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JACQUELINE LARGENT, CHARLOTTE KINGREY, MARY CARTER, ELLA ROBERTS, and RACHEL SMITH

v. Docket Nos. H-88-012/013/014/029/030

WEST VIRGINIA DEPARTMENT OF HEALTH and WEST VIRGINIA CIVIL SERVICE SYSTEM[1]

D E C I S I O N

Grievants are employed under the classification "Licensed Practical Nurse II" (LPN II) by Respondent West Virginia Department of Health (Health) at Huntington State Hospital (HSH), a psychological services facility and one of twelve institutions administered by Health. Complaining that they are compensated at only Step 1 of Pay Grade 11 while another LPN II, D.M., although performing the same duties as they, is paid at the higher Step 5,[2] Grievants

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[1] As of July 1, 1989, the Department of Health became known as "West Virginia Division of Health," and the Civil Service System, "West Virginia Division of Personnel."

[2] All LPN II's are compensated under Pay Grade 11, and there is no assertion of impropriety related thereto. Neither do Grievants contend that they are incorrectly classified as LPN II's. It is noted that, as a result of an early 1980's study, the former classifications of LPN I, II and III were combined into the current LPN I and II categories. See Arthur v. Dept. of Health, Docket No. 246 (W.Va. Civ. Svc. Commn. Jan. 30, 1985) (reclassification (Footnote Continued)

submitted their claims at Level I during Summer and early Fall 1988. Those claims were denied at Levels I, II and III

(Footnote Continued)
upheld). At least one Grievant was an LPN III under the old system.

This grievance is focused on D.M. simply because she is the highest-paid LPN II, and Grievants desire salary equalization with her. Grievants identified D.M. as the only LPN II ranked higher than Step 1, although other evidence suggests this may not be accurate. At any rate, this case must be understood to relate to all HSH LPN II's paid more than Grievants even though, due to Grievants' strategy of exampling D.M., data on individual nurses other than she need not be reviewed.

Interestingly, D.M. is paid at Step 5 not because she was hired thereat, but because she, formerly categorized as LPN I (Pay Grade 9), won a classification grievance, was accordingly promoted September 1, 1987, and, per Civil Service Regulations, her salary elevated the equivalent of one step. However, according to HSH Personnel Chief Dr. Jack Sells, she had to have been hired above the minimum entry salary for LPN I for a one-step increase to raise her to Step 5 of Grade 11. Lev. III, T. 26; also see Lev. III, Gr. Ex. 1.

It is important to point out that Grievants' claim in this forum is limited to a current comparison of their pay with D.M.'s, as opposed to complaints related back to their hiring or salary assignment, or D.M.'s, since the latter events occurred prior to July 1, 1988. W.Va. Code §29-6A-11. Beyond this, it would be questionable whether Grievants could base any claim directly on salary or other remedy granted D.M. as a result of her successful classification petition. See Watts v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Apr. 28, 1989). However, information on D.M.'s and Grievants' original hirings, D.M.'s reclassification, and other incidents require analysis since they are at least relevant to certain defenses posed by Respondent.

Grievant's representative strenuously objected when Health's attorney asked Grievant Kingrey if lowering D.M.'s

(Footnote Continued)

and consolidated after advancement to Level IV, where hearing was held December 22, 1988.[3]

On December 22, the parties proposed, and the undersigned consented to, a responsive post-hearing schedule, involving additional evidence, optional supplemental hearing thereon,[4] and rather extensive briefs, concluding March 10, 1989, with the submission of all parties' proposed findings of fact and conclusions of law. Thereafter, Grievants requested and were granted a one-week extension, making March 17 the due date for the fact-law proposals. All three missed this deadline and, upon Health's request, were

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(Footnote Continued)
salary to Step 1 would satisfy her claim, charging such action would be violative of "several United States Supreme Court decisions." Although recovery is precluded in certain instances unrelated to this grievance, see, e.g., Code §21-5B-3(2), his attention is invited to Annot., 88 A.L.R.2d 1437, 1451, §6 (recoupment of wages overpaid through mistake generally allowed, good faith of employee or negligence of employer notwithstanding).

[3] The West Virginia Civil Service System (CSS) was joined as a party at the beginning of this hearing.

In post-hearing brief, Grievant's counsel erred in his statement that Level III was waived with respect to Ms. Roberts and Ms. Smith; rather, the parties stipulated that the Level III hearing and decision on the claims of Ms. Largent, Ms. Kingrey and Ms. Carter would apply fully, without any supplementation of fact or law whatsoever, to the other two women. There is no provision in the West Virginia state employees' procedure for waiver of Level III consideration of a grievance. Code §29-6A-4(c).

Ms. Cassandra Griffith, who was a party-grievant at the lower levels, did not advance her claim to Level IV.

[4] Such optional hearing was never asked for or conducted.

afforded until late April to complete their presentations.[5] Accordingly, this matter is mature for disposition.[6]

MOTIONS TO DISMISS

Prior to commencement of the December 22 hearing on the merits of this grievance, Health's motion to dismiss, which was joined in by the West Virginia Civil Service System (CSS), was the subject of its own lengthy hearing. Health's petition alleges that Grievants' claim is not cognizable in this forum per W.Va. Code §29-6A-2(i), which excludes "any. . .matter in which authority to act is not vested with the employer" from the definition of "grievance." Save for certain allegations concerning merit pay,[7] Grievants concede that Civil Service System (CSS) Administrative Rules and Regulations (Regs) prevent Health from awarding them what

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[5] One justification for this delay is the Spring 1989 entry of Larry Harless, Esq., into the case as counsel to Grievants. Prior to this, they had been represented solely by David Mott, District 1199, National Union of Hospital and Health Care Employees/AFL-CIO.

[6] Decisions from each of Levels I, II and III, and the Level III hearing transcript, are part of the record in this case.

Any information presented in briefs not previously submitted as evidence has been ignored.

[7] Specifically, Grievants propose that Health could award them a one-step merit increase each year for the next four, and thus equalize their salaries with D.M.'s current pay over that period. As pointed out by Health, even if this were possible, it would be a bastardization of the performance-based system, and, further, D.M. could conceivably attain merit awards over that span and still be paid at a rate exceeding Grievants'.

they seek, i.e., a four-step pay increase. They propose, however, that Regs are inconsistent with West Virginia statutory and constitutional law and thus invalid.[8]

The motion to dismiss is denied due to the joinder of CSS. In circumstances such as those of this case, CSS is an "employer" per Code §29-6A-2(g) since it controls a significant aspect of Grievants' employment. See Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989). Grievants' request that CSS be made a party-respondent was granted pursuant to WVESEGB Rule 4.11 in recognition that the relief sought is available only if that action was taken. It is affirmed that Health acted properly under Regs in this instance and could not have responded otherwise to Grievants' complaints.[9]

On March 1, 1989, CSS filed its "Motion[] to Dismiss Due to Res Judicata and Improper Forum." Despite the motion's title, res judicata, a "doctrine which bars the subsequent litigation of any cause of action which has been previously tried [and resolved] on the merits by a. . .[forum] of competent jurisdiction,"[10] is the only basis for

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[8] As of July 1, 1989, Regs were substantially revised; however, with regard to details pertinent to this grievance, they remained intact.

[9] While it might be suggested Health could have requested CSS to take action on Grievants' behalf, the power to ask is not the power to do.

[10] Mellon-Stuart v. Hall, 359 S.E.2d 124, 131 (W.Va. (Footnote Continued)

dismissal argued therein. CSS misapprehends the meaning of the rule, contending baldly that since the issue of LPN II pay at HSH has been previously adjudicated, this grievance should be dismissed as to all Grievants. As identicality of parties is a requirement for the application of res judicata and, as of Grievants, only Ms. Kingrey was a party-plaintiff to the cases to which CSS now refers, see infra, its motion is now **DENIED** with respect to all Grievants save her. Grievant Kingrey's situation is analyzed below.

GRIEVANT KINGREY[11]

Grievant Charlotte Kingrey pursued to finality, in another forum then of competent jurisdiction, i.e., CSS,[12] a claim at least similar to the one she now poses here.

(Footnote Continued)
1987); accord, Monongahela Power v. Starcher, 328 S.E. 2d 200 (W.Va. 1985); Conley v. Spillers, 301 S.E.2d 216 (W.Va. 1983).

Liller v. W.Va. Human Rights Commn., 376 S.E.2d 639 (W.Va. 1988), clarifies at 646 that issue preclusion doctrines, e.g., res judicata, "can be applied to quasi-judicial determinations of administrative agencies" such as CSS. This principle is illustrated in Herrald v. W.Va. Dept. of Highways and CSS, Docket No. DOH-88-062 (June 13, 1989).

[11] This Grievant's name is spelled both "Kingrey" and "Kingery" in the record. Because the former is the spelling on her grievance form, which is her official filing at Level IV, it will be assumed correct and used herein.

In its brief, Health holds forth that Ms. Kingrey's case is res judicata.

[12] This Grievance Board assumed jurisdiction from CSS of employee disputes arising on or after July 1, 1988. Code §29-6A-11.

Within the context of the instant grievance, this was first expressly noted by the Level II evaluator in his Decision; it was again alluded to by CSS representative Lowell D. Basford at the Level IV hearing.[13] The undersigned has been provided copies of CSS decisions in Arthur, Hayden, Kingrey & Marks v. Dept. of Health, Docket No. 246 (two decisions) (Jan. 30, 1985/Jan. 8, 1986), and Arthur v. Dept. of Health, Docket No. 649 (Dec. 23, 1988). These documents reveal that in August 1984 Ms. Kingrey and others submitted a petition to CSS, complaining that they were being paid at the entry level salary for the LPN II classification, while "new. . .[LPN II's] are being employed or have been employed at. . .[HSH] and are receiving a larger salary. . .." The relief sought, in part, was "to be given a salary increase equal to or more than the new. . .[LPN II's] are being paid with full back pay to compensate for the years of experience." The first-step hearing board within HSH deemed Ms. Kingrey and her colleagues to have a meritorious case, and recommended "a step raise to bring them above the level of the newly hired LPNs and back pay to the time of the hiring of the new LPNs." CSS reviewed the hearing board's conclusions and

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[13] Any argument that Respondent had reopened the case with respect to Ms. Kingrey, per McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981), is not persuasive. Clearly, the other four Grievants were not parties to the previous action, and the merits of the case thus needed examination. Further, the question of res judicata as it related to Ms. Kingrey was raised early in these grievance proceedings by Respondent's agent.

remanded the case with direction that the salary discrepancies be investigated for justification "based on exceptional or special qualifications, special program needs or verifiable recruiting difficulties," or lack thereof. On remand, a majority of the hearing board found that HSH "could not hire new staff who had quality and significant experience at the lower salary levels, thus creating a serious nursing shortage." The board did not specifically grant or deny relief, i.e., salary enhancements, but highlighted "recruiting difficulties" as the reason for the discrepancies.[14] On review, CSS interpreted the board's decision "as a recommendation to deny the relief sought, and adopted the same."

By their Proposed Conclusion of Law 3, Grievants argue, without citation to authority,

> This grievance as to [G]rievant Charlotte Kingrey is not barred by the doctrine of res judicata, since the parties[-]respondent are not the same as in any former grievance; the operative facts are

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[14] The hearing board had one member designated by the LPN's, one selected by HSH, and one "neutral" member. On remand, the nurses' designee was unavailable to participate. At Level IV, Grievants' representative argued this as basis for questioning CSS's January 8, 1986, decision. His point is not well-taken, since majority consensus was reached therein and since Ms. Kingrey and the other nurses admittedly chose not to appeal the decision to the Supreme Court of Appeals of West Virginia.

On December 23, 1988, CSS denied Docket No. 649 as moot since it presented a "grievance. . .identical to the grievance covered by" its 1985 and 1986 orders in Docket No. 246. It is interesting but not otherwise significant that this decision was handed down one day past the Level IV hearing in this grievance.

As an aside, federal personnel regulations provide for special pay rates to be utilized when "recruiting difficulties" arise. 5 C.F.R. §§530.303, 530.306.

> not the same; the former grievance provided that partial relief was proper for the [G]rievant; and the subject [G]rievant was not afforded the opportunity to be fairly and fully heard in the former grievance; and the laws, rules, policies and practices bearing upon the former grievance have in various respects been changed since then.

Between the CSS grievances and the instant ones, the parties are identical for all practical purposes; Ms. Kingrey was and is a complainant, the West Virginia Department of Health was and is a defendant. That CSS was the adjudicating entity in the previous case, and is a party-respondent to this one, is irrelevant. The operative facts are, in pertinent regards, the same. It is true that there may have been more LPN II's hired by HSH at a salary level higher than Ms. Kingrey's since CSS heard and decided her former case; however, the pay equalization issue remains constant, see n. 2, ¶2. In fact, since D.M. has been employed at HSH since 1983, her salary situation may have been one reviewed by the hearing board and CSS and found justified, although this is not at all clear.[15] The "former grievance" did not ultimately provide partial relief for Ms. Kingrey; in addition, that Ms. Kingrey did not appeal CSS's decision made it a final one. Regs §14.02. It is true that

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[15] Ms. Kingrey testified at Level IV that she personally had been aware of D.M.'s salary since at least early 1985. According to the record, D.M. was an LPN I from around September 1, 1983, until September 1, 1987; the Arthur decisions may have been limited to consideration of LPN II salary, although LPN's without numerical designation are sometimes referenced therein.

"the laws, rules," etc. regarding employee grievances have been amended since 1985-1986, see Code §§29-6A-1 et seq., but this certainly is not justification, without more, to except the application of res judicata.

Finality is desirable in the law; hence, the principle of res judicata. Harrah v. Richardson, 446 F.2d 1 (4th Cir. 1971) (noting applicability of res judicata to administrative decisions even though not judicially reviewed); Liller v. W.Va. Human Rights Commn., 376 S.E.2d 639, 646 (W.Va. 1988). Ms. Kingrey cannot file in essence the same complaint, once the issue contained has been finally adjudicated, in a newly-available forum simply because she did not agree with the first decision. Federated Dept. Stores v. Moitie, 452 U.S. 394, 400-402 (1981); Van Sant v. U.S. Postal Service, 39 M.S.P.R. 408 (1989). Her remedy therefrom was appeal, Regs §14.02, which she did not pursue. Further, she cannot "pour old wine into new wineskins," i.e., bring the same charges under different titles or theories, and state a viable claim; she did not present evidence herein that her situation or the surrounding pertinent circumstances had changed in any regard since the 1985 and 1986 CSS decisions.

However, Liller mandates, as a prerequisite to the utilization of administrative res judicata, the first adjudicatory authority's utilization of "procedures. . .substantially similar to those used in a court of law." 376 S.E.2d 646. The Court found that the former agency in

that case "acted in a judicial capacity and resolved the disputed issues of fact properly before it through a formal and adversary procedure," but found res judicata inapplicable because the issues were not identical. Ms. Kingrey alleged she "was not afforded the opportunity to be fully and fairly heard" in the former proceedings. While she offered no support for this, the responsibility to establish the applicability of res judicata is upon CSS and not her. Neither Respondent presented a transcript or other evidence revealing either Ms. Kingrey's role in or the overall sophistication of the Arthur proceedings. Further, it appears that several specific issues raised by Grievants in the instant case may not have been dealt with by CSS in Arthur. At any rate, CSS has not met its burden of proof with regard to the affirmative defense of res judicata and its motion, insofar as it relates to Grievant Kingrey, is likewise **DENIED.**

MERITS OF GRIEVANCE

This case raises legal issues of some complexity, revolving around the concept of "equal pay for equal work." Grievant's union representative argued at the Level IV hearing that this principle, which is incorporated into West Virginia civil service law, see infra, requires that all personnel performing the same work be compensated in identical amounts. Interestingly, certain of Grievants disagreed with this interpretation and recognized that LPN II's at HSH with greater experience and/or education could be

offered more pay than those without such background.[16] It is not disputed that all LPN II's perform the same work; that LPN II's at HSH, as well as many other staff members at the facility, are discouraged at the salaries offered them; and that employees leave HSH on a rather regular basis for higher-paying jobs elsewhere.[17]

Code §§29-6-1 et seq. establishes the West Virginia Civil Service System (CSS); §29-6-10 authorizes CSS to "promulgate, amend or repeal" its own operating rules in accordance with Code §§29A-1-1, commonly known as the "Administrative Procedures Act." Section 2.01, CSS Administrative Rules and Regulations (Regs), iterates Code §29-6-1 in supplying the purpose of CSS as follows, in relevant particular, emphasis supplied:

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[16] Specifically, Grievants Largent, Smith and Roberts conceded that a newly-hired LPN II might be deserving of more salary than they, depending upon her education and experience. Amazingly, however, their attorney, in his brief, p. 9, stated that "the more senior LPNs would still have a rational argument that their longer service warrants higher pay" than such a recent employee even if Respondent equalized salaries. It would appear that Grievant, their union representative, and their counsel all have somewhat different theories of the cause of action herein.

Although Grievants suggest that the undersigned determine that each of them has "substantially more [LPN, particularly LPN II] experience" than D.M., and "education and training. . .at least as extensive" as D.M.'s, they failed to present adequate evidence to support such a particularized, inclusive finding. See Gr. Proposed Findings of Fact 2, 3. Even if such is true, the pertinence would appear strained in light of the outcome of this Decision.

[17] Grievants generally agreed that D.M.'s salary is the only reason they have low career morale.

> To attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its Civil Service employees, and other incidents of state employment. . . ..

Code §29-6-10(2) grants specific authority to CSS to adopt a pay plan for state employees under its aegis and provides, in pertinent part, that the "principle of equal pay for equal work shall be recognized in the several agencies of state government." Section 6.01, Regs, explains the "Purpose and Intent" of CSS' salary guidelines, emphasis supplied:

> To attract qualified employees and retain them in the classified service,. . .[CSS] shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various state agencies and on comparability to pay rates established in other public and private agencies and businesses. The intent of. . .[CSS] is to recommend to the Governor a pay plan with annual adjustments for cost-of-living increases and additional funds for merit increases.

Section 6.04, Regs, provides, in pertinent part:

> (a) Assignment of Classes - The. . .[CSS] shall assign each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved. . .unless it conforms to one of the pay rates in the pay grade assigned to the employee's class of position.
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> (b) Entry Salary - The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing qualifications, pertinent training, or experience above the minimum required for the class, as determined by the Director, may be appointed at any pay rate above the minimum, unless otherwise limited by. . .[CSS]. For each step above the minimum, the

individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training.

(c) Standard Rates of Pay - The compensation plan applies to all classes of positions in the classified service. It provides standard pay rates for full-time employees. . .. The salary or wage paid shall be determined by the pay grade to which the classification of the position has been allocated. . . . .

. . .

(e) Availability of Funds - Before a department makes salary adjustments. . .its fiscal officer shall certify that funds are available for this purpose.

Section 25, Regs, reads,

If and when it appears desirable in the interests of good administration,. . .[CSS], after public notice and hearing, may amend the rules as it becomes necessary.

It is undisputed that the Regs, as currently promulgated, do not allow any employee covered by Civil Service to attain a pay-hike[18] unless: a) promoted to a higher classification; b) given a longevity raise; or c) awarded a merit increase. Grievants do not contend that they are qualified for promotion, inasmuch as LPN II is the highest level related to their licensure. Nor do they argue entitlement to longevity pay, in that Regs §6.10 limits that benefit to

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[18] Not including cost-of-living raises, which are not pertinent to this grievance.

It is noted that W.Va. Code §5-5-2 grants certain state employees, including Grievants, "incremental salary increases based on years of service."

those individuals who have reached the top step of the pay scale within their grade.

Grievants' position on merit pay is a bit cloudier. Without any corroboration, Grievants' representative asserted that "everyone knows" that such rewards are sometimes performance-based, and sometimes politics-based.[19] He conceded that Grievants were not contending that they had inappropriately been denied merit raises in the past; indeed, no evidence was presented to support such an allegation. He did opine, though, that Grievants were due a salary increase, and "we don't care what you call it." Health correctly protested that under Regs §6.09 such raises may be awarded upon deserving performance only, and to suggest that they somehow could be given merely to equalize salaries would be to propose an abuse of the system. Grievants replied that it had been Health that first raised the merit pay issue, in the lower level decisions. Indeed, it appears Grievants are correct, but it likewise appears that Health referenced merit pay merely to explain its inability to raise salaries in any way due to a

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[19] Post-hearing, Health supplied information that eight employees transferring from other state agencies received merit salary enhancements between July and December 1988. Grievants cited this as an indication that merit pay was not always performance-based. This argument, without more, is not persuasive; even if it were, there is no contention that Grievants were denied deserved merit pay.

gubernatorially-imposed wage freeze, ongoing for several years, affecting all employees of state government.[20]

Evidence offered post-hearing revealed that this freeze was lifted for brief periods during the six-year span, 1982-88, and that while those "windows" were open, Health sometimes imposed its own freeze, see Gr. Ex. 1, and upon other occasions allowed a few merit increases. Since Grievants are not averring that they were improperly denied merit pay at any given time, this information has little bearing on the instant case except to point out that certain statements made by Health or its agents in lower level decisions and at the Level IV hearing may have been inaccurate due to overbreadth.[21] No prejudice to Grievants is perceived by Health's error in this regard.

"Equal pay for equal work" is the subject of Chapter 21, Article 5B, West Virginia Code. Health argues, in effect, that Code §29-6-10(2) must be read in pari materia therewith. See Kimes v. Bechtold, 342 S.E.2d 147 (W.Va. 1986), Syl. Pt. 1 (stating rule of statutory construction). Code §21-5B-3 relates the "equal pay" concept only to a specified discrimination, namely, sex, in the following language:

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[20] No party to this grievance has charged impropriety in the imposition of this freeze upon state employees.

[21] The crux of these declarations was that no performance-based salary enhancement had been awarded to any Health staff member since 1982.

> (1) No employer shall: (a) In any manner discriminate between the sexes in the payment of wages for work of comparable character, the performance of which requires comparable skills; (b) pay wages to any employee at a rate less than that at which he pays wages to his employees of the opposite sex for work of comparable character, the performance of which requires comparable skills.
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> (2) Subsection (1). . .does not apply where: (a) Payment is made pursuant to a seniority or merit system which does not discriminate on the basis of sex, (b) a differential in wages between employees is based in good faith on factors other than sex.

Clearly, Grievants do not have a sex-based claim. D.M. is female, as is each of them. Moreover, the only distinction evident is the employee-favorable market circumstances under which D.M. began association with HSH, complemented by her education and work experience. Therefore, even if Grievants had a valid §21-5B-3(1) complaint, §21-5B-3(2)(b) would appear to provide Respondents an adequate defense thereto. In short, there is no evidence that Grievants have been victimized by discrimination upon the basis of sex or any other criterion protected by law or public policy,[22]

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[22] Indeed, Grievants have not articulated any theory of discrimination other than "equal pay for equal work." Their representatives have suggested impropriety in allowing D.M. negotiation privileges upon hiring, which were allegedly denied them. To the extent that this claim is relevant to this grievance in light of Code §29-6A-11, see n. 2, ¶4, the record simply does not support Grievants' contentions. First of all, no evidence whatsoever was offered that D.M. was told that she could negotiate a higher salary or, indeed, that she did engage in any pre-hiring conversations about her pay. Furthermore, Grievant Largent testified that she did negotiate an entry level of LPN II as
(Footnote Continued)

including the broad umbrella of Code §29-6A-2(d).[23] Four recent related pronouncements of the Supreme Court of Appeals of West Virginia, all styled AFSCME v. CSC,[24] are undergirded by §29-6-10(2)'s inclusion of "equal pay for equal work." The Court did not interpret that concept as necessarily sex-linked, but rather, duty-linked. In essence, the Court held that persons performing like tasks are entitled to wages based on the same CSS classification pay

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(Footnote Continued)
opposed to LPN I, and Grievant Roberts, when she was hired, initiated discussion on this same factor of employment. Grievant Carter supplied that LPN's were "not very recognized in the state system" at the time she was hired and so, she was not surprised at the lack of negotiation surrounding her hiring. All Grievants testified that they had accepted the salary and terms offered them without question, save for Ms. Largent and Ms. Roberts.

Even if Grievants had established that D.M. had been told she could negotiate, and they not only had not but had been expressly refused the opportunity to do so, no impropriety would be shown. One of the vestiges of securing work is assuming certain responsibilities related thereto; an employee cannot complain, after the fact, of her own shortcomings in dealing with the application process and blame them on her employer. See Riffle v. Dept. of Health, Docket No. 89-H-053 (July 21, 1989), n. 8 (grievant's complaint, that employer-respondent accepted her handwritten application as it was but then counted her poor penmanship and misspellings against her in the hiring decision, without merit). Furthermore, Health had no obligation to suggest or permit negotiation with any given candidate for employment; at the same time, no encumbrance against so doing ever existed.

[23] "[A]ny 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."

[24] 324 S.E.2d 363 (1984); 341 S.E.2d 693 (1985); #17929 (unpublished, 5/20/88); and 380 S.E.2d 43 (1989). Respectively, these decisions are popularly known as AFSCME I, AFSCME II, AFSCME III, and AFSCME IV.

scale as opposed to identical, dollar-for-dollar salary. In the instant case, all HSH LPN II's perform the same job, are classed correctly, and are compensated according to the LPN II pay scale.

The situation in which Grievants find themselves is obviously an uncomfortable one for them. However, be the Regs right or wrong, Health, as previously noted, could have done nothing more than it did. The question then becomes the propriety exhibited by CSS in establishing and enforcing Regs. While annual, meaningful longevity pay augmentation would undoubtedly be an incentive to state employees and further aid in their retention, it cannot be said with certainty that Regs operate to discourage qualified individuals from maintaining state employment.[25] There may be more emphasis on recruitment than retention, and this, again while perhaps not as favorable for those already working, is not, on its face, a clearly inappropriate interpretation of the statute setting CSS' direction, Code §29-6-1, or even CSS' own statement of pay policy, Regs §6.01. To say that the situation should be addressed is not to say that the system, as it is now in place, is flawed to the point that

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[25] Dr. Sells estimated that only "less than ten" of HSH's sixty-or-so LPN's had voluntarily left HSH's employ during 1988. The undersigned does not deem this turnover rate, without more, to be indicative of mass discontent.

it is inconsistent with the overall purpose stated by or for CSS.[26]

Another point that needs to be considered is that Regs were not, indeed, could not have been, adopted with the idea of an extended gubernatorial pay freeze in mind. Even if the freeze had not been in place most of the time since 1982, Grievants, all apparently possessed of favorable performance evaluations, likely might have been the recipients of merit pay enhancements, perhaps longevity hikes, and today perhaps satisfied with their earnings.[27] Neither CSS nor Health can be blamed for executive action that could neither be foreseen nor appropriately factored into CSS' pay plan. Furthermore, a gubernatorial freeze might well have stymied any pay increase whatsoever, despite the various mechanisms that could have been provided therefor in Regs.

In their brief, Grievants suggest that they are entitled to relief because the pay gap in question: a) violates state statutes; b) is an ultra vires administrative act; c) is arbitrary, capricious and discriminatory; d) violates

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[26] It is noted that the hearing board in CSS' Arthur decisions at one point recommended the revision of Regs, and other action, so that tenured LPN's would receive more favorable treatment. Jan. 30, 1985, p. 2. At Level IV, Dr. Sells testified that the only path presently open to these nurses for possible salary enhancement was resignation and reapplication, although he offered no guarantee that such a tactic would meet success.

[27] This is assuming, of course, the availability of funds, which is always prerequisite to wage hikes under Regs. §6.04(e).

Grievants' rights to equal protection of the law; e) violates their rights to substantive due process of law; and f) improperly invades the exclusive province of the West Virginia Legislature. They further argue that this Grievance Board, pursuant to Code §29-6A-5(6), has authority to fashion any relief it deems appropriate, including an immediate four-step increase in Grievants' pay. Those assertions are addressed summarily below, although for efficiency's sake not necessarily in the same order as presented.[28]

Grievants, like all LPN II's, are paid at the Pay Grade 11 level. Indeed, some Grievants themselves testified they believed it correct that some LPN II's should be paid differently from others, yet still within Grade 11. There is no discrimination per Code §29-6A-2(d), as Grievants' representative forcefully argues there is, in that all LPN II's are being compensated within the same pay plane as required by the AFSCME quadrilogy. In this same vein, there is no denial of equal protection of the laws or substantive due process. W.Va. Const., Art. III, §§10, 17; see also Art. VI, §39. Additionally, the principle of equal protection, generally speaking, invalidates only those provisions of law which without justification favor certain specified

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[28] There is some question as to whether an administrative forum, such as this Grievance Board, is competent to resolve constitutional inquiries. This Decision should be read in light of this caveat.

groups over other such groups. See, e.g., Atchinson v. Erwin, 302 S.E.2d 78 (W.Va. 1983). Whether tenured and new personnel constitute "groups" for these purposes is very questionable; further, Grievants' example of disparate treatment, D.M., is not such at all. D.M., like Grievants, is stationary at her starting LPN II income.

CSS is not guilty of ultra vires activity herein. Its Regs are not inconsistent with the statutory delegation of authority or statement of CSS' purpose. Furthermore, the West Virginia Legislature gave specific endorsement to Regs when it reviewed and accepted them, as it must all legislative rules, Code §§29A-3-1, 29A-3-9 et seq.; accordingly, neither has CSS violated the separation-of-governmental powers doctrine of Const., Art. V, §1.[29]

No arbitrary or capricious conduct on Health's part is perceived. D.M. had adequate professional history to be hired in at the level she was per Regs §6.04(c). See Level III, Gr. Ex. 1. Market conditions and other legitimate business concerns on Health's part, as established generally but satisfactorily by the record at Levels III and IV,[30] create "a rational relationship" between D.M.'s higher

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[29] In addition, the Governor of the State of West Virginia must grant express approval to any Regs involving employee wages. Code §29-6-10(2). As an aside, neither the Governor nor the Legislature is an "employer" within this grievance procedure, Code §29-6A-1.

[30] See, e.g., Arthur (Jan. 8, 1986); Level III, T. 22-28.

initial salary and a "legitimate objective," i.e., the furtherance of professionalism and the increase of staffing at HSH. No evidence to the contrary was presented by Grievants.[31]

Finally, there is no question that this Grievance Board has authority to grant the relief Grievants seek, but only because Respondent CSS is empowered to amend its rules and regulations. It is clear that the Grievance Board cannot offer a remedy that is unavailable from one or more Respondents in a given case; the lower administrative levels of

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[31] In its Brief, at n. 3, Health contends:

> Despite [G]rievants' assertions that they are better qualified and more experienced than this LPN (D.M.), no objective evidence of D.M.'s qualifications or experience was introduced into the record. Therefore, any comparison of qualifications and experience is completely without foundation.

Fortunately for Health, this statement is simply not true. Testimony, albeit general, was offered at both Levels III and IV concerning D.M., her qualifications, and the circumstances of her employment. Further, Grievant offered an exhibit at Level III which revealed that D.M. had several years' work history as an LPN prior to her affiliation with HSH. Level III, Gr. Ex. 1.

D.M.'s qualifications and the circumstances of her hiring are not elements of Grievants' prima facie case, but more in the nature of an affirmative defense; the burden of their production was thus upon Health. See Covington v. So. Ill. University, 816 F.2d 317 (7th Cir.), cert. denied 108 S.Ct. 146 (1987) (interpreting parallel federal Equal Pay Act, 29 U.S.C. §206(d)).

the grievance procedure would be rendered meaningless otherwise.[32]

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. All LPN II's at Huntington State Hospital (HSH) are paid at West Virginia Civil Service System (CSS) Pay Grade 11.

2. All LPN II's at HSH have the same job description and perform identical duties.

3. Grievants, LPN II's at HSH, are paid at the minimum entry level salary, which is Step 1 of Pay Grade 11.

4. D.M., another LPN II at HSH, is paid at the higher salary level of Step 5, Grade 11. When she was first hired by HSH, she received more than minimum entry pay due to her background and the market conditions at the time.

5. CSS Regulations permit wage hikes for tenured employees via promotion, longevity pay, or merit award. None of these avenues are available to Grievants, the latter

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[32] The definition of "grievance," Code §29-6A-2(i), ¶ 2, and the very framework of the state employees grievance procedure, Code §§29-6A-1, 29-6A-4, support this conclusion. Even in the very few instances where the lower levels may be bypassed, per Code §29-6A-4(e), clearly the employer has the power and authority to rescind the action taken against the employee.

due to a gubernatorial freeze on state personnel salary enhancements. Even absent the freeze, any merit raise must be performance-based and not otherwise awarded, under the Regulations. Grievants contend neither candidacy for the former two means nor wrongful denial of merit pay in the past.

6. Grievants and D.M. are all women.

7. Grievant Charlotte Kingrey has previously pursued to final decision in a forum of competent jurisdiction a grievance claiming that she should be paid equally with higher-paid LPN II's at HSH.

CONCLUSIONS OF LAW

1. In order to prevail, Grievants must prove the allegations of their complaint by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Res judicata is applicable to certain administrative decisions. Liller v. W.Va. Human Rights Commn., 376 S.E.2d 639 (W.Va. 1988). It is an affirmative defense, and as such, the party posing it has the burden of proof thereof, also by a preponderance of the evidence. See Webb v. Mason Co. Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). That burden has not been met herein.

3. The concept of "equal pay for equal work" must be recognized in the agencies of state government in West Virginia. W.Va. Code §29-6-10.

4. "Equal pay for equal work", whether grounded on the Code §21-5B-3 principle that persons assigned to like employment should not be differentiated due to sex or the AFSCME quadrilogy "same duties-same classification" pronouncement, does not require that all individuals performing coincident job tasks always be paid identical salary.

5. Civil Service Regulations which allow hiring employees at a level higher than the minimum, in certain specified circumstances, are valid. See Covington v. So. Ill. University, 816 F.2d 317 (7th Cir.), cert. denied 108 S.Ct. 146 (1987) (business-related reasons including education, experience affirmed as valid basis for wage differential under federal Equal Pay Act). Those Regulations support D.M.'s higher salary in this case and do not violate "equal pay for equal work."

6. Grievants have not proven themselves to be the victims of "discrimination" as that term is defined in Code §29-6A-2(d).

7. Civil Service Regulations with regard to pay, in and of themselves, cannot be said to certainly violate their stated purpose of attracting and retaining qualified personnel, Regs §§6.01, 6.04, or the policy undergirding the establishment of CSS, Code §29-6-1.

8. Grievants have not established any clearly unreasonable, inappropriate, arbitrary, capricious, or illegal behavior whatsoever on the part of either Respondent.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. This office should be promptly advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

M. DREW CRISLIP
Hearing Examiner

Dated: September 15, 1989