no less than 3% and no more than 5% above the minimum salary for each 6 months of pertinent experience or equivalent pertinent training above the minimum qualifications for the class
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> C. When an employee is promoted, his/her pay shall be adjusted as follows:
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> 1. Salaries at the minimum rate of the current classification shall be adjusted to the minimum rate for the job classification to which the employee is being promoted.
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> * * *
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> 3. Additional increments beyond the 5% rate may be granted, at the discretion of the appointing authority, if the employee being promoted has qualifications exceeding the minimum required for the new class. The appointing authority may grant an additional increase of no less than 3% and no more than 5% for each 6 months of pertinent training or experience beyond that required for the new class.

G Ex 1 at L III.

6. Kieth Ann Dressler, Human Resources Director for Huntington Hospital, reviewed Grievant's qualifications and experience. Based upon Grievant's experience at Huntington Hospital and her prior

experience before coming to work for DHHR, Ms. Dressler recommended that Grievant's salary upon promotion be raised from $25,944 to $29,160, an increase of 12 percent. See G Exs C & F at L IV.

7. As a result of Grievant's promotion to Nurse IV, Ms. Dressler determined that Huntington Hospital was required to raise Grievant's pay to $27,768, the minimum for the Nurse IV classification, an increase of 7 percent. See G Exs B, C & F at L IV. In addition, Ms. Dressler checked with the West Virginia Division of Personnel to verify that Grievant was eligible for an additional 5 percent discretionary increase based upon her total nursing and related experience. (See footnote 2) See G Ex F at L IV. 8. The Nurse IV classification is in Pay Grade 16 with an authorized pay range from a minimum of $27,768 to a maximum of $45,168. See G Ex B at L IV.

9. Huntington Hospital had sufficient funds in its annual budget to pay Grievant $29,160 annually. (See footnote 3)

10. Huntington Hospital's Administrator, Desmond Byrne, accepted Ms. Dressler's recommendation, and submitted a WV-11 to promote Grievant to Nurse IV at an annual salary of $29,160. See G Ex A at L IV. Mr. Byrne had previously recommended similar discretionary compensation for newly appointed employees based upon experience above the minimum required for the position, and those recommendations had been accepted. Additionally, had Grievant been an outside applicant for the same position, he would have similarly recommended that she be hired at the $29,160 annual salary.

11. In making his recommendation, Mr. Byrne was aware that Grievant had been offered another position in Kentucky at a salary greater than she would receive from Huntington Hospital after the 12 percent pay raise, but she had nonetheless elected to remain with Huntington Hospital. See G Ex E at L IV.

12. Grievant's pay raise above $27,768 was rejected by DHHR's administrators in Charleston based upon a “verbal discretionary policy” that incumbent employees will receive no more than the minimum pay raise required by the West Virginia Division of Personnel Pay Plan upon promotion. See G Ex 4 at L III.

13. Neither Ms. Dressler nor Mr. Byrne was previously aware of this internalDHHR policy restricting discretionary pay increases upon promotion.

14. Michael McCabe, DHHR's Director of Human Resources, was aware of an unwritten policy, in effect as of July 1997, prohibiting all discretionary pay raises for incumbent employees as a cost-

saving measure. However, this limitation did not apply to appointments of new employees hired from outside the agency.

15. DHHR is generally unable to recruit new employees unless it offers a higher starting salary to such appointees. Likewise, DHHR fails to retain incumbent employees when it refuses to compensate them for their experience upon promotion.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Grievant contends her treatment by DHHR constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d). Discrimination is defined therein 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." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 4) of discrimination under Code § 29-6A-2(d), must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;
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> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't 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, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant established a prima facie case of discrimination by showing that DHHR's unwritten policy makes her ineligible for any discretionary salary increase upon promotion, while newly-hired or reinstated state employees appointed to the same or comparable positions, with equal or less experience, continue to remain eligible for, and receive, higher salaries upon appointment. See Ali v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-474 (June 30, 1998); Parsons v. W. Va. Dep't of Transp., Docket No. 97- DOH-289 (Oct. 30, 1997). Moreover, while the West Virginia Division of Personnel's policymakes a distinction between pay upon appointment (newly-hired or reinstated employees), and pay upon promotion (incumbent employees), both groups of employees are eligible for the same three to five percent pay raise.

Respondent admits that its unwritten policy treats the two groups of employees disparately by restricting pay increases for incumbent employees, such as Grievant, while nonetheless permitting higher pay for new employees hired from outside state government. Respondent presented non-specific evidence that this policy resulted from general budget considerations, and has been applied uniformly to incumbent employees in all DHHR facilities and offices. Mr. McCabe, DHHR's Human Resources Director, also indicated that the agency was unable to fill vacant positions with qualified applicants who are not currently employed by the agency, unless it offers them a salary above the minimum for their classification based upon their training and experience.

The West Virginia Supreme Court of Appeals has previously determined that state agencies may properly offer higher salaries to newly-hired employees without raising the pay of incumbent employees performing the same jobs, and that such differentiation does not violate the equal pay mandate in W. Va. Code § 29-6-10(2). Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994). See AFSCME v. CSC, 174 W. Va. 221, 324 S.E.2d 363 (1984). See also W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994). This Grievance Board has followed Largent, and applied it in grievances alleging pay discrimination violating Code § 29-6A-2(d), denying relief when the higher-paid employee was hired at a different point in time, arrived on the job with training and experience consistent with the higher salary, and a need to pay higher salaries to recruit new employees was articulated and not shown to be pretextual. See, e.g., Brutto v. W. Va.Dep't of Health

& Human Resources, Docket No. 96-HHR-076 (July 24, 1996); Dala v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-059 (Mar. 29, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995).

The situation presented by this grievance is readily distinguishable from Largent, and prior decisions of this Board applying Largent, in that DHHR applied its standing policy to deny an otherwise appropriate pay increase authorized by the West Virginia Division of Personnel's Administrative Rule, (See footnote 5) as well as the statewide Pay Plan Implementation Policy, solely because Grievant was an incumbent state employee at the time she was selected for promotion. Such differentiation between incumbent and newly-hired employees at the time they are selected to fill a position directly conflicts with W. Va. Code § 29-6A-2(d), because it relates exclusively to the status of the applicant, and is therefore not related to the actual job responsibilities of the position. (See footnote 6) Because none of the reasons offered for treating Grievant differently from non-incumbent employees are job-related, it is unnecessary that Grievant demonstrate those reasons are pretextual. (See footnote 7) Moreover, even if W. Va. Code § 29-6A-2(d) is not applicable, DHHR's treatment of Grievant in these circumstances is arbitrary and capricious, because it is neither job-related, nor based upon a rational difference between Grievant's ability to perform the duties of her position, and that of a newly-hired employee with equal or less experience, who would have received the same salary for which Grievant was recommended. Although the Administrative Rule and Pay Plan Implementation Policy give state agencies discretion on whether to compensate newly-hired or promoted employees above the minimum rate for the classification they are entering, it was arbitrary for DHHR to implement a blanket policy which failed to consider the individual facts and circumstances of Grievant's promotion. Likewise, under the particular circumstances presented by the facts in this case, it is an abuse of discretion to treat two categories of employees differently, as was done in this instance. Because the employer would have paid $29,160 to another applicant who was not an incumbent employee, DHHR's cost-saving rationale for its policy is fatally flawed.

Accordingly, Grievant established that she was discriminated against by her employer in violation of W. Va. Code § 29-6A-2(d), and her employer applied an arbitrary and capricious policy to her employment situation, when her salary upon promotion to Nurse IV was set at $27,768, rather than $29,160, as recommended by Huntington Hospital's Administrator. In order to make Grievant whole, DHHR is required to pay her the difference between those salaries, plus any across-the-board pay

raises she would have received, with interest, retroactive to August 1, 1997. See W. Va. Code § 29-6A-5(b);Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992); Stickley v. Berkeley County Bd. of Educ., Docket No. 95-02-573 (Feb. 20, 1998); Yokum v. Randolph County Bd. of Educ., Docket No. 97-42-299 (Jan. 14, 1998); Blankenship v. W. Va. Dep't of Health & Human Resources, Docket No. 90-H-438 (Sept. 30, 1991), rev'd on other grounds, 189 W. Va. 342, 431 S.E.2d 681 (1993). See generally, Gribben v. Kirk, 195 W. Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;
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> and,
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> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d),

by showing that, upon promotion to Nurse IV, she was denied a recommended pay increase, based upon her level of training and experience, where her employer routinely grants similar recommended salaries to similarly-situated persons hired from outside state government. Respondent failed to establish legitimate non- discriminatory, job-related reasons for its actions. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA- 225 (Dec. 23, 1991).

4. Grievant established by a preponderance of the evidence that her employer's policy of routinely awarding recommended salaries above the minimum for the classification, based upon training and experience above the minimum required for entry into the classification, to newly-hired applicants, while refusing to approve any recommendations for salary above the minimum for similarly-situated incumbent state employees, such as Grievant, was arbitrary and capricious, and constituted an abuse of the agency's otherwise broad discretion in such matters.

Accordingly, this grievance is **GRANTED**. Respondent is hereby **ORDERED** to pay Grievant $29,160 per year, retroactive to July 1, 1997, and to compensate her for the difference between her actual salary and the salary she would have received had she been granted a salary of $29,160 upon promotion to Nurse IV, plus interest.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 26, 1999

Footnote: 1

Grievant was represented by Deborah Wilson. Respondent was represented by Assistant Attorney General B. Allen Campbell.

Footnote: 2

DHHR did not challenge Ms. Dressler's determination that Grievant had at least six months of pertinent experience beyond the minimum four year's experience required forpromotion to Nurse IV.

Footnote: 3

Grievant's predecessor in this position, John Hipes, was being paid $32,164 at the time he resigned. See L II HT at 5.

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 5

143 C.S.R. 1 § 5.05 (1995).

Footnote: 6

It is noted that the language in W. Va. Code § 29-6A-2(d) which indicates that differences in treatment of employees must be "related to the actual job responsibilities of the employees" is more specific than the language defining discriminatory practices under the West Virginia Human Rights Act (W. Va. Code § 5-11-9), or the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); W. Va. Univ. v. Decker, supra. Moreover, a grievant alleging discrimination under Code § 29-6A-2(d) is not required to show that the discrimination resulted from an illicit motive. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Footnote: 7

Although Grievant is not required to demonstrate that the employer's articulated reasons for discrimination were pretextual, Grievant nonetheless established that the WV- 11 recommending additional pay for Grievant upon promotion which was forwarded to DHHR by Administrator Byrne, following approval by John E. Bianconi, Acting Commissioner of the Bureau for Community Support, was neither approved nordisapproved by an official in Grievant's chain of supervision, as required following standard agency practice.