NELLIE SLUSS, et al.,

Grievants,

v. DOCKET NO. 03-HHR-410

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

Respondents.

DECISION

On October 21, 2003, Grievants (See footnote 1) filed a grievance against Department of Health and Human Resources/Pinecrest Hospital (DHHR or Pinecrest), Respondent, claiming discrimination in the way salary adjustments were made in the health service job classifications. As relief, Grievants seek, “To receive the same pay raise retroactive to October 1, 2003, when the Health Service Workers received salary adjustments. To receive a copy of the report that was used to establish the salary adjustments for Health Service Workers, Health Service Assistants, LPN's and RN's.”

By agreement of the parties, levels one and two were waived, and the grievance was denied at level three. The Division of Personnel (DOP) was joined as an indispensable party at level four. A level four hearing was held in the Grievance Board's Beckley office on March 24, 2004. Grievants were represented by Roger Mooney. DHHRwas represented by counsel, Landon Brown, and DOP was represented by Lowell Basford. The matter became mature for decision April 23, 2004, the deadline for submission of the parties' fact/law proposals.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are all employed by DHHR at Pinecrest as Health Service Assistants.

2. The Health Service Assistant (HSA) classification, at pay grade 7, is one step above the Health Service Worker (HSW) classification. Employees in both classifications are Certified Nurse Assistants (CNA's), but the HSA's have additional training beyond that required for the HSW classification and perform additional duties. HSA's may perform HSW job functions, but HSW's cannot perform HSA work.

3. The DHHR filed a proposal with the Personnel Board "(1) To establish a special hiring rate for the Nurse I, II, III, IV, Licensed Practical Nurse, Health Service Assistant and Health Service Worker positions and (2) to grant a special pay differential for employees in the Nurse I, II, III, IV, Licensed Practical Nurse, Health Service Trainee, Health Service Assistant, Health Service Associate and Health Service Worker positions" at the State Hospitals, to be effective October 1, 2003.

4. One of the goals of the proposal was "to grant a special salary differential to current employees in these job classifications."

5. The salary differentials used in the proposal were based on comparisons of similar positions at regional hospitals and nursing homes. Amounts of pay for direct health care classifications were compared to similar positions at private facilities. Theamounts were taken from W. Va. Health Care Authority detail reports from Worksheet 11 of the 2002 Uniform Financial Reports for those facilities.

6. For HSA's, these reports found the average salary at regional hospitals to be $19,687, and at regional nursing homes to be $18,344, while the average salary for HSA's at Pinecrest was $21,292.

7. For HSW's, these reports found the average salary at regional hospitals to be $19,451, and at regional nursing homes to be $18,344, while the average salary for HSA's at Pinecrest was $17,966.

8. Based on these comparisons, Pinecrest HSW's were granted a $1,500 per year salary increase, while HSA's were not granted a salary increase. In addition, Health Service Trainees were given a $1,400 raise, Health Service Associates were given a $3,200 increase, and Nurse classifications were given salary increases ranging from $3,200 to $5,800.

9. The salary comparison study used by Respondent DHHR as the basis for its decision that HSA's already made comparable salaries to the private sector was flawed, in that salaries used for comparison to HSA classifications were the same salaries used to compare to the HSW

classifications.

DISCUSSION

Since this grievance is not about discipline, Grievants must prove all of their claims (See footnote 2) by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide the claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996);*Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Grievants claim discrimination and favoritism by comparing themselves to other direct patient care workers at Pinecrest who received salary adjustments, while they did not. Respondent counters that 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.

"'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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 29-6A-2(h). 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 (Apr. 30, 1992).

Grievants made a *prima facie* showing of discrimination and favoritism, being similarly situated to the other direct patient care employees included in the salary adjustment proposal. They were, to

their detriment, not granted salary increases commensurate with the plan to improve their salaries to private sector rates, and the differences were not, in fact, related to their job responsibilities. The last criterion for the test to prove discrimination or favoritism requires a more detailed look at the actual salary study performed by DHHR and relied upon by DOP. A major flaw is evident in this study, upon which Respondents based the salary adjustments granted to the direct patient care classifications. The obvious cause of the flaw is that the private institutions with which DHHR compared salaries do not use the same classifications or titles for their employees, so there is no direct correlation between private sector positions and state positions. By placing HSA's in a higher pay grade than HSW's, the DOP recognizes the differences between the two classifications merit more pay for the former. In the state system, both HSA's and HSW's are CNA's, but DOp recognizes that they have different skills. In the private sector, CNA's are all grouped under the same category, and there is no evidence private institutions recognize the differences and compensate accordingly.

While, on the face of the data summary (Level three Agency Exhibit No. 1) the average salaries are different, looking behind the summary numbers to the source reveals an interesting anomaly: with the exception of CAMC-Charleston, the individual regional hospital and nursing home comparison average salaries per full-time equivalent are identical for HSA's and HSW's. (See footnote 3) Level Three Exhibit No. 11. Salaries at Pinecrest were compared to those at thirteen other hospitals, as well as 26 nursing homes, and it would be practically impossible for, at every one of these facilities, the average salary per full- time equivalent for two different populations of employees to be exactly the same. Thisstrongly implies that, the population of private facility employees whose salaries are averaged in the HSW comparison is the same population averaged in the HSA comparison. In other words, for comparison purposes, Respondents made no distinction between positions in the private sector whose duties would fall within the state HSA classification and those whose duties would fall within the HSW classification. This caused Respondents to determine that the difference between Pinecrest HSA salaries and private sector HSA salaries is greater than for HSW's. Respondent would have reached the same result if it had simply compared the salaries Pinecrest pays to HSW's with the salaries it pays to HSA's: HSA's are, generally, paid more than HSW's, therefore they do not need additional salary to bring them up to the pay level of HSW's.

Unfortunately, it is impossible from the evidence to determine what the duties of the comparison employees in the private sector are, so there is no way of determining if they are more like HSA's or

more like HSW's. The financial report detail sheets referenced in the source data summary were not offered in evidence by either party, but the undersigned, having some familiarity with those types of reports, takes notice they do not describe the duties and responsibilities of the positions for which salary expenditures are listed. If, as Grievants assume, the CNA's to which they were compared at other hospitals would be classified as HSW's in state hospitals, then the average salaries to which their average salary was compared was too low, creating the appearance that their salaries were already above those in the private sector for comparable positions. If this were true, then Respondents' decision not to adjust Grievants' salaries was justified, but it seems more likely that in the private sector, like at the state facilities, employees with more duties and greater responsibility are paid more. 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. *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).

Respondents cannot offer legitimate reasons for their actions, because they must rely on a flawed study to support those actions. Respondents asserted that the salary disparity was but one aspect of the proposal. The proposal, DHHR maintains, was also intended to address a recruitment and retention problem that exists with HSW's but not with HSA's. This assertion is belied by the proposal itself, though. The August 14, 2003, letter to the State Personnel Board from DHHR Secretary Paul Nusbaum that requests the special salary adjustments (part of Exhibit No. 11) explicitly states that Pinecrest and the other state hospitals are experiencing recruitment and retention problems with nursing and other health care employees. It then proposes increases for all nurses and *all* health service classifications. The lack of recruitment and retention problems for HSA's that Respondents now claim exists is apparently a pretext to justify the erroneous conclusion that no salary disparity exists for HSA's.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a

preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide the claims are morelikely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR- 486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met this burden. *Id.*

2. 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 (Apr. 30, 1992).

3. Grievants have established by a preponderance of the evidence that they have been subjected to a discriminatory practice when they were not considered for salary advancements based on valid criteria for comparison to the private sector.

4. 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. *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).

5. Respondents have failed to offer legitimate reasons to substantiate their actions. Their proffered reasons are pretextual. For the foregoing reasons, this grievance is **GRANTED**.

Respondents are **ORDERED,** to develop and apply, within 90 days, legitimate criteria and methods for comparing HSA salaries to equivalent positions in the private sector, based on sound mathematical (See footnote 4) and statistical analysis. 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.

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, 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: May 28, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Nellie Sluss, Donna Carter, P. Diana Penn, Yvonne Farley, Evelyn M. Lilly, Bonnie L. Davis, Katrina Nabors and Kathy McKinney

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Footnote: 2

Grievants raised a number of claims in the proposed findings of fact and conclusions of law that were not raised in the actual grievance. These issues have not been considered.

Footnote: 3

The method of comparing average salaries used by DHHR is also mathematically flawed, but it was flawed consistently for every classification, so it was not the cause of the discrepancy complained of. DHHR obtained an average salary per full-time equivalent for each hospital and nursing, then averaged this set of averages without weighting to take into account the varying numbers of full-time equivalents in each facility. This, in essence, gave more significance to salaries paid at facilities that have a greater number of employees.

Footnote: 4

Respondents may not use the same mathematically unsound methods in the interest of fairness to other positions that were evaluated the same way -- the two mistakes will not cancel each other out.