TERRI COX, *et al.*,

Grievants,

v.

Docket No. 04-HHR-021

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/

WELCH COMMUNITY HOSPITAL

and WEST VIRGINIA DIVISION

OF PERSONNEL,

Respondents.

DECISION

The grievants (collectively "Grievants") are thirty-four employees from the Respiratory Therapy, Laboratory, and Radiology Departments of respondent Welch Community Hospital. (See footnote 1) Their job classifications include Respiratory Therapist, Medical Technologist, Medical Laboratory Technician, Medical Laboratory Assistant, Radiological Technologist 2, Health and Human Resource Specialist, and Office Assistant II. In their Statement of Grievance, Grievants claim that "salary adjustments given to nursing personnel are unfair and represent discrimination against other patient care departments that also provide 'hands on' services." As relief, Grievants seek "salary adjustments madeto all 'hands on departments,' including, respiratory therapy, laboratory, and radiology, consistent with adjustments made to nurse pay scales."

Levels I and II were waived. The grievance was heard (See footnote 2) at Level III on December

19, 2003. (See footnote 3) A decision denying the grievance was issued on January 16, 2004. (See footnote 4) Grievants claimed default with respect to issuance of the Level III decision. By order entered March 17, 2004, in *Terri Cox, et al., v. Dep't of Health & Human Res./Welch Community Hospital*, Docket No. 04-HHR-021D, the West Virginia Education and State Employees Grievance Board ("the Grievance Board") denied the default claim and noted that the parties were proceeding to Level IV.

At Level IV the West Virginia Division of Personnel ("Personnel") was added as a respondent, having been deemed an indispensable party. The Level IV evidentiary hearing was held on November 19, 2004, in the Grievance Board's hearing room in Beckley. Grievants were represented by Terri Cox ("Grievant Cox"). Barbara Folden ("Grievant Folden") and Cindy Butcher ("Grievant Butcher") also appeared in person and assisted Grievant Cox. The Department of Health and Human Resources ("HHR"), which operates Welch Community Hospital, was represented by counsel, Landon R. Brown, Senior Assistant Attorney General. Personnel was represented by Assistant Director Lowell D. Basford. At the conclusion of the Level IV hearing, the record was allowed to remain open for thirty days to afford the parties an opportunity to submit written proposed findings of fact and conclusions of law, if they so desired. No post-hearing submissions were received from any of the parties. This grievance matured for decision on December 20, 2004.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant Cox has been a respiratory therapist for twenty-seven years. She has been employed at Welch Community Hospital ("Welch Hospital") in that capacity for fourteen years.

2 2. Grievant Cox, who resides in Welch, waited a number of years until an opening for a respiratory therapist became available so that she could work at Welch Hospital.

3 3. Grievant Folden has been employed as a respiratory therapist at Welch Hospital for over four years. Prior to her employment at Welch Hospital, Grievant Folden worked at Raleigh General Hospital for thirteen years.

4 4. Grievant Folden obtained her position at Welch Hospital by responding to a newspaper advertisement.

5 5. Respiratory therapists are required to be licensed and pursue continuing education.

6 6. Grievant Folden is a member of the Board of Respiratory Care, which was established pursuant to West Virginia Code section 30-34-3. The Board of Respiratory Care is charged with, among other things, licensing qualified applicants and maintaininga registry of individuals who are licensed to provide respiratory care. W. Va. Code § 30-34- 5.

7 7. Grievant Butcher is a radiological technologist and stenographer. She has been employed at Welch Hospital for five years.

8 8. Grievant Butcher obtained her position at Welch after her supervisor advised her of an opening.

9 9. In correspondence, dated August 14, 2003, Paul Nusbaum, Secretary of the Department of Health and Human Resources ("Secretary Nusbaum") submitted a request to the State Personnel Board ("Personnel Board") for special hiring rates and salary adjustments for "current nursing and other health care employees" at a number of hospitals operated by HHR. HHR Exhibit 1 at Level IV. One of the six hospitals included in this request was Welch Hospital. HHR Exhibit 1 at Level IV.

10 10. Secretary Nusbaum based the foregoing request upon the fact that the hospitals identified in his August 14, 2003, correspondence were experiencing "[r]ecruitment and retention problems" as a result of "very intensive competition with other government and private health care facilities for qualified nurse and health care personnel." HHR Exhibit 1 at Level IV. (See footnote 5)

11 11. By correspondence, dated August 28, 2003, Secretary Nusbaum was informed that the "Personnel Board approved your proposal to establish special hiring ratesfor Nurse 1, Nurse 2, Nurse 3, Nurse 4, Licensed Practical Nurse, Health Service Assistant and Health Service Worker" at identified institutions. HHR Exhibit 2 at Level IV.

12 12. The August 28, 2003, correspondence to Secretary Nusbaum further advised that the Personnel Board "also approved salary adjustments for the job classifications at the health care facilities" that were identified on a chart that was attached to the original letter to Secretary Nusbaum but were omitted from the copy introduced as HHR Exhibit 2 at Level IV.

13 13. The effective date for the aforementioned changes authorized by the Personnel Board was October 1, 2003.

14 14. During a meeting of department heads at Welch Hospital, the Administrator announced that the raise would be given to employees providing direct patient care.

15 15. The parties are in agreement that, with the exception of those classified as Office Assistant II, Grievants are involved in direct patient care.

16 16. Lowell Basford, Assistant Director of Personnel ("Assistant Director Basford"), is in charge of the Classification and Compensation Section within Personnel.

17 17. The special hiring rate and the pay differential at issue herein were approved for the four levels in the nurse classification series, nursing director I and II, licensed practical nurse, and the three titles within the health service worker series. HHR did not request a special hiring rate or a pay differential for any other job classifications. Assistant Director Basford at Level IV; HHR Exhibit 4 at Level IV.

18 18. HHR sought and received a special appropriation from the legislature to address the long-standing recruitment and retention problems relating to Nurses, Licensed Practical Nurses, and Health Service Workers.

19 19. Cathy Addair is the Human Resources Director for Welch Hospital.

20 20. There are eight respiratory therapists positions at Welch Hospital. There are no vacancies in that job classification.

21 21. There are ten radiological technologists positions at Welch Hospital. There are no vacancies in that job classification.

22 22. Welch Hospital had to recruit for a second PRN respiratory therapist (See footnote 6) position that was recently added to the staff. Although the steps taken to recruit for this position were not expressly stated, the implication was that it required more than the usual amount of effort to fill that slot.

23 23. No evidence was introduced with respect to recruitment or retention problems for any of the other classifications into which Grievants fall.

Discussion

This is not a disciplinary grievance. Therefore, Grievants bear the burden of proving their claim by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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).

Sadly, this is a case of disappointed expectations. When HHR decided to address long-standing recruitment and retention problems with respect to nurses, licensed practical nurses, and health service workers, it sought and received approval from the PersonnelBoard to offer special hiring rates and pay differentials for those specified classifications. In addition, HHR received a special appropriation from the legislature to fund these incentives, which related solely to nurses, licensed practical nurses, and health service workers (collectively "nursing group" for ease of discussion).

It appears that, when he announced its implementation, the administrator at Welch Hospital characterized the pay differential as applying to employees who provided direct care to patients. Tr.4. His unfortunate, overly-inclusive description of the group of employees who would receive the pay increase set the stage for the misunderstanding and disappointment that led to this grievance. Understandably, given the Administrator's misstatement, Grievants believed that the increase would apply to them, as well as the nursing group.

A recurring theme throughout this grievance has been that, like nurses, Grievants provide direct care to patients (See footnote 7) and should therefore be included in the pay differential the nursing group received. This is the theory upon which Grievants base their claim of discrimination. Discrimination is defined 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." W. Va. Code § 29-6A-2(d).

This same definition is found in the statutes relating to education employees. W. Va. Code § 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that "[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added). Therefore, the initial question that must be resolved is whether Grievants established that they are similarly situated to the employees who received the pay differential.

It is true that Grievants provide direct patient care. It is clear that their services are important and valuable. Unfortunately, this does not entitle them to participate in the pay differential that was requested and obtained by HHR pursuant to the provisions of Rule 5.4(f)(4) of the Division of Personnel. Rule 5.4(f)(4) recognizes that the goal of the civil service plan for uniformity is not always feasible due to factors such as market forces, locales, and lack of a pool of qualified candidates for certain positions. Accordingly, the Personnel Board is authorized to approve

> the establishment of pay differentials to address circumstances such as **class-wide recruitment and retention problems**, regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

W. VA. CODE ST. R. § 143-1-5.4(f)(4)(2004)(emphasis added).

In this case, HHR could not compete with the compensation offered to employees from the nursing group by the private sector. As a result, HHR experienced long-standing "class-wide recruitment and retention problems" with respect such employees. HHR attempted to address these problems by obtaining the Personnel Board's approval of a special hiring rate and a pay differential. That request was limited to the specified job titles that have been discussed herein under the inclusive term of the nursing group. The Personnel Board's approval of those incentives was limited to the specific job titles identified by HHR in its request. Such approval does not extend to Grievants.

In order to establish that HHR discriminated against them by not seeking similar incentives for their job titles, Grievants need to prove that there are recruitment and retention problems of similar magnitude with respect to their positions in Welch Hospital. Grievants are unable to meet this burden.

Grievant Folden testified at Level IV that "there is a shortage of respiratory therapists in West Virginia" and that "it is hard to recruit to our area." However, there are no current openings for a respiratory therapist at Welch Hospital. Grievant Folden, as a member of the Board of Respiratory Care, was able to state authoritatively that, as of June 2004, there were a total of 1,214 respiratory therapists licensed in West Virginia. Grievants' Exhibit 3 at Level IV. However, there is no evidence as to the significance of this number in terms of filling vacancies at Welch Hospital.

Grievant Cox has been employed at Welch Hospital as a respiratory therapist for fourteen years. According to her testimony at Level IV, Grievant Cox had to wait a number of years before a position became available at Welch Hospital. This suggests that Welch Hospital enjoys a stable work force in respiratory therapy.

In addition, Grievants did not introduce any evidence that respiratory therapists were being lured away from Welch Hospital by higher pay or better benefits in the private sector. Nor is there any evidence that the geographic region is considered undesirable by prospective candidates. There was no evidence that postings for positions had to be renewed multiple times because of a dearth of qualified applicants.

Grievants introduced an article from the internet that discussed the career potential for students who may want to become respiratory therapists. The article cited shortages of respiratory therapists in certain western states. It also indicated that respiratorytherapists could command good beginning hourly wages in the cities of Dallas and Portland, as well as the state of Alaska. Grievants' Exhibit 2 at Level IV. However, this does not assist in determining if there are recruitment and retention problems relating to respiratory therapists in Welch, West Virginia.

Human Resources Director Cathy Addair did agree that Welch Hospital had recently been required to engage in recruitment to obtain the services of a PRN respiratory therapist. This was only one position. Further, the position in question required the successful applicant to fill in as needed. It can be inferred that such variable schedule is probably not appealing to a number of potential applicants. In any event, one difficult opening does not rise to the level of the recruitment (See footnote 8) and retention problems discussed in relation to the nursing group.

Grievant Ruth Brown (See footnote 9) asserted at Level III that there was also a problem with recruitment and retention in the Radiology Department. Tr.4. Grievants introduced articles that discussed a shortage in radiological technologists on the national level. Grievants' Exhibits 4 through 6 at Level IV. One such article indicated that a staffing shortage in radiological technologists “is greatest in university hospitals and hospitals with rural population bases.” Grievants' Exhibit 4 at Level IV. Welch Hospital may well fit within the category of a hospital with a rural population base. However, there was no evidence presented to suggest that Welch Hospital has problems filling radiological technologistpositions, lacks qualified applicants, is unable to attract applicants to the geographic area, or routinely loses its employees to the private sector due to higher salaries and better benefits. In fact, there was no evidence regarding any radiological technologists leaving Welch Hospital.

According to Human Relations Director Cathy Addair, there are no vacancies for radiological technologists. Nor does the evidence suggest recruitment problems. Grievant Butcher, who has worked at Welch Hospital as a radiological technologist for five years, worked there during part of her training. Thereafter, her current supervisor advised her of an opening for which Grievant Butcher successfully applied. Thus, recruitment was clearly not a problem in that particular instance.

Grievants have not attempted to dispute that HHR has experienced long-standing problems in hiring and keeping employees in the nursing group classifications. Nor do Grievants dispute the fact

that the Personnel Board's approval of the special hiring rate and the pay differential incentives were limited to the nursing group.

In sum, Grievants have failed to establish that they are similarly situated to the nursing group with respect to recruitment and retention problems. Therefore, Grievants cannot establish a case of discrimination.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievants must prove their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). “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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. The Personnel Board is authorized to approve

> the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems[.] In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

W. VA. CODE ST. R. § 143-1-5.4(f)(4)(2004).

4 4. Discrimination is defined 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.” W. Va. Code § 29-6A-2(d).

5 5. The crux of a discrimination claim “is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

6 6. Grievants failed to prove that they were similarly situated to the classifications that received the special hiring rate and pay differential because Grievants failed to prove that they were in classifications that suffered, to a similar degree, from the pervasive recruitment and retention problems that plagued HHR with respect to the classifications of Nurse 1 through 4, Licensed

Practical Nurse, Health Service Assistant and Health Service Worker

7 7. In light of the fact that Grievants could not demonstrate that they were similarly situated to the employees with whom Grievants attempted to compare themselves, Grievants are unable to prove that they have suffered discrimination, as defined above.

Accordingly, this grievance is **DENIED**.

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 West Virginia Code section 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:

February 22, 2005

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Terri Cox, Donna Cooper, Denise Fowler, Ruth Brown, Angela Dale, Katherine McCoy, Terry Jeffcoate, Cindy Butcher, Rebecca Hassan, Kay Spencer, Verna Walker, Carmen Martin, Chris Green, Richard Street, Donna Stoots, Barbara Folden, Renee Muncy, Stephanie Fannin, Michelle Gillman, Carol Lester, Lynn Stallsmith, Devon Cline, Judy Tiller, Martha Gibson, Connie White, Joan Gunnels, Robert Starkovich, Suzy Cox, Nita Dennison, Josephine Rollyson, Rita Frasher, Ronald Felts, Jody Shelton, and Treasa Conner appear on the certificate of service for the Level III decision. The parties agreed at Level IV that this was the appropriate source for identifying Grievants.

Footnote: 2

References to pages in the transcript of the Level III hearing shall appear herein as "Tr._".

Footnote: 3

At Level III the grievance was styled "Parks, et al. v. WV Department of Health & Human Resources/Bureau for Behavioral Health and Health Facilities/Welch Community Hospital."

Footnote: 4

Footnote: 5

The charts containing information supporting Secretary Nusbaum's request that were attached to his correspondence of August 14, 2003, were not attached to the copy admitted into evidence as HHR Exhibit 1 at Level IV.

Footnote: 6

This is a respiratory therapist who fills in, as needed.

Footnote: 7

This discussion does not relate to the two employees in the Office Assistant 2 classification.

Footnote: 8

Concerns about recruitment are also undercut by testimony at Level III that one respiratory therapist drives from as far away as Tazewell to work at Welch Hospital. Tr.7. The fact that someone is willing to drive so far suggests that the position is desirable.

Footnote: 9

She did not appear at the Level IV hearing.