ANGEL McCARTY, et al.,

Grievants,

v. Docket No. 04-HHR-011

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

JOHN MANCHIN SR. HEALTH CARE CENTER and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Angel McCarty, Jo-Ann Augustus, Vicki O'Connor, Cherie Dunn, Kimberly Attoe, Mary Donaldson, Linda McCoy, Delana Yost, Tenna Husk, Lora Boone, Alma Allen , Barbara Tomana, Shawn Bleigh, Twyla Snopps, and Michelle Heldreth ("Grievants"), employed by the Department of Health & Human Resources as Health Service Workers ("HSWs") and Health Service Assistants ("HSAs") at the John Manchin Sr. Health Care Center ("Manchin Center"), filed individual level one grievances in July 2003, alleging they had been denied a promised salary increase. For relief, Grievants request the increase with back pay. After the grievances were denied at levels one, two, and three, individual appeals were made to level four in January 2004. (See footnote 1) **A hearing was conducted in Fairmont at the Manchin Center, at Grievants' request, on May 25, 2004. Grievants represented themselves, DHHR was represented by Assistant Attorney General Robert Miller, and the Division of Personnel was represented by Assistant Director Lowell D. Basford. The grievance became mature for decision upon receipt of DHHR's proposed findings of factand conclusions of law on June 22, 2004. Grievants elected not to file post-hearing submissions.**

The following facts have been derived from a preponderance of the evidence submitted at levels three and four.

Findings of Fact

1. Grievants are all employed by HHR at the Manchin Center as Health Service Workers and Health Service Assistants.

2. On August 14, 2003, Secretary Paul Nusbaum noted recruitment and retention

problems within HHR's hospitals and asked the State Personnel Board to approve pay increases for current health care employees and special hiring rates for new employees. One of the goals of the proposal was "to grant a special salary differential to current employees in these job classifications."

3. The State Personnel Board approved increases for all Registered Nurses, Licensed Practical Nurses, and all Health Service Associates, to become effective October 1, 2003.

4. Health Service Workers at Sharpe, Pinecrest, and Lakin Hospitals were given pay increases ranging from $1,500 to $1,900. Health Service Assistants at Sharpe received a $1,500 pay increase, and the Health Service Assistants at Lakin received a $108.00 increase.

5. These increases were granted subsequent to a study conducted by DHHR of the salaries paid to health care workers in both public and private hospitals and nursing homes in the geographic region surrounding each of the hospitals. 6. Health Service Assistants, at pay grade 7, work under general supervision and perform paraprofessional work assisting professional staff in the care treatment, habilitation and rehabilitation of patients in state operated facilities. Health Service Assistants are distinguished from Health Service Workers, pay grade 6, by either the assignment of lead worker duties on an ongoing basis, or the assignment of duties to develop and/or monitor program plans within a specific discipline at a facility. Additionally, a Health Service Assistant has some latitude of action in the development of treatment plans.

7. The salary study indicated the Fairmont regional hospital average for Health Service Assistants and Health Service Workers was exactly the same, $18,661.00.

8. The salary study indicated the Fairmont regional nursing home average for Health Service Assistants and Health Service Workers was exactly the same, $18,166.00.

9. The salary study indicated the statewide nursing home average for Health Service Assistants and Health Service Workers was exactly the same, $17,788.

10. There was no differentiation made between the duties of Health Service Assistants and Health Service Workers when the information about regional salaries was compared.

11. Based on these comparisons, the average salary for Manchin Center Health Service Workers and Health Service Trainees is higher than the salaries of hospital and nursing home employees in the geographic area, and they were not granted a salary increase.

Discussion

The essence of Grievants' complaint is that the Manchin Center also experiences a retention and recruitment problem, and the failure to grant them a salary increase was discriminatory. Respondent asserts all the employees were treated equally, and the disparate outcomes were the result of a consistent application of the method they used to make the salary comparison.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The question of this particular salary increase has recently been reviewed by the Grievance Board, and there are no differences in the essential facts or issues in this grievance which would lead to any changes in the outcome. Grievants in both Sluss v. Dep't of Health & Human Res. and the Div. of Personnel, docket No. 03-HHR-410 (May 28, 2004), and Bates v. Dep't of Health & Human Res./Lakin Hospital and the Div. of Personnel, Docket No. 04-HHR-018 (June 30, 2004), prevailed on claims of discriminationbased upon a determination that the DHHR study was flawed. Specifically, by placing HSAs in a higher pay grade than HSWs, DOP recognizes the differences between the two classifications and finds HSAs merit more pay than HSWs. However, the private institutions do not use the same classifications or titles for their employees, so there is no direct correlation between the private sector positions and the state positions. Further, it is impossible to determine the duties of the comparison employees in the private sector. In fact, it seems more likely that in the private sector, like the state facilities, those employees with more duties and greater responsibilities are paid more. Sluss, supra.

As in Sluss and Bates, supra, the salaries of the employees at the Manchin Center were compared to those of regional hospitals and nursing homes. The regional salaries of the Health Service Assistants and the Health Service Workers were found to be identical. The Administrative Law Judges in Sluss and Bates, supra, determined that it would be impossible for the average salary for two different populations of employees to be exactly the same. It is believed these identical numbers were the result of combining those private sector positions whose duties would fall within the state HSA and HSW classifications.

Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." To establish a claim of discrimination, employees must demonstrate a prima facie case by demonstrating:
(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 the 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). Thereafter, the grievants may show the offered reasons are pretextual.

As in Sluss and Bates, supra, Grievants have met their burden of proof and established a prima facie case of discrimination. They are similarly situated to the other direct patient care employees included in the salary adjustment proposal, and they were, to their detriment, were not granted a salary increase. Respondents failed to rebut the prima facie case of discrimination, because they relied on a flawed study to support their actions.

The foregoing findings of fact and discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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); Howellv. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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."

3. To establish a prima facie case of discrimination, employees must demonstrate the following:

(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.

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4. Grievants have met their burden of proof and established a prima facie case of discrimination.

5. Respondents have failed to rebut the prima facie case of discrimination.

Accordingly, this grievance is GRANTED . Respondents are ORDERED, to develop and apply legitimate criteria and methods for comparing Health Service Assistants' salaries to equivalent positions in the private sector, based on sound mathematical and statistical analysis, as was Ordered in Sluss and Bates. If Grievants' salaries are found to be lower than their private equivalents by an amount comparable to the difference between HSW's and their private-sector counterparts, then Respondents are ORDERED to grant a similar salary advancement to compensate for the disparity, with interest.

Any party 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 theBoard with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 30, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***The grievances had been consolidated at level three.***