WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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MARY L. CLINE

v. **Docket No. 89-26-600**

MASON COUNTY BOARD OF EDUCATION and TOM A. McNEELY

D E C I S I O N

I. PROCEDURAL HISTORY

Mary L. Cline (Grievant), a teacher for Mason County Board of Education (Respondent), complained at Level I on September 26, 1989, that:

> The Mason County Board of Education violated. . . [W.Va. Code §] 18A-4-8b[(a)], when. . .[it] resolved Mr. [Tom] McNeely's grievance by immediately placing him in the position of Learning Center Coordinator/Instructor [(C/I)]. I was also notified that I would be transferred from the. . .C/I position in the spring. I am more qualified and more seniored than Mr. McNeely.
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> In addition, the Board of Education violated. . . [W.Va. Code §] 18-4-10, when they placed Mr. McNeely into the. . .C/I position without the Superintendent's recommendation. I was the only person recommended for this position by the Superintendent.
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> Resolution to this grievance would be to allow me to stay in the position as I am the most qualified and senior applicant.

After waivers there and at Level II[1], Grievant's claim, at Level III, was first the subject of an extensive hearing and thereafter a decision denying relief. Grievant advanced her complaint to Level IV on October 11, 1989, where hearing was convened November 16, 1989.

At the outset of that hearing, the parties first presented a copy of the Level III decision and hearing transcript[2] and the following written stipulations of fact:

> 1) The adult basic education. . .[C/I] position was properly posted in June 1989.
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> 2) Mrs. Mary Cline, the Grievant, was recommended by the Superintendent for the position.
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> 3) The Mason County Board of Education voted to place Mrs. Mary Cline into the position in July 1989.
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> 4) Another employee, Mr. Tom McNeely, an applicant for the position, filed a grievance over the fact Mrs. Cline was chosen for the position.
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> 5) Mr. McNeely's grievance was waived at Level II.[3]
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> 6) The Mason County Board of Education granted Mr. McNeely's grievance at Level III and placed him into the adult basic education. . .[C/I] position.

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[1] As required by Code §18-29-3(c), these waivers were in writing and were based on a lack of authority to grant the relief requested. Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 89-43-222/etc. (June 12, 1989).

[2] References to Grievant's Level III transcript will be identified as "Cline T. #" in this Decision.

[3] Entry #5 of this stipulation is plainly wrong. Mr. McNeely's case was the subject of both an extensive hearing at Level II and a decision denying relief. In fact, his grievance was not waived at any of Levels I, II or III.

7) Mrs. Cline was notified that she would be displaced from the position in the spring through the transfer process.

8) Mrs. Cline filed a grievance; claimed she was the most qualified and seniored candidate.

Not until this stipulation was presented was the undersigned equipped to grasp the gist of Grievant's claim. Primarily, neither that Grievant had ever actually been awarded or placed into the C/I job by Respondent nor the circumstances of that personnel action had previously been made clear. Further, it was not explained until then, November 16, that both Grievant and Mr. McNeely currently occupy the single C/I position. In addition, the parties promised to submit additional pertinent evidence post-hearing, namely, Mr. McNeely's Levels II and III grievance hearing transcripts[4] and decisions, and this was accomplished November 17.

Shortly after November 17, the undersigned had opportunity to review the record of this case, significantly including its Level III transcript and decision and the Levels II and III documentation of Mr. McNeely's earlier grievance. As a result, additional and rather basic procedural issues came to light, particularly relating to the focus of Respondent's Level III inquiry into Grievant's situation. Not astonishingly, Mr. McNeely's material was centered around a comparison of his qualifications with

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[4] References to Mr. McNeely's hearing transcripts are identified as "McNeely II T. #" and "McNeely III T. #" in this Decision.

those of Grievant. However, somewhat surprisingly, the same was true of Grievant's own Level III claim. Respondent, instead of simply dismissing her grievance on procedural grounds of finality, see Epling v. Boone Co. Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), proceeded to a renewed and in-depth review of the relative entitlements of Grievant and Mr. McNeely to the C/I post.

Consultation with Grievant's representative and Respondent's attorney culminated in understanding that a supplemental conference was needed. Mr. McNeely was informed of this meeting, which was set for December 5 in Point Pleasant; he, represented by Ronald Vance[5], appeared, as did both parties and their representatives. At that time, counsel for Respondent conceded that her client had, via its Level III hearing and decision in the instant grievance, effectively reopened Mr. McNeely's claim and allowed Grievant to intervene therein. The undersigned accepted this concession, to which only Mr. McNeely expressed opposition;[6] despite the objection, and to merely formalize what had already occurred below, Mr. McNeely was officially joined as

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[5] Mr. Vance, a teacher at Wahama High School in Mason County, was also Mr. McNeely's representative at Level III of his case.

[6] This objection was made upon advice of the undersigned, which advice neither Grievant's nor Respondent's representative protested despite invitation. It was noted that Mr. Vance is a lay-consultant and, like his client, generally unfamiliar with the grievance procedure save for Mr. McNeely's own case.

a third-party respondent in the case at hand per WVESEGB Rule 4.11. Mr. McNeely was given full explanation as to what had transpired at the November 16 hearing; offered the opportunity to review that day's transcript; allowed ten days, a period he agreed was reasonable, to confer with an attorney or other consultant if he wished and to advise whether he desired further hearing at Level IV before this record was closed.

In that ten-day period, Mr. McNeely did contact Attorney Marion Ray of the firm of Hunt & Wilson of Charleston, West Virginia. Mr. Ray obtained some general information from this Grievance Board about the case; thereafter, Mr. McNeely reported Mr. Vance would continue as his only representative and that he did not desire a further hearing or opportunity to submit evidence or written fact-law proposals. Grievant and Respondent presented proposed findings of fact and conclusions of law[7] by the set deadline of February 2 and the case is thus ripe for disposition.

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[7] Respondent offered its fact-law proposals on November 27, 1989, and waived the opportunity to submit anything additional after Mr. McNeely's joinder; Grievant filed her proposals February 2, 1990.

Grievant and Respondent were also afforded the chances to seek further hearing and offer additional evidence. Both declined to take advantage of either opportunity.

II. DISCUSSION

a. ADDITIONAL RELEVANT FACTS

Facts beyond those of the written stipulations are uncontroverted. Respondent, in June 1989, posted as vacant the C/I position. Listed as a desired credential was ten college hours of adult-education (AE) classes. Seven individuals, including Grievant and Mr. McNeely, bid on the opening; of the seven, only Grievant and two other applicants had any pertinent AE training, according to Respondent's records. Gr. Ex. A.

A.E. Sommer, Respondent's Vocational Director, screened the pool and, since there were persons with AE background, decided to interview only them: Grievant, with ten AE hours, Berna Hilbert, with nine,[8] and Shirley Miller, with three. In addition, as a courtesy, Mr. Sommer met with William McWhorter since he, Mr. McWhorter, with twenty-one years with the Mason County Schools including time as a secondary principal, was by far the most senior applicant. The other three candidates, including Mr. McNeely, were eliminated from the process. After his review, Mr. Sommer penned the following message to Mason County Superintendent of Schools Rick P. Powell: "Mary Cline is recommended for this

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[8] Ms. Hilbert chose to forego a formal interview since "she had worked at the Vocational Center and. . .[Mr. Sommer] was familiar with her. . .." McNeely II T. 52.

position. She is qualified and has the required adult basic education hours." Gr. Ex. A. Mr. Powell adopted this recommendation as his own and passed it along to Respondent, which approved it in July 1989.

b. MR. MCNEELY'S GRIEVANCE

Sometime thereafter, Mr. McNeely became aware that his application was unsuccessful and initiated a grievance. At Levels II and III, he presented information that he indeed had three college-level AE hours. These were not on file in Respondent's Personnel Office, however, and the weight of the evidence is that Mr. McNeely was at fault in this. See, e.g., McNeely II T. 75.[9] He also argued convincingly that many of his college courses, while not designated as AE on his transcript, related very directly to adult instruction. See, e.g., McNeely II T. 20-21, McNeely III T. 21. He continued that it was unfair of Mr. Sommer to exclude his application without interviewing him, when the perceived discrepancy may have come to light. Also, he opined that Mason County Policy 805 requires that all declared candidates for a job be interviewed.[10]

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[9] The transcript page with Mr. McNeely's AE hours displayed is also emblazened with this rather bold message: "ISSUED TO STUDENT - STAMPED IN RED INK." McNeely Ex. G-6.

[10] Policy 805, titled "Professional Personnel Employment Procedures," provides, in pertinent part, "When applicants have been screened and interviewed, a recommendation for employment is to be made. . .." Other than this one reference, the Policy is silent on interview procedure.

Mr. McNeely also posed the contention that Grievant had been pre-selected for the C/I position and thus, the beneficiary of "favoritism." See, e.g., McNeely III T. 22. He thought it unusual that "ten" AE hours would have been chosen as the desired number, since most college classes are three-hours' credit and since Grievant perhaps more than coincidentally had exactly ten hours.[11] Further, Mr. McNeely complained that Mr. Sommer's written recommendation, see Gr. Ex. A, first passed to Superintendent Powell and then to Respondent for action, incorrectly characterized the ten AE hours as "required." McNeely III T. 39. Respondent's President Emma Kearns admitted at Grievant's Level III hearing that her Board had not seen the vacancy notice in question prior to voting on Grievant's placement. Cline T. 87-88.[12]

In addition, it was established at Mr. McNeely's Level III hearing that Grievant does not have a Masters degree in Adult Education, as had been represented to Respondent by Mr. Sommer immediately prior to its approval of her selection. Mr. Powell admitted this was an error on Mr. Sommer's

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[11] Mr. McNeely, alleging the "ten-hours" posting was custom-made for Grievant and thus should be found invalid, rhetorically queried, "Will we have future job postings that read things like [']a left-handed dwarf from [the Mason County town of] Leon with seven. . .hours in so-and-so?[']" McNeely III T. 34; also see McNeely II T. 32.

[12] Mr. McNeely also found it suspicious that he was qualified and had applied for a state-level vocational-education director's job, but that he could not even get an interview for the lesser C/I post in Mason County. McNeely III T. 26-27.

part, McNeely III T. 50, and that Grievant, who carried several adult-education courses in her graduate program, had as her actual major Vocational-Technical Education. Cline T. 18.[13]

Respondent's undated decision in Mr. McNeely's grievance[14] reads as follows, emphasis supplied:

> 1. Grievant [McNeely] should have been granted an interview for the position of Adult Learning Center. . .[C/I].[15]
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> 2. Grievant [McNeely] has proved that he was grieved by the actions set forth in his grievance.
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> 3. The Grievant [McNeely] has proven, to the satisfaction of the Board [of Education], that he was the most qualified applicant and that the qualifications of Mary Cline were overstated by Mr. Sommer.
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> At. . .[its] regular meeting on the 18th day of September, 1989, the Mason County Board of Education voted three (3) members to two (2) to grant this grievance and directed that the Grievant [McNeely] be installed to the position of Adult Learning Center. . .[C/I], effective immediately.

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[13] According to Grievant, "our State Assistant Director of Adult Basic Education has a Masters in Vocational Technical Education with hours in Adult Education" just as she does. Cline T. 30.

[14] August 28, 1989, was the date of Mr. McNeely's Level III hearing.

[15] In rendering this conclusion, Respondent did not expressly adopt Mr. McNeely's interpretation of its Policy 805, see n. 10. Certainly, and especially since the Policy speaks of "screening" as well as "interviewing," it does not appear to mandate that each applicant for a vacancy be interviewed. It is imagined that such a requirement would be overly onerous in situations involving more than a few applicants; indeed, it is "common that all applicants are not interviewed" in Mason County. McNeely II T. 67, 87.

c. MRS. CLINE'S GRIEVANCE

At Grievant's Level III hearing, many rebuttal points were raised. For example, Grievant explained she had three AE undergraduate hours that apparently were overlooked by Respondent's Personnel Office, for a total of thirteen. Cline T. 47-49. Further, she argued that if Mr. McNeely had courses not designated "AE" but in reality relating to adult education, so did she. Cline T. 32-40, 51. Finally, she presented evidence that a prerequisite to assuming the C/I post was a six-hour in-service training program she took in July 1989 but which has not yet been completed by Mr. McNeely. See generally T. 41-47, T. 64.

Its October 4, 1989, decision in the instant case, Mrs. Cline's grievance, is:

> 1. Grievant failed to show that she is the most qualified candidate for the position.
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> 2. Tom McNeely was more qualified than Grievant and should have been employed as Adult Learning Center. . . [C/I].
>
> The Board of Education voted to deny the grievance by a vote of three members to two.

d. CONCLUSIONS

It is undeniable that Mr. McNeely demonstrated some flaws in the process which resulted in Grievant's original selection. Precisely what all those flaws were, and what practical impact they may have had, is less clear. For instance, Respondent did not offer any reasons for its

conclusion that Mr. McNeely should have been interviewed.[16] However, that conclusion will be accepted as correct, since Respondent should be allowed wide discretion in personnel matters and its related decisions not overturned unless they are clearly wrong. See Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

Whether or not hours not designated as AE should have been considered is frankly beyond the expertise of the undersigned; however, it should be noted that neither Grievant nor Mr. McNeely presented evidence supporting this use of non-AE courses. Further, it would seem to be quite a burden on county boards of education to be forced to closely examine the content of each course on an applicant's transcript to discern whether he or she has training in a certain area.

The record is basically uncontroverted that Mr. McNeely's one three-hour AE class was not of record in Respondent's Personnel Office during the selection process, and that it was his responsibility to ensure his file's updating. Therefore, assuming for a moment it was appropriate to screen applicants and interview only those with hours designated "AE," then it follows that the decision not to interview Mr. McNeely was correct.

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[16] The reader's attention is invited to nn. 10, 15.

The major problem with Respondent's action in placing Mr. McNeely in the position at Level III of his case, and reconsidering and reaffirming that action in Level III of Grievant's is that twice it violated the principles of Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988), and its progeny.[17] In Milam, it was held that a county board of education may delegate its job-selection authority and all that goes along therewith (interviewing, etc.) but that it may not then second-guess its designee's views unless it conducts an independent and thorough evaluation of all applicants. In this scenario, although Respondent states in ¶3 of its decision, McNeely grievance, that Mr. McNeely "has proven. . .that he was the most qualified applicant," the record is crystal clear that only he and Ms. Cline were compared in arriving at this conclusion.[18] Further, at that point, Respondent was reviewing particulars of Mr. McNeely's resume' without allowing Grievant a like opportunity, i.e., "an interview with the Board of Education." As a possible alternative to reevaluating all candidates, Respondent could perhaps have suggested that Mr. Sommer meet with and interview Mr. McNeely, so that he and

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[17] Conceivably, Respondent recognized its error under Milam, and therefore allowed the reopening of Mr. McNeely's case. The reader's attention is also invited to Martin v. Wilks, --- U.S. ---, 109 S.Ct. 2180 (1989).

[18] It is recognized Respondent took these actions as grievance evaluator and not employer. This strange role dichotomy is the focus of Epling.

Grievant would have the same basis for consideration, and not created this anomalous situation. Indeed, something along those lines is what must be ordered now, nearly one year after the fact.[19]

The undersigned has been advised that both Mr. McNeely and Grievant have recently been placed on administrative transfer, pending the outcome of this grievance. Some might have argued that at the time Ms. Cline filed her claim she did not have a grievance, since she was not then on transfer. However, it is noteworthy that the advisory Ms. Cline received was not that she, sometime then in the future, would be recommended for placement on the administrative transfer list with all the due process rights which attach thereto, see W.Va. Code §18A-2-7; rather, she was informed that she definitely would be transferred, with no right of hearing before Respondent beforehand. See id.

Further, it could be asserted, citing Epling, that Grievant's transfer was the result of Respondent's Level III

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[19]It might be thought, since no one besides Grievant and Mr. McNeely has contested the C/I selection process, that the other five candidates should not have the benefit of reconsideration. Carrying this reasoning one step further, since Respondent has now evaluated Grievant and Mr. McNeely independent of its designee, Mr. Sommer, Mr. McNeely would be entitled to the job. However, this Grievance Board stands behind its decision in Milam, and review of all candidates, at least those still interested, is necessary.

Due to the outcome herein, Grievant's claim that Mr. McNeely could not be awarded the C/I post since he was not recommended therefor by Superintendent Powell need not be addressed. The reader's attention is invited, though, to Epling, n. 11.

decision, as grievance evaluator and not employer, in Mr. McNeely's case. While this makes some degree of sense, it is important to point out, as did Superintendent Powell, that never did Respondent order Grievant's displacement, but only Mr. McNeely's instatement. That Grievant's displacement (transfer) was not a part of Respondent's orders is supported by the fact that Respondent has allowed, for almost the entirety of school term 1989-90, two employees, Grievant and Mr. McNeely, to occupy one vacancy, and presumably to receive full salaries therefor. Beyond this, of course, it has already been established that Mr. McNeely's grievance was reopened by Respondent during its Level III consideration of Grievant's claim.

In addition to those in the narrative, the following findings of fact and conclusions of law are rendered.

FINDINGS OF FACT

1. Grievant Mary Cline was selected in July 1989 to be Respondent's Vocational-Technical Center Coordinator/Instructor (C/I).

2. Mr. Tom McNeely, an unsuccessful applicant, filed a grievance over his non-selection, which was granted at Level III. Thereafter, Grievant filed the within grievance, which has proceeded to Level IV.

3. There were seven applicants for the position. Respondent has at no time reviewed the candidacy of anyone other than Grievant and Mr. McNeely for the C/I job.

4. By its Level III handling of Grievant's case, Respondent, by its own admission, reopened Mr. McNeely's grievance and allowed Grievant to intervene therein.

CONCLUSIONS OF LAW

1. "When a county board of education does not directly participate in the evaluation process and delegates the responsibility for a determination of the most qualified applicant for a particular position to the superintendent of schools [or another person or group of persons], it must either accept that determination or conduct a reasonable and rational evaluation of all applicants for said position. Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988)." Butcher v. Gilmer Co. Bd. of Educ., Docket No. 89-11-642 (Apr. 13, 1990).

2. Respondent did not "conduct a reasonable and rational evaluation of all applicants" for the C/I job.

Accordingly, this grievance is **GRANTED**, to the extent that Respondent is ORDERED to promptly conduct, consistent with the terms of this Decision, a detached, fair and equal evaluation of the credentials of any and all of the original seven applicants still interested in the C/I job, as those credentials existed as of Grievant's original selection in July 1989, to determine who should have been selected under the standard of Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986). Since Respondent has already been actively and directly involved in this dispute,

it may be well for an independent committee, not including any of Respondent's own members, its Superintendent, Mr. Sommer, or anyone who previously has participated in the C/I selection process or the grievance of either Grievant or Mr. McNeely, to be appointed by Respondent to be its designee for this purpose; however, this is only a suggestion and Respondent should not feel at all compelled to adopt it. The person determined to be entitled to the C/I post, per Dillon, shall be awarded sole and immediate possession of the job; Grievant and/or Mr. McNeely, if not chosen, will immediately be returned to the position he or she held at the time of advancement to the C/I slot.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

M. DREW CRISLIP
Hearing Examiner

Date: April 24, 1990