DEBRA A. ROBINETTE,

Grievant,

v. DOCKET NO. 97-HHR-152

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/WELCH EMERGENCY HOSPITAL,
and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Debra A. Robinette, Grievant, filed this grievance against Respondent, the West Virginia Department of Health and Human Resources/Welch Emergency Hospital (DHHR-WEH) on July 31, 1997. The West Virginia Division of Personnel (Personnel) was made a party at Level IV. She grieves that "LPNs [are being] hired with less experience[,] [and are] making more or as much salary as I am. I have 10 (ten) years experience. 3 yrs. Nursing Home [sic]. 7 yrs. Clinical Experience [sic]." As relief, Grievant requests that her "position and pay be upgraded to LPN II."

This grievance was transferred to the undersigned on October 27, 1997, for administrative reasons. Previously, the parties had agreed to submit this case on the record as developed at Level III.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant is employed by DHHR-WEH as a Licensed Practical Nurse (LPN).

2. DHHR-WEH hired Grievant as a ninety-day exempt temporaryemployee on October 18, 1994. (Agency Ex. 1.)

3. The LPN classification is assigned to pay grade seven with a salary range of $15,060 - $24,528. (Agency Ex. 5, 6.)

4. During Grievant's temporary appointment, her salary was $18,612. (Agency Ex. 2.)

5. Before her temporary appointment, Grievant signed a “Salary Agreement Form” which states that she discussed and agreed upon an annual salary of $18,612 during the temporary period. (Agency Ex. 3; Level III, Tr. at 3, 22.). Although Grievant admits she willingly signed the Salary Agreement Form, she now complains that she would have tried to negotiate a higher starting salary had she known she could have done so. (Level III, Tr. at 3, 8, 17, 18, 20.)

6. DHHR-WEH changed Grievant's status to that of a permanent employee on April 20, 1995. Grievant's annual salary of $18,612 did not change. (Agency Ex. 1.)

7. On July 1, 1996, Grievant received an across-the-board raise applicable to all state employees, which increased her annual salary to $18,912. (Agency Ex. 1.)

8. In 1994, DHHR-WEH hired two LPNs at $9.40 an hour. (Level III, Tr. at 2.)

9. LPN is a single class series in the State Classification and Compensation Plan. The classification of LPN II does not exist in the plan. (Agency Ex. 5, Level III, Tr. at 22.)

DISCUSSION

In order to prevail in a grievance of this nature, Grievantmust 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" is embraced by W. Va. Code §29-6-10. See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (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 DHHR-WEH set the salaries of Grievant's fellow employees at a level which exceeds Grievant's current salary, or that the salary disparities which Grievant has identified violate any statute, policy, rule, regulation, or written agreement under which Grievant works. See W. Va. Code §29-6A-2(i).

In addition to the foregoing findings of fact and narration,it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Geroski v. W. Va. Div. of Corrections, Docket No. 96-CORR-113 (April 23, 1997).

2. Under W. Va. Code §29-6-10(2), the State Personnel Board shall have the authority to promulgate, amend, or repeal rules, in accordance with W. Va. Code §29A-1-1 et seq., and to implement:

> [A] pay plan for all employees in the classified service, after consultation with appointing authorities and the state fiscal officers, and after a public hearing held by the board. Such pay plan shall become effective only after it has been approved by the governor after submission to him by the board. Amendments to the pay plan may be made in the same manner. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

3. Under West Virginia Division of Personnel Administrative Rule 5.04(a), the State Personnel Board "assign[s] each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay

rates in the pay grade assigned to the employee's class of position."

4. West Virginia Division of Personnel Administrative Rule 5.04(b) regarding entry level salaries under the pay plan provides:

> The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing pertinent training or experience above the minimumrequired for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the mid-point of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the mid-point where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class. (Emphasis added.)

The use of the word "may" indicates that the employer has no duty to hire an applicant above the minimum starting salary.

5. The principle of "equal pay for equal work," as proscribed in W. Va. Code §29-6-1, and the West Virginia Division of Personnel Administrative Rules, does not require that all employees

performing the same tasks be paid identical salaries. Acord v. W. Va. Dept. of Health and Human Resources, Docket No. 91-H-177 (May 29, 1992).

6. 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).

7. "No rules or regulations require a state employer to inform an applicant that [s]he can attempt to negotiate a higher salary." Austin v. W. Va. Dept. of Health and Human Resources,Docket No. 96-HHR-216 (Sept. 30, 1996).

8. Grievant submitted no evidence to justify the establishment of an LPN II classification.

9. Grievant failed to prove, by a preponderance of the evidence, that a violation, misapplication or misinterpretation of any statute, policy, rule, regulation, or written agreement, or that she was entitled to any relief.

Accordingly, the 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.

Dated: November 18, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE