KATHY BEAUCHAMP, et al.,

Grievants,

v. **Docket No. 04-HHR-098**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF HEALTH FACILITIES LICENSURE AND CERTIFICATION and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants (See footnote 1) initiated this proceeding on January 8, 2004, alleging entitlement to a salary increase that was granted to nurses employed by the Department of Health and Human Resources ("DHHR") in state hospitals. The grievance was denied at levels one and two on January 12 and 14, respectively, and a level three hearing was conducted on February 17, 2004. The grievance was denied in a written level three decision dated February 27, 2004. Grievants appealed to level four on March 4, 2004. After a hearing was scheduled, the parties elected to submit this matter for a decision based upon the record developed below, accompanied by fact/law proposals, which were submitted on May 17, 2004. Grievants were represented by Grievant Rebecca Dunn; DHHR was represented by Assistant Attorney General Robert Miller; and the Division of Personnel ("DOP") was represented by Assistant Director Lowell Basford. This matter wasreassigned to the undersigned administrative law judge for a final decision on June 11, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed as Health Facility Nurse Surveyors ("HFNS") and assigned to work for DHHR's Office of Health Facility Licensure and Certification ("OHFLAC").

2. Grievants are responsible for surveying and monitoring DHHR-operated health care facilities, including nursing and personal care homes, in order to determine their compliance with state and national regulations and certification requirements. Grievants are not assigned to an office, and prepare reports from their homes. The remainder of their time is spent visiting facilities and observing patient care. HFNS must be currently licensed registered nurses in order to determine whether patients are being cared for pursuant to applicable medical standards. Grievants also investigate complaints made against DHHR facilities.

3. The HFNS classification is compensated at Pay Grade 15.

4. On October 17, 2002, the State Personnel Board approved a DHHR proposal which established special hiring rates for Nurses, Nurse Directors, Licensed Practical Nurses and Health Service Worker positions at Mildred Mitchell Bateman Hospital. This proposal also granted a special pay differential for employees in theseclassifications and a shift differential pay program for all DHHR hospitals. See Grievant's Ex. # 8.

5. On August 21, 2003, the State Personnel Board approved another DHHR proposal which established special hiring rates for Nurse 1, Nurse 2, Nurse 3, and Nurse 4 classifications. The Board also approved salary adjustments for these job classifications at six of the health care facilities under DHHR's purview. A few months later the Board also approved the implementation of special salary adjustments for employees in the Nurse Director I and II classifications.

6. The above-described salary changes were the result of severe recruitment and retention problems, which were most serious at Mildred Mitchell Bateman Hospital, where the turnover rate for registered nurses was approximately 82% in one year. Pursuant to studies regarding private sector salaries, it was found that salaries for health care workers and nurses at state-operated facilities were significantly lower.

7. OHFLAC currently has only three of 32 HFNS positions vacant, and the turnover rate over the past three years for those positions has consistently been extremely low, never rising above 9%.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. *Procedural Rules of the W. Va. Educ. & State*

Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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. *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23- 174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the Grievants have not met their burden. *Id.*

Grievants contend that, since they are required to maintain their licenses as registered nurses in order to be qualified to perform their duties, they are similarly situated to nurses at state-operated facilities who received salary increases. Grievants claim that their salaries also are significantly lower than those of private-sector nurses, and that there have also been recruitment and retention problems in their job classification. Although not worded as such, Grievants' claims are tantamount to a claim of discrimination and/or favoritism.

"'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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 29-6A-2(h). A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under *W. Va. Code* §§ 29-6A-2(d) & (h), 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.

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

Grievants have not established a *prima facie* case of discrimination or favoritism in this case, if

only based upon the fact that they have significantly different job duties from the nurses employed at state facilities. While Grievants are, indeed, required to be licensed registered nurses, they merely observe patient care, as opposed to nurses employed at state facilities who are responsible for planning and implementing direct patient care 100% of their time. Moreover, contrary to Grievants' assertions, the evidence in this case simply does not establish that OHFLAC is experiencing any significant recruitment or retention problems with these particular positions. Under the facts presented, Grievants simply have not proven that they are similarly situated to the nurses employed at state facilities, so this cannot serve as the basis for a salary increase for Grievants.

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. *Procedural Rules of the W. Va. Educ. & State Employees GrievanceBd.* 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. *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988).

2. A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under *W. Va. Code* §§ 29-6A-2(d) & (h), 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.

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

3. Grievants have failed to establish a *prima facie* case of discrimination or favoritism in this case, because they are not similarly situated to nurses who are employed at DHHR hospitals and health care facilities.

Accordingly, this grievance is **DENIED**.

Any party 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 itsadministrative 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: July 7, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The named Grievants include Kathy Beauchamp, Carolyn Booher, Rebecca Dunn, Edna Buchanan, Jane Cost, Crystal Bunch, Louise Hall, Tracy Fletcher, Charity Boyden, Janet Fox, Tamara Lilly, Pamela Garrettt, Gloria Thompson, Beverly Hissom, Sharron Ball, Yvonne Keller, Jonni Stoker, Nancy Kiedaisch, Kay McVey, Christina Tenney, Joy Pack, Jackie Wickline, Nancy Snider, Linda Wright, and Charlene Straight.