GERALD WALTERS and

SHEILA RIFFE,

Grievants,

v. DOCKET NO. 97-HHR-264

DEPARTMENT OF HEALTH AND HUMAN RESOURCES, and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Gerald Walters and Sheila Riffe filed this grievance on November 7, 1996, alleging discrimination in pay of employees, and requesting back pay and to be made whole in every way. The grievance was denied at the lower levels. At Level III, Grievants' representative clarified the grievance as involving race and sex discrimination, and equal pay for equal work issues, surrounding the fact that other employees in the same class title as Grievants were making a higher hourly wage, one employee who obtained his license as a Licensed Professional Nurse (LPN) at the same time as Grievants was making a higher hourly wage, and other employees in a lower class title were making a higher hourly wage, Upon appeal to Level IV, the parties agreed to submit the matter for decision based upon the record developed below, supplemented with proposed findings of fact and conclusions of law. The matter became mature on September 22, 1997, the deadline for submission of any such proposals. For reasons explained below, the grievance must be denied.

ISSUES

Did Respondent engage in discrimination, or violate the “equal pay for equal work” doctrine, in regard to Grievants' compensation?

FINDINGS OF FACT

I 1.

Grievant Walters was initially employed at Respondent's Welch Emergency Hospital

on October 1, 1993, as a temporary, ninety-day employee at $7.25 per hour. He was later regularly employed as an entry level Licensed Practical Nurse (LPN) at that same rate of pay, beginning February 1, 1994. Grievant Walters is a white male. (See footnote 1)

II 2.

Grievant Riffe was initially employed on November 1, 1993, as a temporary, ninety-dayemployee making $7.25 per hour. She was later regularly employed as an entry level LPN at that same rate of pay, beginning April 5, 1994. Grievant Riffe is a white female.

III 3.

Calvin Lucas (See footnote 2), who was already regularly employed at the hospital as a Certified Nursing Assistant (CNA), graduated with his LPN license at the same time as Grievants did. Upon obtaining his LPN license, Mr. Lucas was promoted into the LPN class title, from the CNA position he previously held. In being promoted from a position in one pay grade to a position in a higher pay grade, he was entitled to and received a pay increase which placed him above the entry-level salary for LPNs. He also was eligible for an across-the-board raise, for which Grievants were not eligible, because of his status as a regular employee prior to his promotion to the LPN position.

IV 4.

Four or five black, female LPNs work at the hospital, and are paid approximately $2.23 per hour more than Grievants.

V 5.

Five CNAs working at the hospital make more per hour than Grievants.

VI 6.

LPNs have some supervisory responsibility for CNAs, assigning them tasks and assisting CNAs with any problems they encounter. CNAs perform general patient care such as taking vital signs and giving bed baths.

VII 7.

Salary at hiring may be higher than the minimum if the employee has sufficient experience or training above that required for the position. For each six months of experience in addition to that required for the position, an employee may be paid an additional 5%. Other factors may also allow persons to be hired at more than the minimum salary, such as market conditions.

VIII 8.

The LPN class title is in pay grade seven, and the yearly salary for pay grade seven ranges from $15,060 to $24,528. The CNA class title is in pay grade four, and the yearly salary for pay grade four ranges from $12,276 to $20,016.

DISCUSSION

In this non-disciplinary grievance, Grievants bear the burden of proving their case by a preponderance of the evidence. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb.28, 1995). See W. Va. Code §29-6A-6, paragraph 5. They must prove discrimination and/or violations of the “equal pay for equal work” doctrine regarding Respondent's setting of salaries.

DISCRIMINATION

W. Va. Code §29-6A-2(d) defines "discrimination" as "any 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." To establish a prima facie case of discrimination, a grievant must show:

> (a) that he or she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he or she has, to his or her detriment, been treated by the employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were not job-related, and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Goff v. W. Va. Dept. of Education, Docket No. 93-DOE-446 (Sept. 9, 1994). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he or she can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants' alleged both race and sex discrimination. There were broad allegations made that black, female employees made more money per hour than Grievant Walters, and that black employees and male employees made more than Grievant Riffe. These allegations are accepted as true. Respondent provided information regarding a few persons to whom Grievants may have referred, but Grievants themselves did not name specific individuals. Grievants presented no concrete evidence as to other employees' individual salaries, race, gender, employment history,qualifications, or similar data from which any in-depth comparison can be made.

Grievants' racial discrimination argument thus consists of simply asserting that because other

employees are black and they are white, any differentials in pay must be racially motivated. Similarly, their sexual discrimination argument consists of simply asserting that because other employees are of the opposite sex, any pay differentials must be sexually motivated. However, such broad assertions standing alone generally do not make a prima facie showing of discrimination. Woods v. Dept. of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 22, 1997); n. 1, Phillips v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992). (See footnote 3) One reason for this rule (requiring more than a bare allegation) is that, if the other employees are not more specifically described, it is impossible to determine what each person's individual situation actually is, much less what reasons exist for each person's situation. Thus, it is impossible to assess whether the differences are job-related or not. An information void was presented here, except to the extent that Respondent volunteered specific information regarding a few employees.

Even assuming that a prima facie case of discrimination can be made by general allegations such as Grievants', Respondent has offered legitimate, job-related reasons for the pay differentials. at 12. Respondent explained that one CNA (to whom Grievants may have referred in claiming a CNA made more per hour than they) had many years of experience, and also extensive service with the State, such that the CNA had been hired above the entry-level salary, and had received across- the-board raises and perhaps merit increases over the years. “[T]he Legislature specifically allowed public employers to pay state and county employees differing salaries based upon such factors asyears of service” and other personal characteristics such as training and experience. Goff, at 12. The pay ranges for the two pay grades involved overlap, and it is quite possible that a person paid within the confines of pay grade four makes more than a person in pay grade seven, without discrimination being involved.

Respondent further explained that Mr. Lucas, the LPN who received his license at the same time as Grievants, was promoted from his previously-held CNA position. His promotion involved a “jump” of three pay grades, which resulted in a significant increase over the entry level LPN salary, according to regulations then in effect. As Grievants were hired as entry level LPNs, they did not have the benefit of obtaining their positions through promotions. Moreover, Grievants did not possess sufficient prior experience to allow them to be hired at a salary above entry level.

These are legitimate, job-related reasons for the disparity in pay between Grievants and others to whom they might compare themselves. See generally, West Virginia University v. Decker, 447

S.E.2d 259, 191 W. Va. 567 (1994). (See footnote 4) It is possible that all other employees who make more money than Grievants -- whoever they are -- do so for similar reasons. Grievants did not show the employer's job-related explanations were a mere pretext, or that they did not apply to the persons to whom Grievants compared themselves. Grievants' discrimination claim must fail.

EQUAL PAY FOR EQUAL WORK:

The "equal pay for equal work" doctrine applicable to this grievance is embodied in W. Va. Code §29-6-10, which states, in pertinent part:

> [The Division of Personnel is authorized to promulgate rules which provide for]... a position classification plan for all positions in the classified service... based upon similarity of duties performed and responsibilities assumed, so that... the same schedule of pay may be equitably applied to all positions in the same class... 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.

This provision has been interpreted by the West Virginia Supreme Court of Appeals to not mandate identical pay for identical work. The Court determined that it does not violate the "equal pay" doctrine for employees within a classification to be paid differing amounts, so long as those amounts are within the confines of the classification's pay scale. Largent v. W. Va. Div. of Health, 192 W. Va. 239 at 244-246, 452 S.E.2d 42 (1994). "In short, employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on ... specifically identifiable criteria that are reasonable and that advance the interests of the employer." Id. at 246. See also, West Virginia University v. Decker, supra.

Grievants argued that Largent was inapplicable to their situation, because Largent involved exclusively female LPNs. However, Largent is not so narrowly written, and is not to be so narrowly applied. Indeed, Largent has been applied in grievances which did not involve LPNs, much less exclusively female LPNs. See, e.g., Woods, supra (hearing examiner); Rice v. Dept. of Transp., Docket No. 96-DOH-180 (Aug. 29, 1997) (storekeeper); Lilly v. W. Va. Dept. of Public Safety, Docket No. 96-DPS-314 (Aug. 22, 1997) (electronic technician). The general rule of law announced in Largent, and quoted above, dictates the outcome of this grievance.

Here, Grievants' only evidence of a violation of the "equal pay for equal work" doctrine isthat their pay is lower than that of several colleagues. They have not alleged that the salaries are not all within

the applicable pay ranges for their classifications. Nor have they presented any persuasive evidence that the pay differentials are based upon improper considerations. There is no proof here, only speculation and suspicion on Grievants' part. It is incumbent upon Grievants to prove bias by Respondent. Heller v. Dept. of Tax and Revenue, Docket No. 96-T&R-318 (May 9, 1997) at 6. This, they failed to do. Under the circumstances presented here, Grievants' argument must fail. Id. See Taylor v. Monongalia County Health Dept., Docket No. 96-MCHD-383 (May 28, 1997); Nafe v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

CONCLUSIONS OF LAW

1 1.

In this non-disciplinary grievance, Grievants bear the burden of proving their case by a preponderance of the evidence. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). See W. Va. Code §29-6A-6, paragraph 5.

2 2.

W. Va. Code §29-6A-2(d) defines "discrimination" as "any 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." To establish a prima facie case of discrimination, a grievant must show:

(a) that he or she is similarly situated, in a pertinent way, to one or more other employee(s);

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(c) that such differences were not job-related, and were not agreed to by the grievant in writing. Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Goff v. W. Va. Dept. of Education, Docket No. 93-DOE-446 (Sept. 9, 1994).

3 3.

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he or she can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4 4.

It does not violate the “equal pay for equal work” doctrine for employees within the same classification to be paid differing amounts, so long as those amounts are within that classification's pay grade. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42, 47-48 (1994). Accord v. W. Va. Dept. of Health and Human Resources, Docket No. 91- H-177 (May 29, 1992).

5 5.

Grievants failed to prove that Respondents discriminated against them on the basis of their race or sex.

6 6.

Grievants failed to prove that Respondents violated any statute, rule, regulation or policy.

Accordingly, this grievance is **DENIED**.

Any party, including the 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 andshould 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 25,1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1 *That Grievant Walters is a white male, and Grievant Riffe is a white female, are facts deduced from the record and arguments.*

Footnote: 2 *Mr. Lucas' race is not clear from the record.*

Footnote: 3 *As one Grievant is male and the other female, there is an internal inconsistency in the sexual discrimination theory, as well.*

Footnote: 4 *This case involved an age discrimination claim related to salaries. In holding in favor of the University, the Court found that the Human Rights Act does not forbid employers from paying workers based on their relative market value, and that "[i]n specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation." Syl. Pt. 4, Decker, supra.*