PATRICIA HUNT,

Grievant,

v. **DOCKET NO. 03-HHR-224**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

DECISION

Grievant Patricia Hunt filed this grievance against the Department of Health and Human Resources/Pinecrest Hospital (Pinecrest or Respondent) on June 3, 2003, stating: “Discrimination based on salary not comparable to other RN Nurse III doing the same job.” Grievant stated the relief sought as: “Salary made the same as other Nurse III's.” (See footnote 1)

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on October 3, 2003. Grievant appeared *pro se*, and Respondent was represented by Robert Miller, Assistant Attorney General. This matter became mature for decision on October 21, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is a Registered Nurse (RN) employed at Pinecrest Hospital, classified as a Nurse3, and was hired January 16, 2001. She is the Unit Director for Units 2B and 2D.

2. Grievant's current annual salary is $31,296. She was originally hired as a Nurse2, paygrade 15, at an annual salary of $28,284. When she was reallocated from Nurse2 to Nurse3 on February 4, 2002, she was given a 5% salary increase.

3. The Division of Personnel Classification/Compensation Plan sets the paygrade for the

Nurse3 classification as paygrade 16, from $27,768 to $45,168.

4. Grievant is the lowest-paid of the seven Nurse3s at Pinecrest. The salaries of the other Nurse3s range from $31,428 to $41,884. All of the Nurse3 salaries are within the paygrade 16 range.

5. Grievant is the only Unit Director Nurse3 who directs two units. The other Unit Directors only have one unit each. Grievant therefore oversees more residents and staff than the other Nurse3s.

6. The other Nurse3s were hired in originally as Nurse3s, and given higher salaries upon their appointments. Grievant is not eligible to apply for new Nurse3 openings that may have higher salaries associated with their positions.

7. There is a nurse shortage in Pinecrest's recruitment area, and Respondent must offer new hires from the private sector more money than Grievant is making now in order to get them to take the job.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not.*See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant claims Respondent's practice of paying other Nurse3s higher salaries is discriminatory, and violates the principal of equal pay for equal work. Respondent asserts there is no requirement to pay incumbent employees a higher wage than new hires in the same classification, as long as all employees in the same classification are paid within the proper paygrade for that classification.

"'Discrimination' means 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). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant is similarly situated to the other Nurse3s at Pinecrest. Although she has more experience and tenure than the other Nurse3s, she is paid less. As Grievant has more responsibility than many of the other Nurse3s, the lower pay is not related to her actual job responsibilities. Grievant has made a *prima facie* discrimination claim.

Once Grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v.Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). Respondent asserts that the difference is not, in fact, discriminatory because all Nurse3s are paid within the paygrade 16 range, and that new Nurse3s are offered a higher salary as a recruitment tool.

It is not discriminatory for employees in the same classification to be paid different salaries. Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003). The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. *See* AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees 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 v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

"Additionally, 128 C.S.R. 62, § 19.4 states any classified employee 'whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .'. As noted by the West Virginia Supreme Court of Appeals in Largent, [*supra,*] pay differences may be 'based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.' Id. at 246." Jenkins v. Dept. of Environmental Protection/Office of Mining

and Reclamation, Docket No. 03-DEP- 154 (Sept. 12, 2003).

Respondent has offered a legitimate, non-discriminatory reason for the pay discrepancy. As Grievant pointed out, the apparent disparity does create an injustice, but it is legally permissible. As long as Grievant remains in the system, she is ineligible to receive salary advancements designed to make the overall pay scheme at Pinecrest moreequitable. If she wants to keep doing the same work at a higher pay, she would be required to resign, wait for a while and then apply for a Nurse3 opening at a higher base rate, but, as Grievant pointed out, that action is something a responsible employee would not do. While Respondent stated Grievant is a very valuable employee and would like to see her receive more money, there is no way within the Division of Personnel procedures controlling salary advancements to give it to her, unless Respondent grants her a merit increase based on recorded measures of performance.

The following conclusions of law support this decision.

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. Id.

2. Any difference in the treatment of employees, unless the difference is related to the actual job responsibilities of the employee, or agreed to in writing by the employee, is discrimination. W. Va. Code § 29-6A-2(d).

3. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant has established by a preponderance of the evidence that her lower salary is *prima facie* a result of discrimination.

5. Once Grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

6. The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6- 10. *See* AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees 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 v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); 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). It is not discriminatory for employees in the same classification to be paid different salaries. Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003). 7. “Additionally, 128 C.S.R. 62, § 19.4 states any classified employee 'whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .'. As noted by the West Virginia Supreme Court of Appeals in Largent, pay differences may be 'based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.' Id. at

246." Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation, Docket No. 03-DEP- 154 (Sept. 12, 2003).

8. Respondent proved it has a legitimate, nondiscriminatory reason for the salary differences between the Nurse3s at Pinecrest.

For the foregoing reasons, this grievance is hereby **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, 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: October 28, 2003

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant stated at the hearing that the salary she was seeking is $36,456.