EVA SHORT,

Grievant,

v.

DOCKET NO. 99-HHR-038

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/HUNTINGTON HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Eva Short, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Huntington Hospital ("HHR") on December 2, 1998:

> I want to lodge a formal complaint concerning merit increase of June 1996, which some supervisory personnel have received while other employees in original (8) eight have not received said merit raise because of this, I feel I have been discriminated against.
>
> Relief sought: Merit increase should be retroactive from promised date of 7- 96 & I should receive this [sic] monies immediately plus interest.

The grievance was mutually waived by the parties at level one, and a level two conference was held between Grievant and Kieth Ann Dressler, Human Resources Director on December 15, 1998. Ms. Dressler issued her level two decision on December 22, 1998, finding that the grievance was timely filed, but that Grievant had failed to prove the allegations contained in her grievance. Prior to a level three hearing, the issues of timeliness and res judicata were again addressed, and Grievance Evaluator M. PaulMarteney found that the grievance was timely, not barred by res judicata, but, because of a conflict of interest, waived level three of the grievance procedure. This matter was advanced to level four on February 8, 1999, and a hearing was conducted in the Grievance Board's Charleston, West Virginia office, on February 23, 1999. Grievant appeared pro se, and HHR was

represented by Tiffany M. Bost, Esq., Assistant Attorney General. This matter became mature on March 9, 1999, the deadline for the parties' proposed findings and conclusions. Neither party submitted proposals.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

List of individuals to receive recommended merit increases in 1996.

HHR's Exhibits

Ex. 1 -

LIII Grievance Decision, Dunn/Napier v. HHR, dated Sept. 16, 1998.

Ex. 2 -

Grievance Form submitted by Eva Short, dated October 9, 1996.

Testimony

Grievant testified in her own behalf, and presented the testimony of Rebecca Dunn, Kelby Napier, and Kieth Ann Dressler. HHR presented the testimony of Kieth Ann Dressler and Michael McCabe.

BACKGROUND

Grievant and others filed a grievance on October 9, 1996, regarding merit raises they were allegedly promised, but never received. They requested merit raises retroactive to June 1996. This grievance proceeded through the grievance process, and in Short, et al. v. Dep't of Health and Human Resources, Docket No. 97-HHR-270 (July 29, 1997), it was held that the grievants failed to timely file their level three decision to level four, and the grievance was dismissed. Subsequently, a grievance was filed by another Huntington Hospital employee, Patsy Little, regarding the same 1996 merit raises on December 8, 1997. The facts established in Little v. W. Va. Dep't of Health and

Human Resources, Docket No. 98-HHR- 092 (July 27, 1998), which are not disputed in the instant grievance, established that merit raises had been recommended for employees at Huntington Hospital during fiscal year 1996. During the first and second quarters of 1996, 28 Huntington Hospital employees received merit raises. Fourteen (14) additional employees had been recommended for merit raises during the third quarter of 1996. However, in June 1996, each HHR health care facility was notified that Secretary Gretchen Lewis would be placing a “freeze” on further merit raises due to department-wide financial difficulties. However, a reduced number of merit raises would be considered on a pro-rated basis. Huntington Hospital was permitted to recommend 8 additional merit raises for approval before July 1, 1996.

In accordance with this directive, Kieth Ann Dressler, Huntington Hospital's Human Resources Director, selected 8 of the 14 employees previously approved for recommended merit raises, and submitted their names to HHR for approval. Ms. Little was not among the 8 recommended. Subsequently, Desmond H. Byrne, Administrator of Huntington Hospital, rescinded the action taken by Ms. Dressler, and requested merit raises for all of the original 14 employees. Ultimately, Secretary Lewis did not grant any merit raises to any Huntington Hospital employees. However, she did approve merit raises for employees at other HHR facilities that submitted a reduced number of requests, consistent with the revised quotas established before all merit raises were “frozen.”

On November 21, 1996, Mr. Byrne wrote to Ms. Little, informing her that she had been recommended for a merit raise, but that all merit raises had been frozen by SecretaryLewis. He informed her that she would be evaluated for resubmission if and when the freeze on merit raises was lifted. In early December 1997, Ms. Little found out that other employees at other HHR facilities had received merit raises after Huntington Hospital's merit raises were “frozen.” She filed her grievance on December 8, 1997.

In Little, HHR raised the defense of timeliness, arguing that the grievable event occurred when the 1996 merit raises were not forthcoming, and that Ms. Little had waited too long to file her grievance in December 1997. The Administrative Law Judge noted that the complaint alleged in the grievance was discrimination, and that the disparate treatment had not been discovered by Ms. Little until early December 1997. Ms. Little filed her grievance less than ten working days after discovering that other HHR employees had received what she perceived as preferential treatment, therefore, the ALJ found that Ms. Little's grievance was timely filed. Further, in Little, the ALJ opined that it was

arbitrary and capricious for HHR not to approve merit raises for the eight employees recommended by Ms. Dressler in response to HHR's own request for revised, reduced recommendations. However, because Ms. Little was ranked 12th out of 14 on the original list, the ALJ determined that she had not proven she would properly have been included in the top 8 employees who would have received merit raises in accordance with the pro-rated formula applied to other HHR facilities. Little, supra.

In the instant matter, Grievant was among the eight employees who were recommended for merit raises as a result of the pro-rated formula applied by HHR to other facilities in 1996. She had originally filed a grievance in October 1996 regarding the 1996 merit raises which were “frozen” and never received. That grievance was dismissed atlevel four in Short, et al. v. W. Va. Dep't of Health and Human Resources, Docket No. 97- HHR-270 (July 29, 1997), for untimeliness. Specifically, the grievants received the level three decision in that matter on May 19, 1997, but did not appeal to level four until June 3, 1997, more than five (5) working days after receipt of the level three grievance decision. That decision was dismissed before a level four hearing was conducted, and thus that grievance was never heard on its merits.

Subsequently, two other Huntington Hospital employees, Rebecca Dunn and Kelby Napier, discovered through the Little decision, that other HHR facilities had received money for merit raises, and filed a grievance in August 1998, alleging discrimination. Ms. Dunn and Ms. Napier were also among the 8 employees recommended for merit raises by Ms. Dressler in 1996. At level three, Ms. Dunn and Ms. Napier were awarded the 1996 merit raises, with back pay plus interest.

Following the approval of merit raises for Ms. Dunn and Ms. Napier, Grievant filed the instant grievance, alleging discrimination, on December 2, 1998. At level two, Kieth Ann Dressler, found that the grievance was timely filed. At level three, the grievance evaluator found that the grievance was timely, and that it was not barred by the doctrine of res judicata, as the original grievance had never been heard on its merits. In addition, the second grievance was alleging discrimination, which was not part of the original grievance. Nevertheless, the grievance was waived at level three, and advanced to level four on February 23, 1999. HHR raised the issues of timeliness and res judicata, and moved that this grievance be dismissed.

AFFIRMATIVE DEFENSES

HHR raised the defense of timeliness for the first time at level four, citing Pryor, et al. v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997), as support for its proposition. In Pryor, the grievants initiated their grievance upon discovering that a co- worker had won a grievance at level four on the same issue, which was compensation for working out of classification. The employer raised the issue of timeliness, and the Administrative Law Judge held the grievance was untimely.

In the instant case, the timeliness defense was also not raised before level four of the grievance procedure by HHR. Unfortunately for the employer, the grievance procedure statute has been amended since the date of the Pryor decision, and the employer is now required to raise a timeliness defense at or before level two or it is deemed waived. Specifically, W. Va. Code § 29-6A-3(2) provides, in pertinent part, that “[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.”

Ms. Dressler addressed the issue in her level two memorandum, but it is clear from that document that she is merely clarifying that the grievance is timely, and that neither she, nor any other representative of HHR raised that issue as a defense. Because this defense was not raised at or before level two, it must fail.

With regard to HHR's second defense, the preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, ___, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309(Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). "The identicality of issues litigated is the key component to the application of administrative res judicata . . . . Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit." Liller, p. 646.

Clearly, res judicata cannot bar this grievance. The first grievance, filed after merit raises were not given in 1996, was never heard on its merits at level four, but was dismissed on the basis of timeliness. The second grievance alleges discrimination, which was not an issue raised in the first grievance, nor could it have been, as it was not known at that time that other HHR facilities had been granted merit raises while Huntington Hospital received none. In addition, it was not until Ms. Napier and Ms. Kelby received their merit raises in 1998 that any of the Huntington Hospital employees

received the 1996 merit raises. In other words, although the underlying factual situation and relief requested are essentially the same in both grievances, the cause of action is different. In the prior grievance, the cause of action was based on the “interference” of HHR in the administration of Huntington Hospital. In the current grievance, the cause of action rests on the Level III grievance decision in Dunn, et al. v. W. Va. Dep't of Health and Human Resources (Sept. 16, 1998), which granted some of the disputed merit raises based on the level four decision in Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (Aug. 27, 1998). By applying this level three decision to other names on the list of proposed merit raises, Huntington Hospital granted additional merit raises. Although Grievant was named on the original list, she again did not receive a merit raise. The level three grievance evaluator discussed and found this matter was not barred by res judicata, and I concur with his decision. Therefore, this grievance will now be addressed on its merits.

FINDINGS OF FACT

I find, by a preponderance of evidence the following facts.

1. Grievant has, at all times relevant to this grievance, been employed by HHR at Huntington Hospital as a Licensed Practical Nurse (LPN).

2. In 1996, Grievant was ranked 5th of 14 employees who were to be recommended for merit raises.

3. Due to a “freeze” on merit raises, HHR instructed all of its facilities to submit a revised reduced list of employees to receive merit raises.

4. Ms. Kieth Ann Dressler, Director of Human Resources, submitted a revised reduced list of eight employees, including Grievant, who were recommended for merit increases.

5. Desmond Byrne, Administrator at Huntington Hospital later rescinded the list submitted by Ms. Dressler, and resubmitted the original 14 names for merit raises. 6. No merit raises were issued to Huntington Hospital in 1996, but other facilities that had submitted revised reduced lists were awarded monies for the recommended merit raises.

7. In August 1998, Rebecca Dunn and Kelby Napier filed a grievance requesting they receive the 1996 merit raise, after it was discovered that other facilities had received the merit increases, despite the “freeze.” Ms. Dunn and Ms. Napier were among the 8employees on Ms. Dressler's revised reduced list of employees to receive merit increases in 1996.

8. Ms. Dunn and Ms. Napier were granted the merit raises, with back pay and interest, at Level III of the grievance process.

9. Grievant filed her grievance on December 2, 1998, upon discovering that Ms. Napier and Ms. Dunn had been awarded the 1996 merit increase, alleging discrimination.

DISCUSSION

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, 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 HHR 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 1) of discrimination, 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Applying this prima facie analysis to the facts presented here, Grievant demonstrated that during the same quarter of the fiscal year, HHR employees at other health care facilities were awarded merit raises, while her recommended merit raise was denied. Furthermore, two employees at Huntington Hospital were awarded merit raises in 1998, as a result of filing a grievance over this matter, once discovering that other employees had been given the raises. Grievant is similarly situated to these HHR employees who received merit raises before the “freeze” was imposed, as well as to thetwo Huntington Hospital employees who were granted merit raises in 1998. Thus, Grievant has established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d). See Travis v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998).

HHR does not claim, nor could it, that Grievant was not among those eight employees on the revised reduced list who would have been eligible for merit increases in 1996, had that list not been rescinded. Nor does HHR claim any job-related differences between Ms. Napier and Ms. Dunn and Grievant, which would justify giving them raises, but not her. Indeed, the reason Ms. Dunn and Ms. Napier received the merit raises was because they established that other employees at other HHR facilities that had submitted reduced lists had received merit raises. No evidence was presented to establish that the reason Ms. Dunn and Ms. Napier were given the merit raises was because they were in administrative positions.

Therefore, HHR has failed to rebut Grievant's prima facie case of discrimination, and Grievant has shown that she was adversely affected by the discriminatory treatment shown to Ms. Dunn and Napier. Cf., Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998).

CONCLUSIONS OF LAW

1. W. Va. Code §29-6A-3(2) provides, in pertinent part, that “[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.” The affirmative defense of timeliness was not raised in this grievance until level four, and thus is denied. 2. The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, ___, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995).

3. "The identicality of issues litigated is the key component to the application of administrative res judicata . . . . Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit." Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, ___, 376 S.E.2d 639, 646 (W. Va. 1988).

4. Res judicata cannot bar this grievance as the merits of the original grievance were never litigated or heard at level four. In addition, Grievant raises a new cause of action which was not part of the original grievance.

5. 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.”

6. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

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7. Grievant has established a prima facie case of discrimination by showing that she is similarly situated to other employees who received merit raises for 1996, and who were among the eight employees recommended, while she has not.

8. HHR has not established a legitimate, non-discriminatory reason why the other employees were given merit raises for 1996 while Grievant was not.

Accordingly, this grievance is **GRANTED** and HHR is hereby **ORDERED** to award Grievant the merit raise from the third quarter of 1996 to which she was entitled, as well as all back pay and interest from the date employees of other facilities were awarded third quarter 1996 merit raises.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 25, 1999

Footnote: 1

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).