MARY V. BRUTTO,

Grievant,

v. **Docket No. 96-HHR-076**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, AND WEST VIRGINIA DEPARTMENT OF ADMINISTRATION, DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This is a grievance by Mary V. Brutto (Grievant) alleging that the Respondent West Virginia Department of Health and Human Resources (DHHR) is not compensating her in accordance with the doctrine of equal pay for equal work. (See footnote 1) This grievance was initiated at Level I on August 18, 1994. Following adverse decisions at Levels I and II, Grievant appealed to Level III. The Division of Personnel (DOP) was joined as an indispensable party on May 25, 1995, and a Level III hearing was conducted on November 20, 1995. Sue Sergi, Commissioner of the Bureau for Children and Families,denied the grievance at Level III on February 14, 1996. Grievant appealed to Level IV on February 22, 1996, and a Level IV evidentiary hearing was conducted in this Board's office in Morgantown, West Virginia, on May 23, 1996. (See footnote 2) All parties submitted timely post-hearing arguments and this matter became mature for decision on July 10, 1996, upon receipt of the Level III hearing transcript.

There is no significant dispute regarding the facts in this matter. Accordingly, the following Findings of Fact are made based upon the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant, a female, was employed by Respondent from August 1979 to March 1995. At the time this grievance was initiated, she was classified as a Social Service Worker I.

2. In July 1994, Respondent filled a vacant Social Service Worker I (SSWI) position through voluntary demotion of a male employee, "J.M.," then employed as a Social Service Worker III. (See footnote 3)

3. Grievant was tasked with providing training to J.M.

4. After completing his on-the-job training under Grievant's tutelage, J.M. performed substantially the same duties as Grievant.

5. Rule 5.06 of the Administrative Rules of the Division of Personnel, governing "Pay on Demotion" provides:

> The pay of an employee who is demoted and whose current pay is above the maximum pay rate for the new classification is reduced to at least the maximum pay rate of the new classification. The employee's salary may remain the same if his pay is within the pay range of the new classification, or his pay may be reduced to a lower pay rate in the new range. If the employee's salary before demotion falls within the range for the lower class, but does not coincide with a pay rate in that range, his salary is reduced at least to the next lower pay rate in the new range.

143 C.S.R. 1 § 5.06 (1993).

6. Unless required to do so under the terms of Rule 5.06, DHHR does not normally decrease the salary of an employee who takes a voluntary demotion to a position in a lower classification.

7. At the time this grievance was initiated, J.M. was receiving an annual base salary $864 greater than Grievant's annual base salary.

DISCUSSION

Grievant complains that she was not properly compensated in comparison to J.M. in that she performed the same duties, and additional duties on both a voluntary and involuntary basis, for 18 years, while J.M., a male SSWI with less than three years' service with the state, and no previous experience as an SSWI, was receiving a greater annual salary. Grievant generally avers that this situation violates the "equal pay for equal work" laws.

In order to prevail in a grievance of this nature, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). The concept of "equal pay for equal work" upon which

Grievant relies is embraced by W. Va. Code § 29-6-10. SeeAFSCME v. Civil Service Comm'n, 380 S.E.2d 43 (W. Va. 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). As was the case in Largent, and the prior decisions of this Grievance Board cited above, Grievant has not shown that there was any discriminatory motive when HHR set J.M.'s salary higher than Grievant's salary. Instead, the new employee's salary resulted from the circumstance that he previously held a higher classification in the agency. This is a reasonable basis to explain the pay inequity identified here. See Largent, supra; W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994).

Grievant also alleges that she is being compensated in violation of that portion of the federal Fair Labor Standards Act (FLSA) which was added by the Equal Pay Act of 1963. This statute has been found to apply to state and local governments. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). This Grievance Board previously determined that grievances by state employees alleging violations of the FLSA fall within the jurisdiction of this Board. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH- 341 (Apr. 27, 1995). See W. Va. Code § 29-6A-2(i); Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). This issue was not addressed in Largent, because the grievantsand the employees against whom their salaries were compared were all female. Largent, supra, at 239. Therefore, it is appropriate to consider the implications of the Equal Pay Act on this particular grievance.

The Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex:

> Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

The mere fact that Grievant and J.M. are in the same job classification does not necessarily mean that they perform the same work. Hassman v. Valley Motors, 790 F. Supp. 564 (D. Md. 1992). See 29 C.F.R. § 1620.13(e). However, Grievant testified that she trained J.M. to perform his duties, and that he then began performing the same duties as she was assigned. Respondent did not demonstrate that there were any substantial differences in the work performed by Grievant and J.M. See EEOC v. Hay Assoc., 545 F. Supp 1064 (E.D. Pa. 1982). Accordingly, Grievant appears to have madea prima facie case that the Equal Pay Act was violated. (See footnote 4) See Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

DHHR and DOP demonstrated that J.M.'s higher salary was based on the fact that he previously held a higher classification than Grievant and elected to take a voluntary demotion to the SSWI classification held by Grievant. This is clearly a "factor other than sex" as provided in 29 U.S.C. § 206(d)(1)(iv), inasmuch as the regulation authorizing J.M. to retain his higher salary applies equally to males and females. Thus, Respondents have established a legitimate exception to the requirements of the Equal Pay Act, negating Grievant's prima facie case. See Girdis v. EEOC, 688 F. Supp 40 (D. Mass. 1987), aff'd, 851 F.2d 540 (1st Cir. 1988). (See footnote 5)

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. A grievant alleging pay discrimination must prove the allegations in her complaint by a preponderance of the evidence. Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994). 2. 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, 452 S.E.2d 42 (W. Va. 1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-

H-177 (May 29, 1992).

3. Under W. Va. Code § 29-6A-2(i), the West Virginia Education and State Employees Grievance Board has jurisdiction over grievances concerning wage and hour claims under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

4. The Equal Pay Act of 1963 (EPA) amended the FLSA to prohibit an employer from paying different wages to a male and female employee working in the same establishment and performing equal work, on the basis of sex. 29 U.S.C. § 206(d).

5. Grievant, a female Social Service Worker I, established a prima facie case of pay discrimination under the EPA by demonstrating that she received less pay than a male employed by Respondent DHHR to perform substantially identical work as a Social Service Worker I. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

6. Under certain circumstances, as were demonstrated to be applicable here, Rule 5.06 of the Administrative Rules of the Division of Personnel authorizes an employing agency to permit an employee demoted from a higher classification to retain their pay at the same level. See 143 C.S.R. 1 § 5.06 (1993). Because J.M., the male employee against whom Grievant has compared her salary to establish a prima facie case, was previously employed by Respondent DHHR as a Social Service Worker III,Respondents established by a preponderance of the evidence that the pay differential at issue was based on a factor other than sex, an authorized exception to the requirements of the EPA. See 29 U.S.C. § 206(d)(1)(iv); Girdis v. EEOC, 688 F. Supp 40 (D. Mass. 1987), aff'd, 851 F.2d 540 (1st Cir. 1988).

7. Grievant has failed to establish by a preponderance of the evidence that her employer is compensating her, in comparison to J.M. or any other similarly situated employee, contrary to the provisions of W. Va. Code §§ 29-6-10 or 29-6A-2(d), the Equal Pay Act of 1963, or any other statute, policy, rule, regulation, or written agreement applicable to her employment situation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision 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. 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: July 24, 1996

Footnote: 1

To the extent Grievant also complained at Level IV about being required to work out of classification, not receiving merit raises, and not receiving opportunities for promotion to vacant positions in higher classifications, those matters are outside the scope of this grievance and were not properly before the undersigned at Level IV. See W. Va. Code § 29-6A-3(j); W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Footnote: 2

Due to personnel turnover, this matter was administratively reassigned to the undersigned administrative law judge for decision.

Footnote: 3

For purposes of this grievance, it is not necessary to identify this employee by name.

Footnote: 4

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: 5

Although Grievant did not specifically allege discrimination under W. Va. Code § 29-6A-2(d) as a basis for relief, it is noted that application of a standard discrimination analysis to these facts would render the same result. See e.g., Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994).