

ROBERT NIDA, .
Grievant, .

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V. . DOCKET NUMBER: 95-HHR-365

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

DECISION

Grievant, Robert Nida, a Nursing Director I employed at the Huntington Substance Abuse Unit, filed this grievance on March 23, 1994, pursuant to the provisions of West Virginia Code §§29-6A-1, et seq., against his employer, the West Virginia Department of Health and Human Resources, claiming that he had been “arbitrarily discriminated against” by being denied a “salary equity adjustment” in violation of the Division of Personnel's Administrative Rule [143 C.S.R. 1]. The claim was denied at level one on March 30, 1994, by Jack Clohan, Jr., Director of the Division of Alcoholism and Drug Abuse. The grievance was also denied by Mr. Clohan at level two on April 25, 1994. The Division of Personnel (Personnel) was joined as a party at level three, prior to hearings

held on March 28, and May 17, 1995. The grievance was denied at that level on August 23, 1995, by Grievance Evaluator Jack McClung. Appeal was made to level four on August 30, 1995, and evidentiary hearings were held on October 13, and December 5, 1995, at the Grievance Board's Charleston, West Virginia office. The case became mature for decision on or about December 11, 1995, after receipt of Grievant's post-hearing, written argument.

The West Virginia State Personnel Board, a part of Personnel, was created in 1989 to replace the former Civil Service Commission. W. Va. Code §29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service System were also transferred to the Director of Personnel. Code §29-6-9 (1989). Pursuant to Code §29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend or appeal legislative rules governing the

preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. Code §29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See, Callaghan v. West Virginia Civil Service Comm'n, 273 S.E.2d 72 (W.Va. 1980). Finally, and in general, a governmental agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. State Health Planning, 328 S.E.2d 164 (W.Va. 1985). See, Watts v. Dept. of Health and Human Resources, 465 S.E.2d 887 (W. Va. 1995); West Virginia Department of Health and Human Resources v. Blankenship, 431 S.E.2d 681 (W.Va. 1993).

Notice is taken that in late 1991, Personnel began a statewide reclassification project. To accomplish this project, Personnel created Pilot Guidelines to establish the groundwork for its creation of a new classification plan and accompanying pay plan. The actions taken by Personnel were to be in accordance with these new administrative guidelines as opposed to its already-existing administrative rule, 143 C.S.R. 1, which was promulgated pursuant to Code §29-6-10. These guidelines specifically replaced Sections Five and Six of the existing rule dealing with Classification

and Compensation Plans. The section of these Pilot Guidelines at issue here is Section VI.E, which reads as follows:

Correction of Salary Inequities - Whenever the movement of employees in organizational units results in salary inequities, the Director of Personnel is authorized to approve salary adjustment of one or more employees up to a maximum of 10% per employee. The determination as to the extent of the inequity and the appropriate corrective action shall be made by the Director of Personnel, after consultation with the appointing authority and approval by the department secretary.

Effective May 1, 1994, Personnel promulgated a new Pay Plan Policy that superseded the Pilot Guidelines' provisions on pay regulations and the salary schedule. This Section was eliminated.

The following findings of fact have been deduced from the evidentiary record that consists of the testimony offered and exhibits introduced in both the level three and level four hearings:

Findings of Fact

1. Grievant is classified as a Nursing Director I, at pay grade 18. His annual salary is \$36,048.00.
2. Grievant works at the Huntington Substance Abuse Unit (SAU) which is operated by Respondent, West Virginia Department of Health and Human Resources (HHR).
3. The Substance Abuse Unit is located on grounds adjacent to the Huntington State Hospital but is operated by the Substance Abuse Department in HHR's central office in Charleston.
4. The staff at the Huntington State Hospital are responsible for such items as the maintenance, security and dietary needs of the SAU. Huntington State Hospital does not provide supervisory or administrative services to the employees of the SAU.
5. In December 1993, HHR submitted to Personnel for approval requests for raises for nurses in various classifications employed at its hospital facilities in Huntington, Welch and Weston. These raises were requested and granted pursuant to Section VI.E of Personnel's Pilot Guidelines mentioned above.
6. Grievant did not receive an "equity raise" because HHR's administrators failed to review the salaries of the nurses of the SAU in contrast to benchmark salaries it had derived for nurses from Huntington State Hospital's geographic region. [\(See footnote 1\)](#)
7. The "equity raise" requests were generated by the respective administrators of the Hospitals after they were notified that the raises were available. The administrator of the SAU was not notified

of the availability of such raises.

8. The "equity raises" were requested to increase salaries of the respective classified positions closer to those recognized as "benchmarks" derived from a comparison of salaries paid nurses in both the public and private sectors, at twenty-four hour health care facilities within the same corresponding geographic regions. It was hoped that this increase in salaries would address perceived, long-standing recruitment and retention problems.

9. Grievant's salary is \$8,852.00 below the benchmark salary for Nursing Director Is within the applicable geographic region as determined by HHR.

10. Personnel did not review the requested raises to determine if they were based upon "the movement of employees in organizational units result[ing] in salary inequities." Personnel viewed these "equity raises" as discretionary with the appointing authorities to grant.

11. But for the fact that the administration of the SAU was not informed that HHR was intending to request for and award "equity raises" to its nursing staff, Grievant would have received a 10 percent raise.

12. Not all administrators within HHR's organizational units were notified that HHR intended to request "equity raises" for the three health care facilities where the raises were awarded.

Discussion

"Discrimination" is defined by 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 employee or are agreed to in writing by the employee." Grievant contends that he has been discriminated against because HHR did not recommend to Personnel that he be given an "equity raise." He claims that he was similarly situated to the nurses and nursing administrators who were granted said raise; therefore, had it not been solely because of an oversight on behalf of HHR, he would also have been given a raise. HHR argues that Grievant has not proven his case by a preponderance of the evidence. It contends that the decision to request "equity raises" was discretionary, and that Grievant cannot establish that he should have received a raise. Personnel contends that the raises were based upon an exercise of discretionary authority, and the fact that Grievant did not receive a raise indicates that it was not intended he get one. It also asserts that the raises were given to help solve severe recruitment and retention problems that the SAU has not experienced; therefore, the

SAU employees were not included in the request for raises. It supports this conclusion by recognizing that other directors of nursing employed by HHR, who work in different parts of the State, were not given raises. The record does not contain sufficient documentary evidence to either support or contradict this conclusion.

Much of the testimony and argument at both hearings in this matter concerned Section VI.E of the Pilot Guidelines and whether the equity raises approved under this provision were really "equity raises." All proper inferences from the record, from the language of the Pilot Guidelines and the clear and unambiguous language of this section support the conclusion that this section was intended to be utilized by appointing authorities to increase and equalize salaries of its classified positions based upon "the movement of employees in organizational units" which resulted from the reclassification project of Personnel. This provision was not created to specifically address recruitment and retention problems for vacant, classified positions. In any event, this apparent inappropriate reliance upon Section VI.E of the Pilot Guidelines for the issuance of 10 percent raises is not the heart of this matter. Grievant's argument is simply that if HHR could have relied upon this provision to give raises to its nursing staff, and in particular, directors of nursing, it should have done so for him; therefore, its failure to do so was discriminatory.

The record is replete with opinion testimony and argument concerning the recruitment and retention problems of HHR's various hospitals and the SAU, and of the duties and responsibilities of Grievant's position in contrast to those of other directors of nursing. The parties both argue that these particular facts relate to whether Grievant was similarly situated to the nursing directors who did receive an "equity raise," and to whether Grievant should be entitled to a raise based upon an inequity of salaries.

Also, there was much speculation on whether the SAU should have been given consideration for "equity raises," and whether a conscious decision had been made to exclude it from consideration or whether it was not included in the proposal to Personnel based upon "administrative oversight." Grievant contends that the HHR administrators and the Huntington State Hospital administrators simply forgot to include the SAU in the proposal. This is the crux of Grievant's case as he contends that it is discriminatory for an employer, through negligence or oversight, to fail to grant an employee a raise in salary intended to bring a particular class of employees closer to a benchmark salary determination, while it gives the same raise to other employees within the same classification. It is

recognized that raises are typically discretionary, but it is also noted that one need not establish intent as an element of discrimination as that term is defined in Code §29-6A-2(d). Here, Grievant, a nurse assigned to the classification of Nursing Director I, was not given consideration for a raise while one or more classified employees within the same class title and within the same physical location of employment were given consideration for, and awarded a raise intended to increase the salaries of positions determined to be paid below the market level for comparable positions. Grievant's salary is also well below the benchmark, market level salary, as computed by HHR. HHR has offered no evidence to explain why this omission occurred. Therefore, the evidence cannot support the finding that the omission was based upon the job duties assigned to Grievant. Grievant has also established that it is more likely than not that had the SAU been included within the salary survey, he would have received an "equity raise." [\(See footnote 2\)](#) Grievant has not only established a technical violation in that he was the victim of discrimination as that term is specifically defined in Code §29-6A-2, he has shown that he would have received a raise if not for HHR's apparent inadvertence or negligence. Therefore, he is entitled to the relief he seeks.

The following conclusion of law is hereby appropriately presented as supported by the discussion above:

Conclusion of Law

Grievant has established by a preponderance of the evidence that HHR discriminated against him in not awarding him a raise in December 16, 1993, when it attempted to increase salaries of its employees classified as Nursing Director Is, at its twenty-four hour, health care centers within the Huntington, West Virginia geographic region.

Therefore, this grievance is hereby **GRANTED**. HHR is **ORDERED** to award Grievant a raise in the amount of \$3604.80, and interest from December 16, 1993, to the date payment is made to him.

Any party or the West Virginia Division of Personnel 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.

ALBERT C. DUNN, JR.
Administrative Law Judge

April 30, 1996

[Footnote: 1](#)

It was determined that the following facilities were within Huntington State Hospital's geographic region: Cabell-Huntington Hospital, HCA/River Park Hospital and St. Mary's Hospital. Notice is taken that other health care facilities within the Huntington area, including hospitals, along with the SAU, were excluded from this salary study.

[Footnote: 2](#)

Actually, Keith Ann Dressler, Huntington State Hospital's Director of Human Resources, testified that she believed Grievant had received an equity raise.