JENNIFER BATES, et al.,

Grievants,

v. DOCKET NO. 04-HHR-018

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/LAKIN HOSPITAL and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On October 23, 2003, Grievants (See footnote 1) filed a grievance against Department of Health and Human Resources/Lakin Hospital (HHR or Lakin). The Division of Personnel was added as an indispensable party. The Statement of Grievance reads:

> Discrimination based upon the inequity and unfairness in which the salary adjustments for direct care staff (job title of Health Service Assistants) were distributed by the Division of Personnel for HHR.

The relief sought was:

> To be made whole in every way, including but not, limited to, a more equitable and justified distribution of monies from the Division of Personnel, HHR; for salary adjustments made through the State personnel [sic] Board Meeting on 8/21/03. Including all back pay from October 1, 2003.

By agreement of the parties, Levels I and II were waived, and the grievance was denied at Level III. (See footnote 2) A Level IV hearing was held on March 16, 2004. (See footnote 3) The matter became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the

following Findings of Fact.

Findings of Fact

1. Grievants are all employed by HHR at Lakin as 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. (See footnote 4) One of the goals of the proposal was "to grant a special salary differential to current employees in these job classifications." Sluss v. Dep't of Health and Human Res., Docket No. 03-HHR-410 (May 28, 2004).

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. (See footnote 5)

4. Health Service Workers and Health Service Worker Trainees at Sharpe, Pinecrest, and Lakin Hospital were given pay increases ranging from $1,300 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. No other Health Service Assistants received increases. (See footnote 6)

5. These increases were granted after a study of the salaries paid to similar workers in the surrounding geographic region.

6. The Health Service Assistant classification, at pay grade 7, is one step above the Health Service Worker classification. Health Service Assistants have additional training beyond that required for the Health Service Worker classification and perform additional duties. Health Service Assistants may perform Health Service Worker job functions, but Health Service Workers cannot perform Health Service Assistant work. Sluss, supra. Additionally, Health Service Assistants frequently supervise Health Service Workers. Class specification. 7. Health Service Workers work under direct supervision performing basic personal and nursing care. These employees are required to have successfully completed training courses and/or passed competency tests. Class specification.

8. Health Service Assistants work under general supervision and perform paraprofessional work assisting professional staff in the care treatment, habilitation and rehabilitation of patients in state operated facilities. Class specification.

9. Health Service Assistants are distinguished from Health Service Workers 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. To become a Health Service Assistant at Lakin the employee must successfully complete a minimum of forty hours of required training in the assigned area that results in certification and approval by HHR. Class specification.

10. The salary study indicated the regional hospital average for Health Service Assistants and Health Service Workers was exactly the same, $20,187.00. Resp. No. 2, at Level III.

11. The salary study indicated the regional nursing home average for Health Service Assistants and Health Service Workers was exactly the same, $17,846.00. Resp. No. 2, at Level III.

12. The salary study indicated the statewide nursing home average for Health Service Assistants and Health Service Workers was exactly the same, $17,788. Resp. No. 2, at Level III. 13. The pay of RN's and LPN's varied from summary to summary. Resp. No. 2, at Level III.

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

15. Based on these comparisons, Lakin's Health Service Workers were granted a $1,500.00 per year salary increase, and Health Service Trainees were granted a $1308.00 increase. Lakin Health Service Associates were granted a $4,200.00 increase, but there are no Health Service Associates at Lakin Hospital. Registered Nurses classifications were given salary increases ranging from $8,004.00 to $10,008.00, and LPN's received a $4,200.00 increase. The Health Service Assistants were granted only a $108.00 salary increase.

16. The salary comparison study used by Respondent HHR as the basis for its decision that Health Service Assistants already made comparable salaries to the private sector was flawed, in that salaries used for comparison to Health Service Assistant classifications were the same salaries used to compare to the Health Service Worker classification.

Issues and Arguments

Grievants assert they have been discriminated against and have not been compared with similarly situated employees in other facilities. Additionally, Grievants note they did not receive a pay increase in 2000 either, and some health care workers did. 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.

Discussion

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.

Grievants have alleged they have been discriminated against. 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."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 7) of discrimination 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).

Once a grievant establishes a prima facie case of discrimination, 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).

Grievants have met their burden of proof and established a prima facie case of discrimination. They were similarly situated to the other direct patient care employees included in the salary adjustment proposal, and they were, to their detriment, only granted minor salary increases.

The undersigned Administrative Law Judge finds the key issue to be Respondents' failure to compare Grievants to like employees. Indeed, it appears Grievants' salaries were compared to what Health Service Workers and Health Service Trainees salaries were in the geographic region. This failure is demonstrated by the data reported in Findings of Fact 10 through 13. Grievants' job responsibilities and training are greater than Health Service Workers and Health Service Trainees, in fact Health Service Assistants supervisethese employees. To decide Grievants' increase based on an incorrect assessment is wrong.

The actual salary study performed by HHR and relied upon by Division of Personnel was discussed in Sluss, supra. In that grievance, Administrative Law Judge Paul Marteney found a major flaw in the study, upon which Respondents based the salary adjustments granted to the direct patient care classifications. Administrative Law Judge Marteney held the following:

> The obvious cause of the flaw is that the private institutions with which HHR 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 [and finds HSA's] merit more pay [than HSW's]. In the state system, both HSA's and HSW's are CNA's, but Dop [sic] 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.

As in Sluss, supra, with the Pinecrest salaries, the salaries at Lakin were compared to those of regional hospitals, and nursing homes. The regional salaries of the Health Service Assistants and Health Service Workers were found to be identical, and it was also found it would be impossible for the average salary for two different populations of employees to be exactly the same. Administrative Law Judge Marteney believed these identical numbers demonstrated:

> 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 resultif 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.

Judge Marteney noted it was impossible to determine what the duties of the comparison employees in the private sector were. If, as Grievant Bates testified, the health care workers to whom they were compared at other hospitals would be classified as HSW's in state hospitals, then the average salary 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. Indeed, it seems more likely that in the private sector, like at the state facilities, that employees with more duties and greater responsibility are paid more. Sluss, supra.

Respondents can rebut a prima facie case of discrimination by offering a legitimate reason for their actions. They are unable to do so because they rely on a flawed study to support those actions. Sluss, supra. At hearing HHR maintained these proposals were also intended to address a recruitment and retention, a problem that exists with Health Service Workers, but not with Health Service Assistants. This assertion is belied by the proposal itself. In the August 14, 2003 letter to the State Personnel Board from HHR Secretary Nusbaum requesting the special salary adjustments, he explicitly states state hospitals are experiencing recruitment and retention problems with nursing and other health care employees. See Sluss, supra. He then proposed increases for all nurses and all health service classifications. The lack of recruitment and retention problems for Health Service Assistants that Respondents now claim exists is apparently a pretext to justify the erroneous conclusion that no salary disparity exists for Health Service Assistants. Sluss, supra. 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, 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.

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. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) 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;
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> and,
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> (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).

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

6. Respondents have failed to offer legitimate reasons to substantiate their actions. Their

proffered reasons are pretextual.

Accordingly, this grievance is **GRANTED**.

Respondents are **ORDERED,** to develop and apply, within 90 days, legitimate criteria and methods for comparing Health Service Assistants' salaries to equivalent positions in the private sector, based on sound mathematical 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 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 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: June 30, 2004

Footnote: 1

As Grievants are all, or almost all, the Health Service Assistants at Lakin Hospital, their names will not be listed individually.

Footnote: 2

There is some question whether the Level III Hearing Examiner understood the classification of Grievants because they were designated as Health Service Workers in that Decision.

Footnote: 3

Grievants were represented by Grievant Bates, HHR was represented by Landon R. Brown, Esq., Assistant Attorney General, and DOP was not represented.

Footnote: 4

"The HHR 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.' " Sluss v. Dep't of Health and Human Res. & Div. of Personnel, Docket No. 03-HHR-410 (May 28, 2004).

Footnote: 5

The need for an increase in this category is unclear as unrebutted testimony indicated there was only one Health Service Associate in the state.

Footnote: 6

Although not a statistical analysis, Grievants submitted a listing of Health Service Assistants' salaries and years of service compared with the highest paid Health Service Workers and their years of service. This document demonstrated 1 out of 25 Health Service Assistants make $890.00 or greater, and eight out of the highest paid Health Service Workers make $890.00 or greater. Additionally, the Health Service Assistants routinely have greater seniority.

Footnote: 7

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).