REGINA FRIEND,

Grievant,

v. **Docket No. 98-HHR-346D**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION ON DEFAULT

On September 11, 1998, Regina Friend (Grievant) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging that her employer, Respondent West Virginia Department of Health and Human Resources (DHHR), had defaulted on her grievance at Level III when the grievance evaluator failed to schedule a hearing within the time limit specified in W. Va. Code § 29-6A-4(c). On October 30, 1998, a Level IV evidentiary hearing was conducted in the Grievance Board's office in Charleston, West Virginia. That hearing was limited to the issue of whether or not Respondent DHHR was in default. On November 25, 1998, the undersigned Administrative Law Judge issued an Order Granting Default, finding that DHHR failed to respond to Grievant's appeal to Level III within the time limit specified in W. Va. Code § 29-6A-4-(c), and Grievant was entitled to a determination that her employer was in default in accordance with W. Va. Code § 29-6A-3(a). DHHR appealed that ruling to the Circuit Court of Kanawha County which affirmed the default determination on October 12, 1999, in W. Va. Dep't of Health & Human Resources v. Friend, Civil Action No. 99-AA-8. On January 13, 2000, a supplemental Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. (See footnote 1) In accordance with W. Va. Code § 29-6A-3(a)(2), Respondent DHHR was provided an opportunity to demonstrate that the remedy sought by Grievant, retention of her salary at the rate of pay she was

receiving before taking a voluntary downgrade to a lower classification, was either clearly wrong or contrary to law. At the conclusion of the hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on March 1, 2000, upon receipt of the parties' written arguments.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant was employed by Respondent Department of Health and Human Resources (DHHR) as a Protective Service Worker (PSW) in the Webster County office of the Bureau for Children and Families.

2. Grievant applied for a vacancy as a Social Service Worker II (SSW II) in DHHR's Braxton County office. 3. Grievant was selected for the SSW II position. Because the PSW classification is in Pay Grade 11, and the SSW II classification is in Pay Grade 9, Grievant was informed that she would be required to take a 10% pay reduction (5% per pay grade), upon accepting a voluntary demotion to SSW II.

4. As a result of accepting a voluntary demotion, Grievant's annual salary was reduced from $23,544 to $21,180. This pay reduction became effective on August 1, 1998. G Ex 6; A Ex 3.

5. On August 4, 1998, Grievant initiated a grievance contending that requiring her to take a 10% salary reduction was discriminatory.

6. Prior to 1998, DHHR's Bureau for Children and Families had no consistent policy that allowed employees to retain pay, or required employees to take a pay reduction, upon acceptance of a voluntary, non-disciplinary demotion. DHHR exercised discretion permitted under Section 5.6 of the West Virginia Division of Personnel (DOP) Administrative Rule, 143 C.S.R. 1 § 5.6 (1998), governing voluntary demotions, allowing employees to retain their pay in many cases.

7. Field operations of DHHR's Bureau for Children and Families are conducted on a regional basis. Four Regional Directors (RD's) supervise employees assigned to particular geographic regions of the state. DHHR has designated each RD as an appointing authority who may approve or disapprove certain personnel transactions in accordance with Section 3.8 of DOP's Administrative Rule, 143 C.S.R. 1 § 3.8 (1998).

8. Sometime around March or April of 1998, the four RD's in DHHR's Bureau for Children and Families met and agreed to limit the circumstances in which employeesunder their supervision who elected to accept voluntary demotions would be permitted to retain the salary of their previous positions as permitted under DOP's Administrative Rule. Henceforth, the RD's agreed that pay retention would only be approved when filling “priority” positions. These positions were then defined as PSW's and adoption workers, but could be extended to any classification upon mutual agreement of the four RD's.

9. On June 25, 1998, the RD's met with Mike McCabe, DHHR's Director of Personnel, to discuss their pay policy affecting voluntary downgrades. Mr. McCabe left that meeting with the understanding that the RD's were still in the process of developing a policy at that time. Mr. McCabe also expected the RD's to send their policy to him for review, but he never received a written policy, in either draft or final form. A document entitled “Meeting Minutes” was generated by that meeting which contains the following item pertinent to this issue:

> Also discussed was:
>
> The issue of **Family Support Specialists and Adoption positions** being filled with staff who are tenured. Staff internal to the Department who apply for the positions may receive increases in pay, or be voluntarily demoted. The RDs expressed concern about personnel policy and the individual details of staff filling these positions and receiving increases in pay or losing stature. There were questions about what is the policy if the employee returns to their previous position. RDs want to be fair across the board. The differences in pay grades, responsibilities, tenured staff and grievance procedures were discussed. Mike encouraged RDs to establish criteria or standards to be consistent to prevent arbitrary decisions. Mike will review the criteria the RDs will establish and give feedback. There may be a case precedent _ an old grievance case that speaks to some details of voluntary demotion, increases in pay and the policy for staff who change positions within the Department.

A Ex 2 (emphasis in original). 10. Margaret Waybright is DHHR's RD for Region IV, which includes Braxton and Webster counties where Grievant is assigned.

11. On June 29, 1998, Region IV RD Waybright sent a memorandum to all Community Service Managers (CSM's) in Region IV which contained the following guidance on demotions:

> We discussed demotions and reducing salaries accordingly to assure that we are all doing it consistently. Such issues as time in the position, level of responsibility, agency priorities and position in the pay range will be considered. Should you have a situation where someone is interested in a lower pay grade position please discuss the situation with me before any decisions are made.

G Ex 1.

12. The agreement which the RD's first discussed in March or April of 1998 was not reduced to writing until an E-mail was sent from RD Louis Palma to the remaining three RD's on September 16, 1998.

13. DHHR has never adopted an agency-wide policy on voluntary demotions. As of January 1999, Virginia Tucker at DHHR headquarters was working on a policy to govern voluntary demotions and retention of pay. G Ex 10. Region II RD Thomas Gunnoe served on a committee that has been working with Ms. Tucker to formulate an agency-wide policy. As of January 2000, no such policy had been adopted by DHHR.

14. DHHR permits Regional Directors to adopt policies that are not inconsistent with DHHR policies. The informal agreement among the four RD's has never been disseminated as a formal policy. 15. Since April 1998, voluntary demotions in Region IV not involving one of the designated “priority” positions have resulted in a reduction of 5% per pay grade in all cases except four. One employee who accepted a voluntary demotion from PSW in Pay Grade 11 to Economic Service Worker in Pay Grade 8 only received a 10% reduction, rather than a 15% reduction, due to a “clerical error.” A Ex 3. A second employee who transferred from Family Support Specialist in Pay Grade 10 to ESW in Pay Grade 8 only received a 5% reduction rather than a 10% reduction because the employee had been hired as a Work In Training Worker in Pay Grade 9, and Ms. Waybright determined it would be “unfair” to reduce the employee below her original salary. In a third instance, a PSW in Pay Grade 11 who accepted a voluntary downgrade to SSW II in Pay Grade 9 retained her previous salary, because the employee was being accommodated for a disability in accordance with the Americans With Disabilities Act (ADA). A Ex 4; G Ex 2. This exception to the agreed policy was approved by the other RD's. In the fourth exception, another employee with an ADA claim was accommodated by a voluntary downgrade from SSW III in Pay Grade 10 to ESW in Pay Grade 8 with only an 8.5% reduction. This personnel decision was taken by a CSM filling in as RD in Ms. Waybright's absence, and was not discussed with the RD's from the other regions.

16. On July 1, 1998, a DHHR employee in Region II was voluntarily demoted from SSW III in Pay Grade 10 to SSW II in Pay Grade 9 without suffering a loss of pay. G Ex 4. This was not a priority position as defined by the RD's at the time of their agreement, and the RD's did not agree to pay retention as an exception to policy. A clerk in the Region II office failed to realize that the

transferring employee had declined anadoption position for which he had been previously selected, and had accepted a different SSW II position that was not a priority. Thus, RD Gunnoe approved the WV-11 which transferred the employee from an SSW III to an SSW II position without loss of pay, because it was identified as a routine transaction, rather than a priority position transaction, which normally receives greater scrutiny.

17. In the case described in Finding of Fact 16, once the error was discovered, no effort was made to correct the oversight. Likewise, no efforts have been undertaken to correct the errors described in Finding of Fact 15 which resulted in employees being permitted to retain their previous salary under circumstances that would ordinarily be considered contrary to the RD's policy.

18. On February 22, 1999, another DHHR employee in Region I was voluntarily demoted from CSM in Pay Grade 16 to Health & Human Resources Specialist Senior in Pay Grade 13 without suffering a loss of pay. G Ex 9. The RD's mutually agreed to identify this position as a priority based upon DHHR's requirement to take corrective action to reduce an unacceptable error rate in the disbursement of funds. This position was created for that specific purpose, and the employee accepting a voluntary downgrade was particularly well qualified to fill this position.

19. After this grievance was advanced to Level III, Respondent West Virginia Department of Health and Human Resources (DHHR) failed to schedule a timely Level III hearing, placing DHHR in default in accordance with W. Va. Code § 29-6A-3(a)(2). Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 2) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

DHHR contends awarding Grievant the remedy she is seeking, reinstatement of her previous salary in a higher classification, would be contrary to law because it violates the policy of DHHR's Bureau for Children and Families governing voluntary demotions, and would be clearly wrong because it would allow Grievant to retain her salary for a classification that she no longer holds. In a default matter such as this, the employer must overcome the statutory presumption that Grievant prevailed on the merits of her grievance. This Grievance Board has further concluded that the employer must establish any defenses to this statutory presumption by clear and convincing evidence, the same standard which applies during judicial review of factual determinations made byAdministrative Law Judges serving as Hearing Examiners at Level IV. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). See W. Va. Code § 29-6A- 7(b)(4). (See footnote 3) Retention of Grievant's prior salary is a remedy which logically “flows from” her grievance. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

As previously noted, the Administrative Rule of the West Virginia Division of Personnel contains a provision giving state agencies discretion in setting an employee's pay following a voluntary demotion. That provision states:

> Pay on Demotion - The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

143 C.S.R. 1 § 5.6 (1998) (emphasis added).

In early 1998, the four Regional Directors (RD's) who supervise employees assigned to field operations in DHHR's Bureau for Children and Families became concerned about the number of employees who had been promoted to higher graded positions in the West Virginia Works Program, and subsequently taken voluntary downgrades to lower classifications. When these employees were allowed to retain their previous salaries, as permitted by the DOP Administrative Rule, there was a certain amount of grumbling from their peers who were often being paid less money for performingthe same work, even though they had more experience in that employment classification

than the recently demoted employees. The RD's agreed that they would not allow an employee accepting a voluntary downgrade to a lower grade position to retain their previous salary, unless the position being accepted was a “priority” position, meaning it was critical to be filled as quickly as possible with a qualified individual because the work to be performed was particularly important to the agency. The RD's further agreed that there were two categories which met these criteria, Protective Service Workers (PSW's), and employees involved in adoption matters. The RD's further agreed that additional classifications or individual positions could be added, provided that all RD's agreed.

Prior to the action taken on Grievant's voluntary demotion, this agreement was not reduced to writing, nor has it ever been formally disseminated to DHHR employees in the Bureau for Children and Families as a written personnel policy. DHHR has been working on an agency-wide policy covering the same issue, but had not adopted a policy as of the Level IV hearing in this matter. Thus, the only formal policy in evidence is DOP's policy, and that policy explicitly provides that DHHR may allow an employee to retain her prior salary in the circumstances presented. (See footnote 4) Moreover, this unwritten policy has not been followed on at least two occasions since it was purportedly adopted. Although the supervisors responsible for these deviations testified that they were simple “mistakes,” DHHR has taken no action to correct these alleged errors. Indeed, DHHR's Director of Human Resources testified that DHHR has no intention of correcting these oversights. Allof the meritorious, job-related reasons for implementing a policy limiting retention of pay upon voluntary demotion are undermined when the policy is inconsistently implemented.

W. Va. Code § 29-6A-3(a)(2) requires the undersigned Administrative Law Judge to presume Grievant prevailed on the merits. Grievant claimed discrimination in violation of 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, in order to establish a prima facie case (See footnote 5) of discrimination under W. Va. 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). See Flint v. Bd. of Educ., No. 25898 (W. Va. Sup. Ct. of Appeals Dec. 10, 1999). Once a grievant establishes a prima facie case of discrimination under § 29-6A-2(d), the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that thereasons offered for disparate treatment are merely 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).

Consistent with the presumption that Grievant prevailed on the merits of her grievance, the undersigned must presume Grievant established she was the victim of discrimination prohibited under W. Va. Code § 29-6A-2(d). According to Lohr, supra, DHHR is required to present clear and convincing evidence that a finding of discrimination in the facts and circumstances of this grievance is clearly wrong. Despite the good intentions of RD Waybright, the written memoranda submitted into evidence suggest that the purported “policy” under which Grievant's salary was reduced was still being discussed and reviewed at the time Grievant's salary reduction was implemented. Further, multiple deviations from the policy documented in this record are consistent with Grievant's claim that the “policy” is merely a pretext for discriminatory treatment that is not job-related. No matter how valid a personnel policy, it must be consistently enforced to survive scrutiny under a discrimination analysis.

Given that DHHR has allowed other similarly situated employees to retain all or part of their old salaries by mistake, and taken no action to reverse these alleged oversights, it is not “clearly wrong” to approve Grievant's receipt of this same benefit in accordance with a legislative mandate in the grievance procedure. Although this means Grievant willbe receiving a benefit that was explicitly

denied to another DHHR employee who filed a similar grievance in Davis v. West Virginia Department of Health & Human Resources, Docket No. 98-HHR-435 (July 30, 1999), such result is dictated by the nature of the recently added default clause in the state employee grievance procedure.

In Davis, the grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d). The prima facie case analysis provides an evidentiary framework which allows the finder of fact to analyze the evidence presented in a systematic fashion. When an employee is found to have established a prima facie case of discrimination, this simply shifts the burden of proof by requiring the employer to establish a job-related reason or reasons to explain an action that might otherwise appear discriminatory. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). This is a distinctly different analysis from the standard in W. Va. Code § 29-6A-3(a)(2), which states "the hearing examiner shall presume the employee prevailed on the merits of the grievance." As previously discussed, Lohr, supra, requires the employer to overcome this statutory presumption by presenting "clear and convincing evidence."

In Davis, the employee retained the ultimate burden of establishing discrimination by a preponderance of the evidence. Thus, the outcome in this matter differs from Davis primarily because the default clause in the grievance statute shifts the burden of proof from the employee to the employer, and the "clear and convincing" standard requires a higher threshold of proof. In any event, the fact that a different result flows from this proceeding than the outcome of a separate grievance decision involving another employee does notmake the remedy sought clearly wrong or contrary to law within the meaning of W. Va. Code § 29-6A-3(a)(2).

Accordingly, inasmuch as Respondent DHHR defaulted at Level III of the grievance procedure, and DHHR failed to establish by clear and convincing evidence that awarding Grievant the remedy sought would be clearly wrong or contrary to law in accordance with W. Va. Code § 29-6A-3(a)(2), Grievant is entitled to receive her previous salary as a PSW, retroactive to August 1, 1998.

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

CONCLUSIONS OF LAW

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure

for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

2. The language in W. Va. Code § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer does not timely respond to the complaint, resulting in a default. Lohr v. Div. of Corrections, Docket No. 95-CORR- 157D (Nov. 15, 1999). 3. To rebut the presumption created in W. Va. Code § 29-6A-3(a)(2), the employer must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Id.

4. Under the facts and circumstances presented by this Grievance, DHHR failed to establish by clear and convincing evidence that awarding Grievant the remedy sought, reinstatement of the salary she was receiving before she accepted a voluntary demotion to a lower grade position, would be either contrary to law or clearly wrong. See Lohr, supra.

Accordingly, Respondent's request for a determination under W. Va. Code § 29-6A- 3(a)(2), that the remedy sought is clearly wrong or contrary to law is **DENIED**. Respondent West Virginia Department of Human Resources is hereby **ORDERED** to begin paying Grievant the salary she was receiving as a Protective Service Worker prior to August 1, 1998, and to pay her the difference between the pay she received as a Social Service Worker II, and the pay she would have received had she been permitted to retain her previous salary, as back pay with interest, from August 1, 1998, to the date her corrected salary is implemented in accordance with this Decision.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number

so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 27, 2000

Footnote: 1

Grievant was represented by Marilyn Kendall with the West Virginia State Employees Union. DHHR was represented by Assistant Attorney General B. Allen Campbell.

Footnote: 2

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins- Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

Footnote: 3

Arguably, the statute does not allow a Level IV hearing examiner to review the merits of the grievance, but only determine if the remedy is clearly wrong or contrary to law. That interpretation was implicitly rejected in Lohr, supra. However, such an interpretation would not change the outcome in this particular grievance.

Footnote: 4

Grievant's prior $23,544 annual salary in Pay Grade 11 falls within the salary range for a Social Service Worker II in Pay Grade 9, $17,256 to $28,104 annually.

Footnote: 5

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).