SANDRA BOSSIE, et al.,

Grievants,

v.

DOCKET NO. 03-RS-141

DIVISION OF REHABILITATION SERVICES AND

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants are employed by the West Virginia Division of Rehabilitation Services ("DRS") as registered nurses, licensed practical nurses, and health service workers. (See footnote 1) They filed this grievance against DRS on December 30, 2002:

> Discrepancy between hospital facilities under DHHR and our facility under Arts/Education. We all work for the state of W. V. We deliver care 7 days a week/24 hours a day to our patients. We need to be recognized as other state hospital facilities have been recognized with shift differential and holiday pay.
>
> Relief sought: Review base pay to see how we compare with other hospitals in our area and upgrade to a comparable rate.

Grievants' immediate supervisor, Cathy Pennybacker, denied the grievance on December 31, 2002, for lack of authority to resolve the grievance. A level two hearing was held on January 8, 2003, and Sonja Scholl denied the grievance by decision dated January13, 2003. A level three hearing was held on April 10, 2003, and once again the grievance was denied by Grievance Evaluator Katherine L. Dooley. Grievants appealed to level four on May 23, 2003, at which time the Division of Personnel was joined as an indispensable party. A level four hearing was held on August 26, 2003, at which

time this grievance became mature for decision, the parties electing not to file proposed findings of fact and conclusions of law. Grievants represented themselves, and DRS was represented by Warren J. Morford. The Division of Personnel did not make an appearance.

SUMMARY OF EVIDENCE

LIII Grievants' Exhibits

Ex. 1 -

January 23, 2003 Division of Personnel posting for Nursing positions.

Ex. 2 -

July 2001 salary information for Registered Nurses in Charleston, West Virginia, prepared by salary.com.

Ex. 3 -

Handwritten salary information for registered nurses employed at Mildred Mitchell-Bateman and Thomas Hospitals.

Ex. 4 -

2001 W. Va. Labor Statistics, average salaries for registered nurses, licensed practical nurses, licensed vocational nurses, and nursing aides.

Ex. 5 -

Salary information from Putnam General Hospital as of January 2003.

LIII DRS Exhibits

Ex. 1 -

Salary comparison chart for DRS, Mildred Mitchell-Bateman, and Welch Community Hospitals.

LIV Grievants' Exhibits

Ex. 1 -

W. Va. Div. of Personnel General Information for Applicants.

Ex. 2 -

W. Va. Div. of Personnel State Government Job Opportunities.

Ex. 3 -

W. Va. Div. of Personnel Application Instructions; Unassembled Examination Announcement, October 1, 1999-March 31, 2000.

Ex. 4 -

W. VA. Div. of Personnel Written Examination Instructions and Announcement, October 1, 1999-March 31, 2000.

Ex. 5 -

Lana Goodson's Application for Examination.

Ex. 6 -

W. Va. Div. of Personnel Notice of Rank, September 3, 1999, for Lana Goodson.

Ex. 7 -

W. Va. Div. of Personnel Certification List, September 21, 1999.

Ex. 8 -

July 14, 2003 memorandum from Bill Tanzey to Sonja Scholl.Ex. 9 -
Article, Licensed Practical Nurses (unidentified source).

Ex. 10 -

August 26, 2003 Statement of Grievants.

Ex. 11 -

W. Va. Div. of Personnel Administrative Rule, Section 5. Compensation Plan and Salary Administration.

Ex. 12 -

June 17, 2003 letter from Cathy Pennybacker to Janice Holland.

Ex. 13 -

August 18, 2003 list of medications given at DRS.

Ex. 14 -

July 17, 2003 memorandum from Sonja Scholl to RN's, LPN's, HSW's.

Ex. 15 -

Needs List, RN or LPN.

Ex. 16 -

Capitol Nursing Agency Schedule, July-August, 2003.

Ex. 17 -

August 1, 2003 letter from Janice A. Holland.

Testimony

Grievants presented the testimony of Pearl Thompson, Rita Boyd, Sandra Bossie, Karri Kennedy, Lana Goodson, Jewel Saunders, Kathy Hockworth, James Quarles, Diana Blake, Vicki Myers, and Pam Reed. DRS presented the testimony of Sonja Scholl.

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. Grievants are employed by DRS at the West Virginia Rehabilitation Center as registered nurses, licensed practical nurses, and health service workers.

2. Grievants are in the classified service of the State of West Virginia, and the classifications and salaries for their positions are established by the West Virginia Division of Personnel.

3. Grievants are not employed by the West Virginia Division of Personnel (“DOP”) or the West Virginia Department of Health and Human Resources (“DHHR”).

4. Mildred Mitchell-Bateman Hospital in Huntington, West Virginia, is a state-run facility under DHHR which cares for psychiatric patients.

5. Welch Community Hospital in Welch, West Virginia, is a state-run facility under DHHR. 6. Mildred Mitchell-Bateman Hospital health care workers received a salary increase in

2002. DRS health care workers did not.

7. Mildred Mitchell-Bateman Hospital health care workers receive holiday pay and shift differential. DRS health care workers do not.

8. DRS utilizes contract nurses at the Rehabilitation Center on an as-needed basis. Contract nurses are paid approximately $40.00 per hour.

9. Grievants offered to work the shifts currently being assigned to contract nurses for an extra $50.00 per shift.

10. DRS has refused to allow Grievants to work overtime for $50.00 per shift.

11. Sometime after this grievance was filed, the registered nurses were given salary increases.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden fo proving their allegations 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); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6.

Grievants allege they are not being paid a comparable wage relative to Charleston, West Virginia area hospitals and state-run hospitals, specifically, Mildred Mitchell-Bateman, a psychiatric facility, and Welch Community Hospitals. Grievants' complaints are in the form of a claim of discrimination.

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 jobresponsibilities of the employees or agreed to in writing by the employees." 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, a grievants 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. 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. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievants are classified employees for the State of West Virginia. Their classifications and pay grades are determined by DOP. Grievants are not similarly situated to privately run hospitals in the Charleston, West Virginia area, and any comparisons with those facilities is irrelevant to this grievance.

The pay scales for nurses at the two state-run hospitals were submitted into evidence, and there is no dispute that the comparison shows nurses are paid lower than their counterparts at Mildred Mitchell-Bateman, but higher than those at Welch. In addition,it is not disputed that nurses at those facilities received double-time for three major holidays, and shift differentials of an additional $1.00 per hour. DRS does not pay shift differentials to its employees due to budgetary constraints.

Both Mildred Mitchell-Bateman and Welch are operated by DHHR, a separate agency from DRS, and even between those two hospitals there is a difference in salaries. There was some testimony that a legislative appropriation has been given to Mildred Mitchell-Bateman to increase the pay of its nursing staff. Such an appropriation is not without precedent. However, it does not serve to change the entire pay scale for like employees throughout the entire classified system of state government.

Grievants are not similarly situated to employees of DHHR for purposes of pay comparisons. While their classifications and pay grades are determined by DOP, they are also determined by the location of the positions they occupy within the DRS organization. Consequently, Grievants have failed to establish a prima facie case of discrimination.

Additionally, Grievants have failed to establish that DRS' decision not to increase their salaries, give them holiday pay or shift differential pay is arbitrary or capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See* Bedford

County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for thatof the agency. *See generally* Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Grievants understandably want DRS to advocate for a pay increase on their behalf. DRS argues that based on the dire financial circumstances in which the State as a whole, and it in general, finds itself, it cannot afford to provide the pay increases requested by Grievants. There is no basis upon which DRS' actions or failure to act may be deemed arbitrary and capricious as they relate to Grievants' desire for a pay increase. While it is readily apparent Grievants provide a valuable and valued service to DRS and its clients, their grievance is not meritorious.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their allegations 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); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6.

2. Grievants have failed to prove by a preponderance of the evidence that they are entitled to pay raises, holiday pay, or shift differentials.

3. 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 jobresponsibilities of the employees or agreed to in writing by the employees." 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, a grievants 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. 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. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

4. Grievants have failed to establish a prima facie case of discrimination.

5. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See* Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). 6. While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the agency. *See generally* Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

7. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

8. Grievants have failed to prove DRS' action or failure to act with regard to their salaries is arbitrary and capricious.

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. 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: September 23, 2003

Footnote: 1

Grievants are Rita Boyd, Opal Bowen, Michael R. Myers, Vicky Myers, Patricia Holcomb, Pearl Thompson, Carolyn J. Hudson, Bob Hardinger, Larry O. Frazier, Lana Goodson, Kathy Hackworth, Linda Hankins, Rosemary Francis, Charles Jarvis, Martha Saunders, Marsha Tredway, Sharon Byrd, Karri Kennedy, and Sandra Bossie.