PATSY LITTLE,

Grievant,

v. **Docket No. 98-HHR-092**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
HUNTINGTON HOSPITAL,

Respondent.

D E C I S I O N

Patsy Little (Grievant) submitted a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that her employer, the West Virginia Department of Health and Human Resources, Huntington Hospital (DHHR), engaged in discrimination prohibited by W. Va. Code § 29-6A-2(d), when it failed to award her a merit raise in 1996. This grievance was filed on December 8, 1997, and advanced to Level III without resolution. A Level III hearing was held on February 17, 1998. On March 16, 1998, Jonathan D. Boggs, Commissioner of DHHR's Bureau for Behavioral Health and Health Facilities, denied the grievance at Level III. Grievant appealed to Level IV, and an evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on June 8, 1998. (See footnote 1) At the conclusion of that hearing, the parties agreed to a briefing schedule for submissionof post-hearing written arguments. This matter became mature for decision on July 7, 1998, following receipt of the parties' written submissions.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by DHHR as a Housekeeper at Huntington Hospital. She has been

continuously employed at that facility for twenty years. Grievant has never received a merit raise.

2. Desmond H. Byrne is the Administrator of Huntington Hospital.

3. Beginning in January 1996, DHHR authorized each of its health care facilities to award discretionary five percent (5%) merit raises to 5% of its total employees during calendar year 1996 (CY 96). These awards were to be distributed on a quarterly basis so that one-fourth of the employees would receive their raise during each quarter.

4. Based upon the formula described in Finding of Fact Number 3, Huntington Hospital was authorized up to 56 merit raises during CY 96. Accordingly, during the first and second quarters of CY 96, 28 Huntington Hospital employees received merit raises. See DHHR Ex 3 at L IV.

5. At Mr. Byrne's direction, a management committee at Huntington Hospital carefully screened the employees submitted for merit raises. Inasmuch as DHHR infrequently granted authority for merit raises, Mr. Byrne deemed it imperative that any raise recommended for approval by DHHR Secretary Gretchen Lewis be based upon merit, consistent with West Virginia Division of Personnel regulations. 6. In early June, each DHHR health care facility was notified by telephone that Secretary Lewis would be placing a “freeze” on further merit raises, due to department- wide financial difficulties. However, a reduced number of merit raises could still be approved on a pro-rated basis. Huntington Hospital was permitted to recommend 8 additional merit raises for approval before July 1, 1996, the beginning of fiscal year 1997 (FY 97).

7. Before Huntington Hospital was informed of the impending freeze on merit raises, the management committee headed by Mr. Byrne had approved 14 employees to be recommended for merit raises during the third quarter of CY 96. Grievant was among the 14. DHHR Ex 2 at L IV.

8. Consistent with the practice adopted by the management committee for evaluating employees for merit raises, the 14 employees being recommended for merit raises during the third quarter of CY 96 were rank-ordered. Grievant ranked 12th. See DHHR Ex 2 at L IV.

9. When DHHR determined up to 8 Huntington Hospital employees could receive merit raises, prior to all merit raises being “frozen,” Mr. Byrne was on leave. Huntington Hospital's Human Resources Director, Kieth Anne Dressler, selected 8 of the 14 employees previously approved for recommended merit raises by the management committee, and submitted their names to DHHR for approval. Grievant was not among the 8.

10. When Mr. Byrne returned from leave, he rescinded the action taken by Ms. Dressler, and

wrote to his supervisor, Dr. Garrett E. Moran, Commissioner of DHHR's Bureau for Community Support Programs, on June 20, 1996, requesting that merit raisesbe approved for all 14 employees. Mr. Byrne contended this would provide a more equitable distribution of merit raises between supervisory and non-supervisory employees, and Huntington Hospital had sufficient funds in its FY 97 budget to support the proposed raises. The letter was accompanied by 14 WV-11 personnel action forms containing supporting justification for each requested raise. See DHHR Ex 3 at L IV.

11. Dr. Moran agreed with Mr. Byrne, and forwarded his recommendation to Secretary Lewis that all 14 merit raises be approved. Secretary Lewis did not grant merit raises to any Huntington Hospital employees. However, Secretary Lewis approved merit raises for employees at other DHHR health care facilities who submitted a reduced number of requests, consistent with the revised quotas established before all merit raises were “frozen.”

12. The original WV-11's recommending merit raises for Grievant and 13 other employees were never returned to Huntington Hospital as formally disapproved. As of the Level IV hearing in this matter, the WV-11's could not be located and were presumed to be “lost.”

13. On November 21, 1996, Mr. Byrne wrote to Grievant, advising her that he and Dr. Moran had recommended a 5% merit increase which would have increased her salary from $13,800 to $14,496 annually. Mr. Byrne indicated that all merit raises had been frozen by Secretary Lewis, and Grievant would be evaluated for resubmission if and when the freeze on merit raises was lifted. G Ex 1 at L III.

14. In early December 1997, another employee informed Grievant that DHHR employees at other health care facilities had received merit raises after Huntington Hospital merit raises were “frozen.” Grievant verified that merit raises had been approved for someother DHHR employees, and filed this grievance with her immediate supervisor on December 8, 1997.

15. On September 4, 1996, Lakin Hospital forwarded a request for a 5% “merit raise” for an employee who had assumed additional duties following a coworker's death. This raise was approved by Secretary Lewis, effective October 1, 1996. See DHHR Ex 6 at L IV.

16. On June 5, 1997, Lakin Hospital forwarded requests for 5% “merit raises” for two employees who had absorbed the duties of another employee who had retired and not been replaced. These raises were approved by DHHR Secretary Joan Ohl, effective July 16, 1997. (See footnote 2) See DHHR Ex 6 at L IV. In addition, Secretary Ohl has granted authority to the Health Care

Cost Review Authority and Medical Licensing Board to award discretionary raises, based upon the status of those organizations as “special revenue agencies” whose budget is separate from the rest of DHHR.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6. Initially, DHHR contends this grievance is untimely, because the grievance was not initiated within the time limits contained in W. Va. Code § 29-6A-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93- BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra;

Kessler v. W. Va. Dep't of Transp., Docket No.96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). In this particular matter, Grievant received written notice on November 21, 1996 that merit raises had been "frozen." The letter was ambiguous as to when or if this "freeze" would end, and exactly what would become of Grievant's proposed merit raise at that point. For this reason alone, the letter does not provide the clear and unequivocal notice required by Naylor, and decisions of this Grievance Board which follow that ruling. Moreover, the letter on which DHHR relies, citing Naylor, is misleading, because it does not reveal all information then known to Mr. Byrne, such as the fact that other employees at other DHHR facilities had received merit raises on a pro-rated basis. (See footnote 3) It was this fact that Grievant was compelled to discover on her own. Grievant's testimony that she did not learn of this disparate treatment until early December 1997, over one year after receiving Mr. Byrne's letter, was consistent with other facts in this matter, and was thoroughly credible. Grievant filed her grievance less than ten working days after discovering that other DHHR employees had received what she perceived as preferential treatment. Accordingly, her grievance was timely filed within ten days of her discovery of the facts giving rise to this grievance. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Stout v. Harrison County Bd. of Educ., Docket No. 93- 17-081 (Apr. 12, 1994).

In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and otherrecorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). However, an employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-051 (May 16, 1989).

Grievant contends that her treatment by DHHR 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 a grievant, seeking to establish a prima facie case (See footnote 4) of discrimination under Code § 29-6A-2(d), must demonstrate the fol lowing:

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't 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. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, Grievant demonstrated that during the same quarter of the fiscal year, DHHR employees at other health care facilities were awarded merit raises, while her recommended merit raise was denied. Grievant is similarly situated to these DHHR employees who received merit raises before the “freeze” was imposed. However, Grievant is not similarly situated to Lakin Hospital employees who have absorbed the duties of another employee, nor is she similarly situated to employees of special revenue agencies which happen to fall under the supervision of DHHR. Thus, as to employees at other DHHR health care facilities who received ordinary merit raises in June 1996, Grievant has established a prima facie case of discrimination under W. Va. Code § 29-6A-2d. See Travis v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998). DHHR contends that the number of merit raises that could be allowed prior to the beginning of FY 97 was limited on a statewide basis due to

financial considerations. Grievant established that Huntington Hospital had adequate funding in its budget to support all 14 proposed merit raises, but did not show that DHHR's statewide financial difficulty was merely a pretext. Indeed, a preponderance of the evidence indicates that, consistent with this explanation, a reduced number of merit raises were awarded to employees at other DHHR facilities.

As to DHHR's apparent refusal to approve merit raises for the 8 Huntington Hospital employees originally submitted, or at least for the 8 employees who had been ranked highest by the management committee, this action is arguably arbitrary and capricious. An arbitrary and capricious decision does not constitute a proper, job-related basis for discriminatory treatment otherwise prohibited by W. Va. Code § 29-6A-2(d). See Parsons, supra. However, the record indicates Grievant was ranked 12th out of 14 employees who were being recommended for merit raises during the third quarter of CY 96. Even though one or two of the employees who were rated in the top 8 were no longer employed by the end of that quarter, Grievant has not presented any persuasive evidence that she should properly have been included among the 8 employees who could have received merit raises in accordance with the pro-rated formula applied to other DHHR facilities. (See footnote 5) In thesecircumstances, Grievant has not shown that she was adversely affected by any discriminatory treatment, and, therefore, is not entitled to any relief in this matter. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342, 352 (1983); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properly established policies or directives." Terry v. W. Va. Div. of Highways, Docket No. 91-DOH- 186 (Dec. 30, 1991).

3. In accordance with the rules of the West Virginia Division of Personnel, salary

advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, andattendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

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

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

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Although Grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), in regard to employees at other health care facilities who received merit raises prior to July 1, 1996, DHHR established a legitimate, non-discriminatory, and job-related reason for its action in limiting the number of merit raises that could be approved before the new fiscal year began. Because Grievant failed to show she should have been included among 8 Huntington Hospital employees submitted under a reduced merit raise quota, she failed to demonstrate how she was harmed by DHHR's arguably arbitrary and capricious action in failing to approve merit raises for the 8 employees who were ranked highest by a management committee at Huntington Hospital which evaluated employees for merit raises. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dep't 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. Grievant did not demonstrate that DHHR violated any statute, policy, rule, regulation, or applicable written agreement, or acted in an arbitrary and capricious manner when it failed to award her a merit raise in 1996.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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 27, 1998

Footnote: 1

Grievant was represented by Rhonda Nolan, her immediate supervisor. DHHR was represented by Assistant Attorney General Meredith A. Harron.

Footnote: 2

The record does not indicate the exact date between June 1996 and July 1997 when Ms. Ohl succeeded Ms. Lewis as DHHR Secretary.

Footnote: 3

In fairness to Mr. Byrne, it should be noted that he worded the letter in accordance with advice from counsel representing DHHR in a related matter.

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 Mr. Byrne testified that he wanted to see an equitable number of supervisory and non-supervisory employees receive merit raises, Ms. Dressler indicated that Secretary Lewis' office wanted more employees involved in "direct patient

care" to receive merit raises. As a Housekeeper, Grievant is not considered to be involved in direct patient care. In any event, whether any re-shuffling of Huntington Hospital's merit raise recommendation list would result in Grievant's placement in the top 8 employees is too speculative to establish any reasonable expectation to a merit raise, as of the point in time when DHHR'smerit raise initiative had been reduced for financial reasons.