BARBARA HOFF

v. DOCKET NO. 93-BOT-104

BOARD OF TRUSTEES/WEST

VIRGINIA UNIVERSITY

DECISION

Ms. Barbara Hoff's grievance was filed over a perceived pay inequity between the Grievant and three recently hired workers. The Grievant alleged discrimination and the remedy she sought was back pay from the date the inequity occurred at a salary of $35,000 a year. Two individuals, physician's assistants with no prior experience, were hired at $35,000 a year. Another individual, a nurse practitioner, was hired at $31,839 a year. The Grievant, a nurse practitioner with ten years experience as a family planning specialist, was paid $30,000 a year. The Grievant was also the administrator of the Family Planning Program. The other individuals had no supervisory duties. The Grievant's supervisor, Dr. Jan Palmer, stated the Grievant performed the same work as the physician's assistants, in addition to her other administrative duties. Letter from Dr. Palmer to Ms. Phillips, Manager of Classification and Compensation, January 8, 1993.

This Grievance was initiated with an informal conference on February 2, 1993 and a written denial was received on February 3, 1993. Thereafter the grievance was reduced to writing and submitted to Dr. Morgan on February 9, 1993. Dr. Morgan denied the grievance with a letter dated February 23, 1993 and postmarked February 24, 1993. On March 1, 1993 the Grievant requested Default Judgment of the President of West Virginia University, Dr. Bucklew, because the response time from the Respondent exceeded the five days allowed by W. Va. Code §18-29-4(a)(4). The Grievant further stated that since the default judgment should be granted, a Level II hearing would not be necessary. The Respondent did not respond to this request. The Respondent, on March 11, 1993, wrote Mr. Ronald Wright, the Director of this Grievance Board, and requested a Level IV Hearing. Briefs were submitted on this issue. (See footnote 1)

On October 20, 1993 this Grievance Board granted tentative default judgment to the Grievant. The Board also granted Respondent's request for a Level IV hearing for only two purposes; to allow

presentation of evidence of any statutory defense to the Default Judgment, and if there was no statutory defense, to examine whether the remedy was "contrary to law or clearly wrong" pursuant to W. Va. Code §18-29-3(a). Since the beginning of this grievance Ms. Hoff has changed her employment and her requested relief is now for back pay.

Several attempts were made to schedule a hearing without success. After a phone conference the undersigned did receive two position descriptions. On February 4, 1993 the undersigned wrote the parties asking how they wished to proceed. One option given to the parties would be a Final Order based on the "limited record" if no response was received from either party by April 1, 1994. Since no response was received this case became mature for decision on that date. (See footnote 2)

Discussion

The provision of the W. Va. Code §18-29-3(a) at issue is:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

Thus, the first issue is whether the Respondent can prove either of the statutory defenses listed in W. Va. Code §18-29-3(a). This Code section states the Respondent's grievance evaluator may be excused from meeting the time requirements if he can demonstrate he was "prevented from doing so as a result of sickness or illness. . . ." There is no evidence in the record that Dr. Morgan was prevented from responding to the grievance by "sickness or illness", thus this defense has not been proved.

The next issue is whether this case is properly before the Grievance Board. This Board has previously ruled that it does not have any jurisdiction to enforce a default judgment that occurred at a lower grievance level. Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993). But, this Board is required by statute to hear the claim of an employer that the grievant's remedy is

legally unwarranted, or in the words of the statute "contrary to law or clearly wrong." Glance v. Marion County Bd. of Educ., Docket No. 93-24-286 (Mar. 31, 1994); Accord Marrone v. Wayne County Bd. of Educ., Docket No. 92-50-389 (Aug. 31, 1993); Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993). Here, this case is properly before the Board because the Respondent requested a Level IV hearing on this very issue. Flowers v. W. Va. Bd. of Trustees/W. Va. University, Docket No. 92-BOT-340 (Feb. 26, 1993).

Accordingly, the next issue is whether granting the grievant the salary increase requested is "contrary to law or clearly wrong." W. Va. Code §18-29-3(a) provides explicit directions for this review at Level IV. "In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption." Id. This clearly wrong standard is a strict one,limiting the discretion of the Grievance Board. The evidence of record demonstrates the Grievant had significant administrative duties, over ten years of experience, a master's degree, and performed similar clinical duties to the three higher paid employees. Viewed in light of the presumption that Grievant has demonstrated she has been discriminated against, her requested relief, back pay at a salary of $35,000 per year from the time the inequity began, is not clearly wrong or contrary to law. Flowers, supra.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated.

FINDINGS OF FACT

1. Grievant was employed by West Virginia University Health Service as a nurse practitioner and a Family Practice Specialist earning $30,000 a year.
2. One nurse practitioner and two physician's assistants hired after the Grievant received substantially higher salaries.
3. All four employees performed the same clinical duties, but the Grievant had additional administrative duties.
4. After a review of the dates of filing and response, it is clear the Respondent was in default.

CONCLUSIONS OF LAW

1. Since W. Va. Code §18-29-3(a) grants a presumption that the Grievant prevailed on the

merits, which was not rebutted, an award of back pay is not clearly wrong or contrary to law in this case.

2. Further, since the Respondent did not assert a timeliness defense, the Grievant's remedy runs from the time the inequity began, which would be the date the male physician's assistant was hired at a $35,000 annual salary. See AFSCME II v. CSC of W. Va., 341 S.E.2d 693, 698 (W. Va. 1983).

Accordingly, the tentative Default Judgment is **ORDERED AFFIRMED** and the Grievant is to receive the difference in the salary she received and the increased salary of $35,000 from the date of the hiring of the first physician's assistant to the day she quit.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the county in which the cause of action arose and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 30, 1994

Footnote: 1This case was originally assigned to another Administrative Law Judge, but was reassigned for administrative reasons.

Footnote: 2Since they were unrebutted the undersigned accepts the Findings of Fact submitted by the Grievant as true.