CHARLOTTE BUCKNER,

Grievant,

v. **Docket No. 03-HHR-038D**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

WELCH COMMUNITY HOSPITAL

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On November 22, 2002, Grievant, Charlotte Buckner, filed this grievance against her employer, the Department of Health and Human Resources ("HHR"). Her Statement of Grievance reads:

> Baylor staff are not eligible for premium pay, double time holiday pay, shift differential, retention and recruitment pay raises. (See footnote 1)

> Relief Sought: I do not want any other nursing or state employee at Batemen or any other state owned or operated facility to receive any pay raise or increase, shift differential, premium pay, retention and recruitment pay or holiday double time pay that I am not eligible for. [Sic]. I also request shift differential for any hours between 3p [sic] and 7 am regardless of Baylor status or primary shift.

On February 7, 2003, Grievant filed a motion for default with this Grievance Board, stating HHR had defaulted at Level III. After numerous continuances, a Level IV default hearing was held September 30, 2003, at the Grievance Board's Beckley Office, and default was granted by order dated January 13, 2004. A hearing on whether the relief requested was contrary to law or clearly wrong was held on June 4, 2004, and this issuebecame mature for decision on July 19, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by HHR as a registered nurse.

2. Grievant is one of nine nurses at Welch Emergency Hospital ("WEH") known as a "Baylor" nurse. A Baylor nurse is an employee who by agreement works only three days a week. The Baylor nurse works two 12-hour shifts on the weekend and one 8-hour shift during the week for a total thirty-two hours. In exchange for agreeing to work on weekends, Grievant is paid for forty hours a week even though she only works thirty-two hours a week. As a part of this contract, Grievant is never asked or required to work overtime. A Baylor nurse can ask to be placed in a regular nursing position, and this request is granted if possible. (See footnote 3)

3. This specific working arrangement was created by Division of Personnel for WEH on December 19, 1991. Res. No. 2 at Level IV.

4. At some time unclear from the record, the Division of Personnel gave HHR permission to fashion a shift differential and holiday pay plan/policy for its health care workers. HHR was to return to the State Personnel Board for final approval of this plan. Lowell Basford, Assistant Director of the Classification and Compensation Section of the Division of Personnel, met with administrators from HHR several times to assist them with their discussions. He did not participate in the final meetings, but was aware that the plan was approved.

5. HHR Instituted this shift differential and holiday pay plan/policy in December 2002. This Plan/Policy gave a one dollar per hour shift differential to employees who worked the evening and night shifts and double holiday pay to employees who worked the Thanksgiving, Christmas, and New Year's holidays. Baylor nurses were specifically excluded from this plan.

6. By working as a Baylor nurse, Grievant receives payment of approximately $7,500.00 a year for time she did not work. WEH considers this compensation as a shift differential.

7. The payment of a dollar an hour shift differential for the other health care workers in the Policy/Plan falls far short of the shift differential paid to Grievant. (See footnote 4)

8. Granting of this grievance would result in Grievant receiving two shift differentials for the same time worked.

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29- 6A-3. The burden of proof is on a respondent to prove by clear and convincing evidencethat the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Consistent with this statutory presumption that Grievant prevailed on the merits, the undersigned must presume Grievant established the failure to include Baylor nurses in the shift differential/holiday pay plan was an act of discrimination and/or favoritism. Both Grievant and Respondent agreed HHR followed its Policy/Plan, but Grievant believes this Policy/Plan resulted in discrimination and unfavorable and unequal treatment. Grievant's Proposed Findings of Fact and Conclusions of Law.

At the Level IV remedy hearing, Grievant focused on two areas of her requested relief: shift differential and holiday pay. Respondent contends HHR followed its Policy/Plan as approved by the State Personnel Board, accordingly it cannot be contrary to law or clearly wrong - there is no discrimination or favoritism. (See footnote 5) Additionally, Respondent notes Grievant already receives a shift differential and a greater salary for fewer hours worked.

HHR presented clear and convincing evidence that its Policy/Plan was established by its administration, approved by the State Personnel Board, and executed appropriately.

Discrimination is defined in 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." 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."

This Grievance Board has determined the test for establishing a prima facie case (See footnote 6) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), requires a grievant to 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.

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

Because the default was granted, it is presumed Grievant satisfied this test. The question to be addressed now is whether the relief sought is clearly wrong or contrary to law. The remedy sought by Grievant is an additional shift differential and holiday pay.

Respondent established Grievant already receives a shift differential, and this shift differential is much greater than that now received by the other nurses. (See footnote 7) Accordingly,Respondent has established by clear and convincing evidence that to pay Grievant another shift differential would be clearly wrong. Grievant has not been treated in a discriminatory manner or treated less favorably on the shift differential issue.

In contrast, Grievant does not receive holiday pay and the other nurses do. Prior to the new Policy/Plan, no one received double holiday pay. Grievant's weekend work days may very well fall on one of the three holidays, and it would be clearly wrong for her not to receive this same treatment. Respondent did not demonstrate by clear and convincing evidence that Grievant should be excluded from double holiday pay.

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

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong.

2. The Grievance Board has determined a respondent's standard of proof that the relief sought is clearly wrong or contrary to law, once a default claim is proven, is by clear and convincing

evidence. Lohr v. Div. of Corrections/Div. of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999). See W. Va. Code § 29-6A-3.

3. HHR properly enacted its Shift Differential/Holiday Pay Policy/Plan and it was subsequently approved by the State Personnel Board.

4. Respondent established by clear and convincing evidence that it would be clearly wrong to grant Grievant an additional shift differential. 5. Respondent did not establish by clear and convincing evidence that Grievant should not receive the new holiday pay.

Accordingly, this grievance is **DENIED, in part and GRANTED, in part**. Respondent is directed to pay Grievant the same as other employees, when her work day falls on one of the three covered holidays. Additionally, HHR is ORDERED to pay Grievant for any of these three designated holidays, if she worked any of these days since the policy/plan's implementation.

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.

_____ **JANIS I. REYNOLDS**

Administrative Law Judge

Dated: September 30, 2004

Footnote: 1

Although not directly addressed by the parties, it was clear from the testimony that Grievant received the retention and recruitment pay raise all other nurses received. Accordingly, it is unclear what other type of raise Grievant wished to receive.

Footnote: 2

Grievant was represented by Attorney Kay Bayless, the Division of Personnel was represented by Lowell Basford, and

Respondent was represented by Robert Miller, Assistant Attorney General.

Footnote: 3

Only one nurse has requested this change, and her request was granted.

Footnote: 4

If an employee worked all forty hours a week on the evening or night shift, this amount is only equal to a little over $160.00 dollars a month and approximately $2,000.00 in a year.

Footnote: 5

Grievant's attorney noted there were no documents placed into evidence stating the State Personnel Board approved HHR's actions. While this is true, the testimony of Mr. Basford was unrebutted and will be accepted as true.

Footnote: 6

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: 7

As noted previously, there are other differences between the other nurses and Grievant. The other nurses must work forty hours a week to receive pay for forty hours, and they can be called out to work overtime. Respondent established Grievant works thirty-two hours and is paid for forty, and is never called out for a fourth day of work, as she is only required to work three shifts.