MILISSA PARKER,

Grievant,

v. **Docket No. 03-HHR-195**

DEPARTMENT OF HEALTH and HUMAN RESOURCES/

MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Milissa Parker, is employed as a telephone operator by the Department of Health and Human Resources ("HHR" or "Agency") at Mildred Mitchell-Bateman Hospital ("MMBH"). She filed this grievance on May 12, 2003, asserting she should receive the pay increase given to Health Service Workers.

This grievance was waived at Level I and denied at Levels II and III. At Level III, Grievance Evaluator Jerry Wright directed HHR to reallocate Grievant's position to a telephone operator, and that has been done.

Grievant appealed to Level IV on July 7, 2003, and a Level IV hearing was held on December 4, 2003. This case became mature for decision on February 2, 2004, after receipt of Respondent's proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was initially employed by HHR at MMBH as a Health Service Worker in 1999.

2. Grievant was off work for a period of time in 2002, and returned to work in May 2002.

3. Upon her return to work in May 2002, Grievant asked for accommodations due to her diabetes and asthma. Grievant could no longer perform Health Service Worker duties because she

had neuropathy in her feet and hands and could not stand the amount of time the position required. (See footnote 2)

4. In June 2002, HHR placed Grievant in the Family Practice Clinic performing Office Assistant and Health Service Worker duties.

5. The Director of Nursing would pull Grievant from the Family Practice Clinic in the afternoon when the Clinic was over and assign her Health Service Worker duties that required little physical exertion. Grievant did not complain about these assignments to anyone, and was able to perform the limited duties she was assigned.

6. Grievant fell on August 8, 2002, after working two months in the Clinic. Grievant was off work from August 8, 2002, through April 28, 2003, because of this on-the- job injury.

7. On August 20, 2002, Kieth Anne Worden, Director of Human Resources, notified the Director of Nursing, that Grievant would have to be removed from her current position in the Family Practice Clinic because the employee she was filling in for would be returning to work soon.

8. In November 2002, HHR gave a salary adjustment to current Health Service Workers in an effort to recruit and retain these types of employees. 9. Grievant returned to work on April 28, 2003, and presented Ms. Worden with a letter from her doctor stating she had several physical limitations and would need some additional accommodations.

10. On April 28, 2003, Grievant was offered two positions, one as a Health Service Worker doing one-on-ones, (See footnote 3) and the other was to work as a telephone operator. Grievant accepted the telephone operator position.

11. Ms. Worden explained to Grievant on April 28, 2003, that she would not be eligible for the Health Service Worker salary adjustment because she would not be working as a Health Service Worker. Ms. Worden followed this discussion with a letter stating the same information. Also, in this letter, Ms. Worden outlined the identified physical limitations. (See footnote 4)

12. After Grievant accepted the telephone operator position with the knowledge of the pay, she filed this grievance a week later.

13. Some employees, who were classified as Health Service Workers, received the increase, then took other positions, and maintained the increase after the voluntary demotion, as their pay was within their new pay grade. Other employees who were still classified as Health Service Workers, but were not working in the classification, did not receive the increase. 14. After the Level III

Decision, Grievant was reallocated from a Health Service Worker to a telephone operator, because these were the duties she was performing. Grievant did not receive a decrease in pay with this reallocation even though she went from a pay grade 6 to a pay grade 4.

Issues and Arguments

Grievant asserts she should not be punished for being injured, and maintains that employees that were similarly situated were treated differently than she was. Respondent notes all the employees Grievant identified were treated in the same manner as she.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 Resources, 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Although not specified by Grievant, her argument centers on discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences inthe 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(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Assistant Principal. 30, 1992).

Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. 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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep'tof 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).

Grievant has not met her burden of proof, as she has failed to establish a prima facie case of discrimination or favoritism. Grievant was not working as a Health Service Worker at the time of the increase. When she returned to work, she chose not to take the offered position which would have given her the raise. Grievant did not identify any similarly situated employees who were treated differently than she.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 Resources, 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 (Assistant Principal. 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 and Human Resources, 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. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. A grievant, seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Assistant Principal. 30, 1992).

5. Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. 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, 179 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).

6. Grievant has not met her burden of proof, as she failed to establish a prima facie case of

discrimination or favoritism. Grievant did not demonstrated she is entitled to the salary adjustment HHR gave to recruit and retain Health Service Workers because shedid not return to work in a Health Service Worker position. Grievant was not similarly situated to the employees to whom she compared herself.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: February 27, 2004

Footnote: 1

Grievant represented herself, and HHR was represented by Landon Brown, Assistant Attorney General.

Footnote: 2

Grievant hopes to be able to return to a position as a Health Service Worker sometime in the future.

Footnote: 3

These type of Health Service Worker duties do not require an employee to be on his or her feet as much.

Footnote: 4

Grievant now complains she did not ask for all the accommodations she received. Since Grievant received this letter, was aware of these accommodations at the time, and did not protest, it must be assumed Grievant believed these arrangements were appropriate. This issue will not be addressed further.

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).