LYNDA R. TRAVIS, et al.,

Grievants,

v. **Docket No. 96-HHR-518**

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

Lynda R. Travis and nine other employees (See footnote 1) (Grievants) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on March 28, 1996, alleging that they are not properly compensated in comparison with other employees employed by Respondent Department of Health and Human Resources (DHHR) in the same classification. The grievance was denied at Levels I and II, as Grievants' supervisors were unable to grant the relief requested. Grievants appealed to Level III, and a Level III hearing was conducted on October 16, 1996. Gretchen O. Lewis, DHHR Secretary, denied the grievance at Level III on November 26, 1996. Grievants appealed to Level IV on December 5, 1996. Following a series of continuances, each of which was granted for good cause shown, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on June 3, 1997. This matter became mature for decision upon receipt of the parties' written post-hearing arguments on July 14, 1997.

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

FINDINGS OF FACT

1. Grievants are employed by the West Virginia Department of Health and Human Resources (DHHR) in the Investigation and Fraud Management Unit (IFMU) of the Office of Inspector General (OIG).

2. Each Grievant is classified as an Investigator II. The Investigator II classification is in Pay Grade 10 of the compensation scale established by the West Virginia Department of Administration, Division of Personnel (DOP).

3. DHHR also employs Investigator IIs in its Medicaid Fraud Control Unit (MFCU), a separate unit within the OIG.

4. Grievants and the Investigator IIs assigned to OIG's MFCU perform substantially similar duties, although the duties of the Investigator IIs in the MFCU are somewhat more complex. Cf. DOP Exs 2 & 4 at L III.

5. Calvin Robbins is DHHR's Deputy Secretary for Operations. In this capacity, Mr. Robbins has authority to recommend changes in personnel classification and compensation to DOP. 6. Since at least mid-1995, DHHR managers, including Inspector General Edgar D. VanCamp, have devoted substantial efforts toward increasing the compensation paid to Grievants and other DHHR employees in the Investigator II classification.

7. On October 4, 1995, Mr. Robbins wrote to DOP requesting approval from the State Personnel Board to establish a new classification title of DHHR Special Agent in Pay Grade 12. G Ex A at L IV.

8. The proposed DHHR Special Agent classification would have encompassed the positions held by Grievants as well as the Investigator II positions in DHHR's MFCU.

9. The record does not indicate if Mr. Robbins' proposal was ever formally addressed by the State Personnel Board.

10. On February 6, 1996, Mr. Robbins wrote to DOP requesting approval from the State Personnel Board to institute a special hiring rate for Investigator IIs in the MFCU of 25 percent above the minimum salary for the classification. DOP Ex 3 at L III.

11. At all times pertinent to this grievance, there were two Investigator II positions in the Investigations Branch of the MFCU. At the same time, there were nine Investigator II positions in the IFMU. See DOP Ex 1 at L III.

12. Although Grievants and the Investigator IIs in the MFCU share the same classification, there is no record of any lateral movement of Investigator IIs between the two units.

13. Section 5.04(f)(4) of the Administrative Rule of the West Virginia Division of Personnel (DOP), 143 C.S.R. 1 § 5.04 (1995) contains the following provision authorizing pay differentials:

> The Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay differentials for specified work periods, and temporary upgrade problems. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

14. Effective March 1, 1996, the State Personnel Board approved a "special hiring rate" of twenty-five percent above the minimum salary for Investigator II positions in the MFCU. G Ex 7 at L III.

15. DOP was informally advised by DHHR personnel that there was a severe recruitment and retention problem with Investigator IIs in the MFCU. At the time the special hiring authority rate was pending, one of the two Investigator II positions in the MFCU was vacant and the other Investigator II was considering a job offer. In addition, the vacant position had turned over at least twice in the previous three years.

16. Historically, vacant Investigator II positions in the IFMU have remained unfilled for lengthy periods, but during those periods in 1994, 1995, and 1996, no more than one position at a time in the IFMU was vacant. See G Ex 1 at L III.

17. At the time DOP decided to award a pay differential to Investigator IIs in the MFCU, none of the Investigator II positions in the IFMU were vacant.

18. After DOP approved the special pay rate for Investigator IIs in the MFCU, the Investigator II in that unit with a pending job offer elected to remain with DHHR.

19. Since DOP approved the special pay rate for Investigator IIs in the MFCU, at least four Investigator IIs in the IFMU have advised their supervisor that they are actively seeking employment elsewhere.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of

Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

W. Va. Code § 29-6-10 generally embraces the concept of "equal pay for equal work." See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). However, 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); W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); 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).

In this particular situation, DOP's Assistant Director for Classification and Compensation, Lowell Basford, testified at Level IV that Grievants, and the other employees with whom Grievants compare their salaries, are being properly compensated according to DOP's Administrative Rule governing compensation within the classified service. See 143 C.S.R. 1 § 5 (1995). In particular, Mr. Basford explained that he was aware there had been a significant amount of turnover in one of the two Investigator II positions in DHHR's MFCU. Further, he was advised that, while one of two Investigator II positions remained vacant, the remaining Investigator II had a job offer in hand, and was considering resigning. This would leave the MFCU with no Investigator IIs, requiring thattheir workload be shifted to their immediate supervisor and two Auditors in the MFCU, until the Investigator IIs could be replaced.

Mr. Basford opined that a potential vacancy rate of 100 percent in the MFCU was more significant than if 50 percent of the positions in the IFMU were vacant, and one other employee had a job offer pending, because such employee's departure would still leave the IFMU with 3 Investigator IIs, or one-third of its authorized work force. In any event, since 1990 turnover and long-term vacancies in the IFMU have never exceeded 25 percent of the Investigator IIs. Thus, from DOP's perspective the recruitment problem being experience by DHHR was not classwide, but limited to a reasonably defined group of employees in a specific program, a segment which can be carved out for special treatment under § 5.04.

This Grievance Board has previously recognized that DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See

Smith v. W. Va. Div. of Corrections, Docket No. 94- CORR-624 (Feb. 27, 1995). Further, the rules promulgated by DOP pursuant to its delegated authority 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. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Moreover, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981); appeal dismissed, 454U.S. 1131 (1982). This principle has been specifically extended to DOP's exercise of its discretionary judgment in matters involving classification and compensation. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). Indeed, DOP's interpretations in such matters as compensation and classification must be reviewed under a "clearly erroneous" standard. Blankenship, supra. See, e.g., Shahan v. W. Va. Bureau of Commerce, Docket No. 95-DNR-146 (Aug. 31, 1995); Page v. W. Va. Dept. of Transp., Docket No. 94-DMV-240 (Nov. 23, 1994); Arthur v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 93-BEP-527 (July 13, 1994).

Grievants are not claiming that DOP's Administrative Rule pertaining to authorizing pay differentials is inconsistent with legislation which authorizes promulgation of such rules. See Callaghan, supra. Indeed, Grievant's most plausible claim is that DOP exercised its discretion to approve a pay differential for a particular unit of Investigator IIs, rather than create a new, higher-paying classification of "DHHR Special Agent" for all Investigator IIs in DHHR's employ. This argument ignores the fact that DHHR, not DOP, is responsible for compensating its employees. DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function. Because the money for pay raises comes from the employing agency, DOP has no logical motive for unreasonably limiting Grievants' pay.

A preponderance of the credible evidence of record indicates that DOP properly acted within its discretion in interpreting and applying § 5.04 of its Administrative Rule pertaining to pay differentials. In particular, the MFCU Investigator IIs appear to comprise"a reasonably defined group of employees" for which the Rule authorizes special treatment in appropriate circumstances. The

undersigned administrative law judge is unable to substitute his judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis. See Largent, supra. See generally Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Grievants have consistently maintained that their disparate treatment by DHHR and DOP, in regard to selective application of DOP's pay differential authority to award a 25 percent base pay enhancement to their DHHR counterparts in the MFCU, but not to them, constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d). Discrimination is defined therein 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." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that grievants, seeking to establish a prima facie case (See footnote 2) of discrimination under § 29-6A-2(d), must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular;
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> and,
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> (c) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievants establish a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievants may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH- 435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, the undersigned finds that Grievants established a prima facie case of discrimination by demonstrating that they are similarly situated to other DHHR employees in the Inspector II classification, that those other employees received a significant benefit (See footnote 3) in the form of a 25 percent pay differential, a benefit which was not extended to Grievants, and that this differential was not directly related to any differences in their job responsibilities. See Morris v. W. Va. Dept. of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997). Nonetheless, as previously discussed, DOP demonstrated that the action taken in establishing a pay differential for InvestigatorIIs in DHHR's MFCU was specifically sanctioned by discretionary authority contained in § 5.04(f)(4) of its Administrative Rule. DOP's explanation represents a legitimate, non- discriminatory reason for the differential treatment at issue. Grievants failed to present sufficient persuasive evidence that the reasons proffered by DOP and DHHR were merely a pretext for prohibited discrimination or favoritism. See Burdine, supra; Frank's Shoe Store, supra; Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). Further, Grievants have not established that the salary disparities which they are challenging violate any statute, policy, rule, regulation, or written agreement under which Grievants work. See W. Va. Code § 29-6A-2(i).

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

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The West Virginia Division of Personnel (DOP) has broad discretion to perform its administrative functions, so long as it does not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See Smith v. W. Va. Div. of Corrections, Docket No. 94- CORR-624 (Feb. 27, 1995); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-101 (Sept. 21, 1993). 3. DOP's explanation that, consistent with its lawfully promulgated Administra tive Rule, a salary differential is paid to Investigator IIs employed in the Medicaid Fraud Control Unit (MFCU) by Respondent

Department of Health and Human Resources (DHHR), in order to address a specific recruitment and retention problem in that unit, provides a legitimate, non-discriminatory reason for its hiring and compensation practices, so as to defeat Grievants' claim that they are not receiving equal pay for equal work. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Wargo v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-441 (Mar. 23, 1994).

4. In order for grievants to establish a prima facie case of discrimination under § 29-6A-2(d), they must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular;
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> and,
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> (c) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Although Grievants established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the award of a 25 percent pay differential to Inspector IIs employed in DHHR's MFCU, DOP & DHHR established legitimate, non- discriminatory reasons for their actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar.20, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

6. Grievants failed to establish by a preponderance of the evidence that their employer is compensating them contrary to the provisions of W. Va. Code § 29-6-10, or any other statute, policy, rule, regulation, or written agreement applicable to their 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: January 12, 1998

Footnote: 1

Jan Kinser, Edward Waugh, Leslie Poindexter, David Linkenhoker, Patrick Lyons, Jolynn Marrow, Ellis Brown, and Frances Lantz.

Footnote: 2

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: 3

Although it could be argued that such favorable treatment might more appropriately be categorized as "favoritism" prohibited by W. Va. Code § 29-6A-2(h), such treatment would not affect the outcome of this grievance, as the analysis applied is essentially the same. See, e.g., Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).