SUSAN KIBLINGER,

Grievant,

v.

DOCKET NO. 03-HHR-298

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Susan Kiblinger, filed this grievance against her employer, the Department of Health and Human Resources/Pinecrest Hospital (Pinecrest), on June 24, 2003:

> Discrimination due to age, and employment here at Pinecrest is not comparable to newly hired Nurse III with less experience.
>
> Relief Sought: Equal salary - same as newly hired Nurse III's.

The grievance was denied at level one, level two was waived by agreement, and a level three hearing was held on August 18, 2003, where the Division of Personnel ("DOP") was joined as a party. The grievance was denied by Grievance Evaluator Eunice Green by decision dated September 19, 2003. Grievant appealed to level four on September 30, 2003, and a level four hearing was held in the Grievance Board's Beckley office on November 20, 2003. Grievant appeared pro se, Pinecrest was represented by Landon R. Brown, Esq., Assistant Attorney General, and DOP was represented by Lowell D. Basford. This matter became mature for decision at the close of the level four hearing.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Handwritten list of Nurse III's at Pinecrest, with salaries and starting dates; March 31, 2003 budget office printout of Pinecrest nursing personnel.

Ex. 2 -

Pinecrest Hospital Position Description for Unit Supervisor.

Ex. 2a -

Classification Specification for Nurse III.

Ex. 3 -

September 28, 2001 letter from Susan Kiblinger to Personnel Office, with attached resume.

Ex. 4 -

August 6, 2003 letter from Lori M. King to Susan Kiblinger.

Level Four Grievant's Exhibits

Ex. 1 -

November 20, 2003 statement of Susan Kiblinger.

Testimony

Grievant testified in her own behalf. Pinecrest presented the testimony of William Rose at level three, and Devona Smith at level four. Lowell D. Basford testified on behalf of DOP.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a Registered Nurse (RN) employed at Pinecrest Hospital as a Unit Director. She is classified as a Nurse III, and was hired in July, 2001.

2. At the time the grievance was filed, Grievant's annual salary was $34,332.00. (See footnote 1)

3. The Division of Personnel Classification/Compensation Plan sets the paygrade for the Nurse III classification as paygrade 16, from $27,768 to $45,168. 4. Grievant is 54 years old, was hired in July 2001, and is the third lowest-paid of five Nurse IIIs at Pinecrest. The salaries of the other Nurse III's range as follows:

Name	Hire Date	Age	Yrs. Exp.	Salary
Patty Hunt	January 2001	54	25	$31,296
Bonnie Smith	November 2001	54+	4RN, 11 LPN	$33,576
Susan Kiblinger	July 2001	54	23	$34,332
Sylvia Clay	October 2002	52	30	$34,992
Kelli Blankenship	2003			

36 5RN, 6 LPN
$36,456

5. Kelli Blankenship is a Nurse III, but does not serve as a Unit Director. She is in Staffing Services, and teaches, and trains others to teach, Continuing Nursing Education classes.

7. There is a nursing shortage in Pinecrest's recruitment area, and Pinecrest must offer new hires more money than Grievant is making now in order to get them to take the job.

8. When Grievant was hired in 2001, the applicable DOP Administrative Rules allowed a 3-5% salary increase for each 6 months of experience. When Ms. Clay and Ms. Blankenship were hired, the Rules had changed, and now allow for a 10% increase for each 6 months of experience.

9. Pinecrest does not ask applicants their ages prior to hiring. Only after the individual is hired is he or she asked to give his or her age.

DISCUSSION

As this is not a disciplinary matter, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievantclaims Pinecrest's practice of paying Ms. Clay and Ms. Blankenship higher salaries is discriminatory, on the basis of age, and violates the principal of equal pay for equal work. Pinecrest denies it has engaged in age discrimination, and further, asserts there is no requirement to pay incumbent employees a higher wage than new hires in the same classification, as long as all employees in the same classification are paid within the proper pay grade for that classification.

"'Discrimination' means 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). In order to establish a claim of discrimination, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, a grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a 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. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996).

Grievant asserts age discrimination relative to Ms. Clay and Ms. Blankenship. With regard to Ms. Clay, the undersigned does not find Grievant has established a prima faciecase of discrimination. Ms. Clay is only two years younger than Grievant, and over 40, and has 7 years more experience than Grievant. Her salary is $660 greater than Grievants. Taking into account her experience, this difference in salary would appear to be legitimate. However, with regard to Ms. Blankenship, Grievant has established a prima facie case of discrimination. Grievant and Ms. Blankenship are both Nursing IIIs at Pinecrest. Yet, Ms. Blankenship, who is 36 years old, has only 5 years experience to Grievant's 23 years, and her salary is $2,124 greater than Grievant's salary. The burden shifts to Pinecrest to show that this difference is the result of a legitimate, non-discriminatory, reason.

Pinecrest asserts that the difference is not, in fact, discriminatory because all Nurse IIIs are paid within the pay grade 16 range, and the new Nurse IIIs were offered higher salaries as a recruitment tool. In addition, Devona Smith, Acting Administrator, and Human Resources Director at Pinecrest, testified that Ms. Blankenship was hired not only as a Nurse III to provide direct care, but that she is also responsible for training instructors, and providing instruction, for Continuing Nursing Education classes at Pinecrest. Ms. Smith also testified that it is impermissible to ask applicants their ages, and it is not until an applicant is actually hired into a position at Pinecrest that they can obtain his or her birthdate. Therefore, the various Nurse IIIs ages were not known until after they were hired.

It is not discriminatory for employees in the same classification to be paid different salaries. Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003). The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. See AFSCME v. Civil Serv. Comm'n, 181W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that 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).

"As noted by the West Virginia Supreme Court of Appeals in Largent, [supra,] pay differences may be 'based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.' Id. at 246." Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation, Docket No. 03-DEP-154 (Sept. 12, 2003).

Pinecrest has offered a legitimate, non-discriminatory reason for the pay discrepancy between Grievant and Ms. Blankenship. While it is understandably frustrating to Grievant, and other employees in her same situation, it is within the appointing authority's discretion to pay employees different amounts as long as the salaries are within the established pay grade for the classification.

CONCLUSIONS OF LAW

1. As this is not a disciplinary matter, Grievant must prove all of her claims by a preponderance of the evidence. See Unrue v. W. Va. Div. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. Any difference in the treatment of employees, unless the difference is related to the actual job responsibilities of the employee, or agreed to in writing by the employee, is discrimination. W. Va. Cod § 29-6A-2(d). 3. 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, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (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; and
>
> (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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant has not established a prima facie case of discrimination with regard to Ms. Clay.

4. Grievant has established a prima facie case of discrimination with regard to Ms. Blankenship.

6. Once a 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. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. The concept of "equal pay for equal work" is embraced by W. Va. Code § 29- 6-10. See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similarwork 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); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH- 555 (Mar. 20, 1995); 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). It is not discriminatory for employees in the same classification to be paid different salaries. Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003).

8. “As noted by the West Virginia Supreme Court of Appeals in Largent, pay differences may be 'based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.' Id. at 246." Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation, Docket No. 03-DEP-154 (Sept. 12, 2003).

9. Pinecrest proved it has a legitimate, nondiscriminatory reason for the salary differences between Grievant and Ms. Blankenship.

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, andshould 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 2, 2003

Footnote: 1

Since the filing of the grievance, Grievant, as well as other Nurse III's, have received a $7,800.00 salary increase in an attempt to bring their salaries in line with the current market rate of nurses in the Beckley, West Virginia, area.