CECELIA PALMER,

Grievant,

v. Docket No. 02-RJA-239

WEST VIRGINIA DEPARTMENT OF SAFETY/

NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Cecelia Palmer, employed by the Northern Regional Jail and Correctional Facility (NRJCF or Respondent) as an Office Assistant (OA) II, filed a level one grievance on June 24, 2002, in which she alleged that another employee with the same classification was earning a higher salary. For relief, Grievant requested that her salary be adjusted to at least equal that of the other employee. The grievance was denied at levels one, two, and three. Appeal was made to level four on August 2, 2002, and an evidentiary hearing was convened at the Grievance Board's Wheeling office on September 18, 2002. During those proceedings the possibility of a settlement was discussed, and the matter adjourned to allow further development of that resolution. A settlement was not finalized, and the level four hearing was reconvened on February 11, 2003. Grievant appeared pro se, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. The matter became mature for decision on March 11, 2003, the due date for submission of proposed findings of fact and conclusions of law.

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by Respondent since October 3, 1989, and has held the classification title of OAII since June 1, 1996. Grievant has an Associate Degree in Business Administration, and a total of 141 semester hours of college credit.

2. Ginny Guthrie was employed by Respondent as a Licensed Practical Nurse assigned to St. Mary's Correctional Center. When Respondent entered into a statewide contract for medical services, Ms. Guthrie's position was reallocated to OA II, and she was ordered to

report to the Northern Correctional Center on June 17, 2002. The reallocation was a functional demotion, but Ms. Guthrie's salary of $20,136 was not reduced.

3. Ms. Guthrie earns approximately $1,644 more per year than Grievant.

4. Victor Butler, Correctional Unit Manager, filed a grievance several years ago in which he alleged equal pay violations. His grievance was settled, and he was granted a salary increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving the elements of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant argues that her advanced education and experience entitle her to the same compensation as that paid to Ms. Guthrie. She cites Mr. Butler's case as precedent for a salary increase. Respondent asserts that it has not violated any rule or regulation in Ms. Guthrie's reassignment as an Office Assistant.

Although Grievant does not use the specific terminology, her argument is in the nature of discrimination and favoritism, as compared to Mr. Butler. 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 by the employees."

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination and favoritism, Grievant must demonstrate the following:

(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 the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievant establishes a prima facie case of discrimination and/or favoritism, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Although Mr. Butler testified that his grievance involved his compensation being compared with that of a similarly-classified employee, there is simply no evidence of record regarding the exact facts of that case, or why Respondent entered into a settlement. Ingeneral, settlements are confidential, and are not legal authority for granting another grievance. Grievant has failed to establish that Respondent has exhibited discrimination or favoritism.

As to the merits of Grievant's claim, her frustration is entirely understandable. Unfortunately, similar situations where a more experienced employee earns less than a new employee is not unusual in state agencies. This is generally due to recruitment efforts, unlike this case which involves a demotion.

The Division of Personnel Administrative Rule 5.6 provides:

Pay on Demotion - The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification or, if the demotion is to a formerly held classification, his or her last pay rate in the formerly held classification, whichever is greater. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

Since Ms. Guthrie's pay was within the pay range of Office Assistant II, Respondent was permitted to keep her salary at the same level. Even though both employees are Office Assistant II's, it is well-established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay range for their proper employment classification. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of

Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. .Dep't of Health & Human Resources, Docket No. 91-H-177 (May29, 1992). In this case, Ms. Guthrie's demotion is a legitimate reason for the pay difference.

Conclusions of Law

1. Because 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 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. 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 by the employees."

3. Favoritism is defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. Respondent's failure to grant the requested relief in this grievance, even though it did in a prior grievance involving a similar issue, does not constitute discrimination or favoritism.

5. Respondent acted in compliance with Division of Personnel Administrative Rule 5.6 when it determined that Ms. Guthrie's salary as an Office Assistant II would remain the same as it had been when she was classified as a Licensed Practical Nurse, since her salary may remained within the pay range of her new classification.

6. Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employmentclassification. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995);Tennant v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

Accordingly, this grievance is 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. 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: MARCH 26, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE