JACKIE STREETS, et al.,

Grievants,

v. **Docket No. 03-HHR-039**

WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

Grievants are employed in the rehabilitation services department at William R. Sharpe Hospital, Jr. Hospital ("Sharpe"), and initiated this grievance on December 30, 2002, protesting a shift differential which has been granted to other employees at Sharpe. They seek as relief to have their department included in the group that receives the pay differential. The grievance was denied at level one on December 30, 2003, and at level two on January 10, 2003. A level three hearing was conducted on January 23, 2003, and the grievance was denied in a written decision dated January 29, 2003. Grievants appealed to level four on February 6, 2003. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 15, 2003. Grievants were represented by Jack B. Atchison, and Respondent was represented by Assistant Attorney General B. Allen Campbell.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed in Sharpe's Division of Rehabilitative Services, Therapeutic Department. Their department has two shifts, the first beginning at either 7:30 a.m. or 8:30 a.m., and the second shift--known as the "evening shift"-- normally works from 1:00 p.m. to 9:00 p.m. Many of the evening shift employees provide recreational services to the patients at the hospital. There is no third shift in the Therapeutic Department.

2. On October 17, 2002, the Division of Personnel ("DOP") approved a shift differential of $1.00 per hour for employees who work the second and third shifts at all Department of Health & Human Resources ("DHHR") hospitals. (See footnote 1) The reason for the shift differential was the recruitment and retention problems the facilities were having for nurses, nurse directors, licensed practical nurses, and health service workers, due to competition with the private sector and the "undesirability" of those shifts.

3. Pursuant to the commonly used shifts at most hospitals, the shift differential policy specified that the pay differential would be granted to employees who worked the second and third shifts of 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m. Employees must work their entire eight-hour shift within the specified time period to be eligible.

4. Sharpe's shift times vary slightly from those commonly used by other facilities. Only the housekeeping department begins their afternoon shift at exactly 3:00 p.m. Sharpe's nursing department begins the afternoon shift at 3:15 p.m., and the evening shift begins at 11:15 p.m. Additionally, the switchboard uses shift beginning times of 2:30 p.m. and 10:30 p.m. Therefore, Sharpe received permission from Desmond Byrne,Assistant Commissioner for DHHR's Bureau for Behavioral Health, to use the shift differential for employees on the second and third shifts, with beginning work times between the hours of 2:30 to 3:30 and from 10:30 to 11:30.

5. Because Grievants' department does not have traditional second and third shifts and does not provide 24-hour coverage for the hospital, they are not eligible for the shift differential.

6. Although the Therapeutic Department has experienced significant turnover in recent years, all of its evening shift positions are currently staffed, and it was not experiencing recruitment problems at the time the shift differential was adopted.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants claim that DHHR's application of the shift differential policy, which excludes their department's 1:00 to 9:00 p.m. shift, is discriminatory. The granting of a pay differential in order to

address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority, pursuant to the provisions of DOP's Administrative Rule, Section 5.04. Pishner v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998). Nevertheless, Grievants contend that their evening shift constitutes a “second shift,” within the meaning of DHHR's policy, and that their department has also experienced recruitmentand retention problems. Grievants also disagree with DHHR's deviation from the specific terms of the policy for Sharpe employees, because the policy grants the differential only to employees whose shifts begin at 3:00 p.m. or 11:00 p.m., contending that the therapeutic department could also have been included.

DHHR and Sharpe administrators testified that the proposal of the pay differential resulted initially from nursing recruitment and retention problems at Mildred-Mitchell Bateman Hospital. As discussions regarding the policy developed, it was decided that, because all DHHR facilities have had difficulties obtaining and retaining nurses due to competition with private employers, and the second and third shifts are perceived as particularly undesirable, the policy should apply to all DHHR employees working those shifts. Grievants' 1:00 to 9:00 shift is not construed by DHHR officials to be a traditional second shift, and, as Mr. Byrne testified, they “had to draw the line somewhere.” Therefore, Grievants have been excluded from application of the policy.

As noted in Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families , Docket No. 99-HHR-517 (Apr. 26, 2000), the undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute her management philosophy for DHHR's. Skaff v. Pridemore , 200 W. Va. 700, 490 S.E.2d 787 (1997), Kincaid v. W. Va. Div. of Corrections , Docket No. 98-CORR-144 (Nov. 23, 1998). An agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning , 174 W. Va. 558, 328 S.E.2d 164 (1985). Unless Grievants present sufficient evidence to demonstrate DHHR's shift differential policy is clearly wrong, inappropriate, or the result of an abuse of discretion, anadministrative law judge must give deference to DHHR and uphold the policy. Smith v. Parkways Economic Development and Tourism Auth. , Docket No. 97-PEDTA-484 (Apr. 17,1998); O'Connell v. Dep't of Health and Human Resources , Docket No. 95-HHR-251 (Oct. 13, 1995); Farber v. Dep't of Health and Human Resources , Docket No. 95-HHR-052 (July 10, 1995).

Grievants also contend that the shift differential policy itself is discriminatory and has been applied at Sharpe in a discriminatory manner, in violation of West Virginia Code § 29-6A-2(d). That statute 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." In order to establish a *prima facie* case of discrimination, 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.

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 Grievants establish 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). Grievants have failed to establish a *prima facie* case of discrimination, because they are not similarly situated to the employees who have received the benefit of the shift differential policy. Although Grievants' 1:00 to 9:00 p.m. shift could be construed as a “second shift”, they do not work the “traditional” second and third shifts utilized by hospitals in their department, and the evidence does not demonstrate that their department has experienced the recruitment and retention problems that other departments have, contrary to Grievants' assertions. As Mr. Byrne testified, the policy came about due to nursing recruitment and retention problems at a specific facility, which was ultimately applied to all DHHR facilities. DHHR has made every effort to make the policy fair while still “drawing the line” somewhere, which resulted in the decision to apply it to the traditional afternoon and evening shifts. It was within DHHR's authority to make discretionary decisions regarding the content and application of the policy, and Grievants have not demonstrated that it is clearly wrong or constitutes an abuse of

discretion.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority, pursuant to the provisions of DOP's Administrative Rule,Section 5.04. Pishner v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998).

3. An administrative law judge does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute her management philosophy for DHHR's. Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families , Docket No. 99-HHR-517 (Apr. 26, 2000), Skaff v. Pridemore , 200 W. Va. 700, 490 S.E.2d 787 (1997), Kincaid v. W. Va. Div. of Corrections , Docket No. 98-CORR-144 (Nov. 23, 1998). An agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning , 174 W. Va. 558, 328 S.E.2d 164 (1985).

4. West Virginia 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." In order to establish a *prima facie* case of discrimination, 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.

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).

5. Grievants have failed to establish a *prima facie* case of discrimination, and they have not demonstrated that DHHR's shift differential policy is clearly wrong or constitutes an abuse of discretion.

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, and 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.

Date: June 25, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

State agencies may request differential pay for employee groups with which recruitment and/or retention problems exist, but only DOP may approve such a differential for implementation by the agency.