WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

ROBERT SLONE

v. Docket No. 89-40-665

PUTNAM COUNTY BOARD OF EDUCATION

D E C I S I O N

Robert Slone, a teacher for Respondent Putnam County Board of Education, initiated the following grievance at Level I on August 29, 1989:

> Violation of W.Va. Code [§]18A-4-8b(a) in regard to the posted position of [half-time teacher/half-time] principal at Hometown Elementary School. The grievant is the most qualified for the position and duly certified. Relief sought is to be awarded said position.[1]

After denials there and at Level II[2] and Code §18-29-4(c) waiver at Level III, Grievant advanced his claim to Level IV

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[1] At Level II Grievant stated "the awarding of a position such as an administrator" would resolve his case. T. 20. Inasmuch as this general sort of relief is unavailable from this Grievance Board, see Hammond v. Logan Co. Bd. of Educ., Docket No. 89-23-044 (Apr. 17, 1989), n. 1, it is accepted that the Hometown job, retroactive to the commencement of the 1989-90 school term, is his desired remedy.

[2] Grievant's complaint was denied at Level I due to (Footnote Continued)

on November 14, 1989. At the January 12, 1990, hearing, the parties jointly moved that the testimony and exhibits from Level II be accepted as if they had been presented originally at Level IV. This motion was granted, and the parties were additionally given leave to supplement the evidentiary record on January 12, which both did. They also requested and were afforded until January 26 to submit fact-law proposals and, with those presentations, the case is ripe for resolution.

Grievant's primary contention seems to center on the fact that he has several years in Respondent's employ, while successful candidate Mary Means had not worked in Putnam County prior to the 1989-90 term. Respondent's main defense is that Ms. Means was more qualified than Grievant and therefore seniority was not a factor in the selection process.[3] Grievant's Exhibit 5, a letter from Sam P. Sentelle, Respondent's Superintendent of Schools, to Susan E. Hubbard, Grievant's West Virginia Education Association

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(Footnote Continued)
lack of authority there to grant the remedy sought. At Level II, an extensive hearing was conducted and a detailed decision rendered. That decision, as well as the Level II transcript and its attached exhibits, are of record at Level IV.

[3] Ms. Means had no seniority for relevant purposes. The law is well-settled that a teacher's seniority does not include time served without the given county. See Code §18A-4-8b(a).

At the time of his application, Grievant had worked for Respondent for eighteen years.

(WVEA) Uni-Serv Consultant, addresses the subject and reads as follows:

> Dear Susan:
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> In behalf of Robert Slone, you requested reasons why he was not the successful candidate for principal of Hometown Elementary School.
>
> This explanation is one which I would provide to any of our people on application, but not one which is required by. . .[W.Va. Code §] 18A-4-8b, or any other. . .section.. . .At least one other candidate predates him in teaching seniority and a second candidate had had prior administrative experience.
>
> I am disturbed that so many of our people believe that seniority should serve as a basis for administrative selection. I cannot help but speculate whether these people as principals would also want to select teachers by seniority rather than qualifications.
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> The nominee which was approved. . .for the position at Hometown had no seniority within the county. Her recommendations, however, were consistently excellent, and she brought to the position a variety of educational experience. She had taught for twenty-two years, she served as acting principal at George C. Wimer Elementary School in Kanawha County, and she was the top choice among those whom we interviewed. Her evaluations were consistently excellent. She had been nominated for Ashland Oil Teacher of the Year this year. She was selected by her county to attend a special training program on collaborative consultation for exceptional students provided through the University of Texas. Her training included workshops on cooperative learning, congruency school, control theory for classroom management, and the Leaders of Learning conference. She has also travelled extensively.
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> Mr. Slone was not among the top three candidates rated from interview. In addition there was some question concerning his past working relationships which I felt impacted upon my prognosis of his success as a future administrator. This is, I think, illustrated by his inclination to go through you under color of statutory law to obtain the information herein when it would have been readily given to him had he only bothered to ask. Mr.

> Slone has approached members of the Board of Education on procedural matters at his school, bypassing in the process his building administrators and the central office executive staff. I understand he has also raised questions on operational matters such as whether time spent en route to the cafeteria should be included within the lunch period allocated for teachers. This apparent disregard for professional protocol causes me to question his own fitness as a leader. I also question from this his own understanding of the realities of management.
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> I am told that Mr. Slone is well regarded as a teacher, and he might do well as an administrator also. As I have said before, his nonselection does not necessarily represent dissatisfaction with his professional performance. A personnel decision such as this is not so much a determination of fitness per se, but rather a difficult choice among several persons among whom many may be outstanding.
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> Sincerely, Sam P. Sentelle

Inasmuch as Grievant's Exhibit 5 embodies at least the bulk of Respondent's reasoning on Grievant's non-selection, it is a convenient focal point for analysis of this case. Accordingly, it will be utilized as such in the following discussion, with cross-references to the letter's paragraphs.[4]

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[4] While not mentioned in Gr. Ex. 5, it appears Respondent may also have ruled Ms. Means more qualified per se because her administrative certification was earlier than Grievant's. While circumstances related to the date of certification may correctly be viewed an aspect of qualifications, Proctor v. Putnam Co. Bd. of Educ., Docket No. 40-88-182 (Feb. 1, 1989), specific justification for the significance given the timing thereof in an individual case is necessary. See also Mankin v. Logan Co. Bd. of Educ., Docket No. 89-23-548 (Feb. 6, 1990).

Paragraph 2

Although it is not absolutely clear from the record, it must be assumed that the "second candidate" with "prior administrative experience" is Ms. Means.[5] At Levels II and IV, Respondent, although admitting she had no formal experience as an administrator, T. 31, placed much emphasis on her tenure as an Acting Principal[6] in Kanawha County; in fact, the Level II Decision finds as fact, at ¶8, "Mary Means. . .has eight. . .years of administrative experience as Acting Principal," and at Level IV, Grievant was queried, "Do you deny Mary Means has had eight years' administrative experience as an Acting Principal in the Kanawha County system?" However, Ms. Means' own testimony at Level IV revealed that work to consume an approximate average of only ten days' time each school year over the period of service,[7] plus involvement in the annual budgeting process; quite clearly then, Ms. Means did not have the "minimum of three. . .years administrative experience preferred" but not required by Respondent for the job at Hometown, Gr. Ex. 1.

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[5] Apparently Dr. Sentelle was implying that Grievant was without administrative experience in this statement. See this Decision, infra.

[6] This position was also referred to as "Acting Assistant Principal" during the course of this grievance.

[7] Ms. Means identified this period as eleven years, not eight years. Respondent was also in error as to her years of teaching experience, which was twenty-six and not twenty-two at the time of her Hometown hiring.

Significantly, it appears that those participating on Respondent's behalf in the interview/selection process, including Dr. Sentelle, at that time were under the mistaken impression that Ms. Means had eight or at least the equivalent of several full years' service in the Acting Principal capacity.

Grievant argued, on the other hand, that his 1983-89 extracurricular assignment as team leader at Hurricane Middle School was administrative in nature,[8] but, even though invited to do so by Respondent, he did not offer any written policy, law or even testimonial evidence beyond his own very general comments in support of his assertion.[9] Further, Grievant did not explain how much time he devoted

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[8] Grievant's Exhibit 4 is a "Contract of Employment for Extra Duty Supplemental Assignment" between Grievant and Respondent for work as a Team Leader during 1983-84 only, but Grievant's unchallenged testimony was that the assignment had extended through 1988-89.

Despite the fact that the terms "extra duty" and "extracurricular" are used in this document as if interchangeable, as was also true at the Level IV hearing, Code §18A-4-16 is cited in the agreement and it is thus clear the work arrangement was an extracurricular assignment. Extra-duty assignments are covered in the service personnel seniority statute, Code §18A-4-8b(b).

[9] One reference letter included in Grievant's Exhibit 3 mentions his team-leader status and comments, "I found him to be a natural organizer and compatible colleague. . .."

Grievant referred to a "policy" which covers "what duties are prescribed to be" for team leaders, but he did not produce one or, perhaps more significantly, inquire of Respondent's representatives in that particular. It is noted that some sort of policy is also referenced in Grievant's extracurricular contract, Gr. Ex. 4, see this Decision, infra.

to his Team Leader task; his contract therefor, Gr. Ex. 4, only indicates his minimum hours per year are "50 (in accordance with county policy)" and that he is to be paid $200.00 per annum. It is only clear that unlike most of Ms. Means' Acting Principal work, which was performed without additional pay and in place of her normal teaching assignment, Grievant's service as Team Leader was for wages and over and above his instructional duties, and that neither position had an absolute requirement of administrative certification.[10] However, although the Level II evaluator, Dr. Sentelle, found Grievant to have "no educational administrative experience," ¶2, there is simply no adequate evidentiary basis in the record upon which a determination as to whether Team Leaders are or are not "mini-administrators," as Grievant suggested, in Putnam County.[11]

Paragraph 3

While Respondent is quite correct that seniority does not enter into play unless the top candidates are, in essence, equally qualified,[12] certainly the amount and

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[10] This latter conclusion is based upon testimony of Grievant and Ms. Means at the Level IV hearing.

[11] In another case, it might be held that the grievant had failed to meet his burden of proof on this point, and the issue would be resolved in favor of the respondent. Due to the other circumstances of this situation and the outcome of this Decision, it would mean little to take such dispositive action.

[12] The precise language from the lead case on this (Footnote Continued)

quality of an applicant's experience, and the specifics thereof, are relevant to qualifications. State ex rel. Oser v. Haskins, 374 S.E.2d 184 (W.Va. 1988); see also Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58, 61-62, 65 (W.Va. 1986). In that regard, a person's knowledge of and exposure to the general community in which the target institution is located, which would perhaps most often be gained through working within the given school system, has been recognized as an acceptable factor in weighing qualifications. Ramsey v. Mineral Co. Bd. of Educ., Docket No. 28-88-234 (Aug. 29, 1989); see also McCallister v. Logan Co. Bd. of Educ., Docket No. 89-23-617 (Jan. 22, 1990).[13] The record reflects that, in an effort to avoid improper consideration of seniority, Respondent did not consider Grievant's possible familiarity due to his work background

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point, Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986), is as follows:

> Under W.Va. Code. . .[§]18A-4-8b(a). . ., decisions of a county board of education affecting. . .promotions. . .must be based primarily upon the. . .applicant's qualifications for the job, with seniority having a bearing on the selection process when the applicants have otherwise equivalent qualifications or where the differences in qualification criteria are insufficient to form the basis for an informed and rational decision.

Id., Syl. 1.

[13] Community familiarity should not be confused with the "community acceptance" factor questioned in Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988), and other cases.

with Putnam County and its pertinent resources as an aspect of qualifications. Respondent's desire to adhere to the law is admirable; but, to divorce relevant particulars of an applicant's education-related career, e.g., the geography thereof, from a selection process, is inappropriate. See Oser.[14]

Paragraph 4

The record does suggest that while Grievant's evaluations were always at least good, and most often excellent, Mrs. Means' were more "consistently excellent." Gr. Ex. 2; T. 31. Further, she had "excellent" recommendations, T. 37, which were considered, while several highly-favorable reference letters written on Grievant's behalf as recently as 1987 and 1988, at least one by a Putnam County central office administrator, were overlooked even though lodged in Grievant's personnel file. T. 33; Gr. Ex. 3. Respondent's counsel objected to the introduction of these letters since they were not penned in 1989 or in conjunction with the application currently being reviewed; however, it is noted that some of Ms. Means' credentials, cited by Respondent as pertinent, were neither immediate in time nor directly

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[14] No comment is made on the precise weight this factor should enjoy. Clearly, it would not generally be one of the more significant factors in determining qualifications, as was found to be true in Wilcox v. Wyoming Co. Bd. of Educ., Docket No. 55-99-083 (Aug. 2, 1988). Further, it could be viewed in several ways, including familiarity with the school itself, the community near or in which the facility is located, and/or the county and its school system.

related to her Hometown candidacy, e.g., the Ashland Oil nomination. It is true that Grievant did not specifically submit his letters in conjunction with his Hometown application, as Ms. Means, although perhaps upon request, did hers. Nevertheless, his belief that his references would be considered since they were included in his personnel file was hardly unreasonable.

The county's reliance on Ms. Means' Ashland Oil nomination seems clearly misplaced. Testimony revealed that a teacher may be nominated by any person who simply fills out an application which is freely and readily available to the public. Since the process is such an open one, that an instructor's name is submitted simply cannot be deemed a per se indication of a commendable level of professional achievement. Ms. Means admitted she had no idea who had nominated her; it is further assumed she was not ultimately selected for the honor.[15]

Another stated reason for Ms. Means' hiring was that "[s]he has. . .travelled extensively." During the administrative processing of this grievance, Grievant spoke of his own worldwide sojourns. T. 17. Significantly, though, this information apparently was not presented by Grievant during the selection process or otherwise within the knowledge or

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[15] These comments should not be interpreted to cast a shadow on the Ashland Oil award, its integrity or importance.

purview of Respondent. Travel experience was not listed on the vacancy notice as a desired quality; however, for some reason, Ms. Means' background in that area became known to Respondent prior to her selection.[16] Grievant's chagrin at not previously advising Respondent of his travels is understandable; nevertheless, the grievance procedure is not a "super-interview" to allow an unsuccessful applicant leave to submit "everything and the kitchen sink" about his qualifications. Rather, it is a review of the selection as of the time it was made, to determine if a flaw existed in the process such that, if the flaw had not occurred, the grievant might reasonably have been chosen for the contested job. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

Paragraph 5

Portions of the fifth paragraph of Dr. Sentelle's letter are particularly troubling. First of all, his characterization of Grievant's "inclination to go through you [Ms. Hubbard] under color of statutory law to obtain the information herein" as illustrative of a poor "prognosis of his success as a future administrator" is at best highly speculative. It is imagined that Grievant contacted his

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[16] At Level IV, Ms. Means explained that her husband's work with the Union Carbide Corporation required them to live abroad for several years. Since this interrupted her teaching career, it is well-imagined that the situation was discussed during the Hometown selection process.

professional organization, WVEA, when he was not selected for the Hometown job and that Ms. Hubbard, the WVEA area representative, took charge from there.[17] Even if one were to assume Ms. Hubbard knew that Grievant was not the most senior applicant and therefore unentitled to "reasons why" he was not chosen per Code §18A-4-8b(a), but represented something to the contrary to Dr. Sentelle,[18] to attribute this to Grievant and his suitability for a principalship, without more, is patently unfair and arbitrary. It is recognized that Grievant's solicitation of Ms. Hubbard's intervention on his behalf occurred after the choosing of Ms. Means had been finalized, and so in and of itself was not a factor in Grievant's non-selection; however, it was portrayed by Dr. Sentelle as an after-the-fact example of "some question concerning his past working relationships," which admittedly was such a factor.

Further, at least certain of the concerns raised by Dr. Sentelle are of unknown origin. When Ms. Hubbard asked Dr.

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[17] An individual's efforts to work out problems on the job in an informal and personal manner is desirable; in fact, the grievance procedure envisions such, see Code §18-29-4(a), but also allows for employee-organization representation at that stage, see Code §§18-29-2(q), (r), 18-29-3(f). To suggest that one should not seek assistance at any level of the process might create a "chilling effect" on an approach clearly contemplated by the law.

[18] Certainly, there is no hint that Ms. Hubbard did so, or that she has engaged in any questionable behavior whatsoever. Nor did Respondent or any of its agents directly suggest such to be true.

Sentelle, at Level IV, how he had been advised of "question[s] concerning his past working relationships" and other stated concerns, Dr. Sentelle candidly responded, "I don't know.. . .I know I was aware of them but I don't know where they came from." He did not claim to be unable to remember from what source the information had been derived, or even that he felt it would be breaching a confidence or privilege of some sort to reveal that source. Instead, he repeatedly explained that he simply did not know from whence much of the data had come.

However, Dr. Sentelle did report that one of Respondent's members had related that Grievant had approached him with a complaint "about a form his team had to fill out." Apparently, this is the sum and substance of the "procedural matters at his school" Grievant had "approached members of the Board of Education" about, "bypassing in the process his building administrators and the central office executive staff." Grievant neither denied the occurrence of this incident nor offered an explanation therefor.[19] Dr.

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[19] Ms. Hubbard cited the U.S. Const., Amend. 1 protection of the freedom of speech in her opening statement at Level II. Since this point was not pressed or argued, though, it must be deemed abandoned.

This case appears distinguishable from Wall v. Putnam Co. Bd. of Educ., Docket No. 89-40-561 (Nov. 22, 1989). In Wall, a letter of concern the grievant had written to Dr. Sentelle, who had very recently theretofore moved to Putnam County, was considered highly inappropriate by the Superintendent. Although the grievant was not timely informed of Dr. Sentelle's view, the letter "was a, if not

(Footnote Continued)

Sentelle's interpretation of this as an inappropriate act must thus be considered a reasonable one.

Another point of Dr. Sentelle's is noteworthy. The fact that "Grievant raised questions on operational matters such as whether time spent enroute to the cafeteria should be included in the lunch period allocated for teachers" was referred to by Dr. Sentelle as an "apparent disregard for professional protocol." He did not elaborate and therefore his allegation of disregard was not substantiated. Beyond this, Ms. Hubbard challenged Dr. Sentelle's using the "questions" against Grievant since they were, according to her, the subject of a previous grievance, Slone et al. v. Putnam Co. Bd. of Educ., Docket No. 40-87-296-1 (May 26, 1988). Dr. Sentelle, who moved to Putnam County only in May 1989, claimed ignorance of this earlier case and therefore denied the implicit charge of reprisal. The issue of "lunch travel time" was analyzed in the May 26, 1988, decision, but only in direct relation to another grievant besides Mr. Slone. However, as a party to that overall grievance it must be assumed that Grievant Slone was at least in effect a complainant on all points raised; further, if Dr. Sentelle was advised of the travel time dispute, it is well-imagined

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(Footnote Continued)
the, primary reason for Grievant's ill-fated candidacy. . .." Wall, n. 10. This is a rather different scenario from that of the instant case, where Grievant bypassed authority over a minor administrative matter, which action was noted but not portrayed as a salient factor in his non-selection.

that the other "questions" referenced at least included those attached to the previous case. Just as individuals should not be discouraged from reasonable utilization of the grievance process, see n. 17, neither should county boards of education be forced to totally ignore complaints, particularly frequent ones, which are frivolous or unfair in nature.[20] Although the Slone et al. claims were not specified as either, it is noted that Respondent prevailed handily on the merits thereof. However, it is questionable whether this, without more, should have been used against Grievant in this case. At the very least, it was clear that Dr. Sentelle had only limited information about the matter, and to the extent these "questions" negatively affected Grievant's chances at Hometown, their consideration raises an appearance of impropriety.[21]

As previously recognized, Grievant's burden in a case of this nature is at least in the first instance to establish a flaw in the selection process such that, if the flaw had not been present, the outcome might reasonably have been different and favorable to him. Respondent points out that

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[20] See W.Va. Code §18-29-3(s), which provides that the number of grievances filed against an employer may not be deemed a per se indication of poor performance of that employer.

[21] Dr. Sentelle's degree of active involvement in the selection process herein is not well-defined in the record. It must be assumed to be rather high, though, inasmuch as he sat in on at least a portion of Grievant's interview and drafted a rather detailed "letter of reasons," Gr. Ex. 5.

"Mr. Slone was not among the top three candidates rated from interview"; however, the evidence reflects that information beyond the interview results were used in assessing qualifications. For example, Ms. Means was selected because the interview team felt she "was the most qualified, and her past performance was definitely in line, and she was far and above the best applicant in the interview process. . .[and] [s]he had excellent recommendations, and it was just a general consensus that she was the overall best candidate for the position at Hometown Elementary." T. 37. Furthermore, since Dr. Sentelle participated in the interview process at some level, it is wondered what impact certain of the factors questioned herein had on his and team members' views of Grievant during the application period and on the final rankings. A review of those factors, at least with an eye toward their cumulative effect, certainly gives rise to the strong possibility that Grievant might have been selected for the Hometown job had they not been present.[22]

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

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[22] Grievant also alleged his interview was quite short in duration and number of inquiries; Respondent denied this. Due to the outcome herein and the relief ordered, this assertion need not be addressed.

FINDINGS OF FACT

1. Grievant has been employed as a teacher by Respondent Putnam County Board of Education for several years. He was an unsuccessful applicant for a principal/teacher post at Hometown Elementary in Putnam County, which job went to Mary Means, an out-of-county teacher.

2. Ms. Means had twenty-six and Grievant eighteen years' teaching experience at the time of the application process.

3. In an effort to avoid inappropriate consideration of seniority, Respondent failed to analyze Grievant's experience in and familiarity with the Putnam County community as an aspect of qualifications.

4. Respondent determined that Ms. Means had eight years' administrative experience, when in fact she had devoted only an average of ten days per year for eleven years to service as Acting Principal. Respondent further determined, although there was no evidentiary basis for doing so, that Grievant's service as Team Leader did not constitute administrative experience.

5. Respondent considered Ms. Means' nomination for an Ashland Oil Teacher of the Year award in determining her to be the most qualified applicant.

6. Recommendation letters written on Ms. Means' behalf were considered important by Respondent in ruling her to be the most qualified applicant. Although Grievant had several

such letters lodged in his personnel file, they were not reviewed.

7. Respondent considered certain information about Grievant, the source of which was unknown to Respondent's Superintendent of Schools, who was responsible for recommending an applicant to Respondent for hiring.

8. Respondent determined Grievant had inappropriately contacted one of its members about an in-school complaint rather than seeking the assistance of school or central office administrators.

9. Respondent may have considered information about Grievant's involvement in a previous unsuccessful grievance in its determination that he was not the most qualified applicant.

CONCLUSIONS OF LAW

1. In order to prevail in a case of this nature, a grievant must prove, by a preponderance of the evidence, the existence of a flaw in the selection process so significant that, if the flaw had not been present, he or she might have been the successful candidate. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

2. Respondent inappropriately excluded consideration of Grievant's familiarity with the community and its resources. See Ramsey v. Mineral Co. Bd. of Educ., Docket No. 28-88-234 (Aug. 29, 1989).

3. Respondent erroneously excluded reviewing of Grievant's recommendation letters, inasmuch as it considered like information concerning the chosen candidate. See Ginn v. Hardy Co. Bd. of Educ., Docket No. 16-88-185 (Dec. 9, 1988).

4. Respondent gave proper weight to certain factors but undue weight to others, including the successful applicant's Teacher of the Year nomination, which was the result of an open nomination process and not per se indicative of a commendable level of professional achievement; information concerning Grievant, the source of which was unknown to Respondent's Superintendent; and others.

Accordingly, this grievance is **GRANTED**, and Respondent **ORDERED** to forthwith reconsider the applications of Grievant and Ms. Means for the job at Hometown Elementary, consistent with this Decision. Each should be allowed a reasonable opportunity to supplement his application materials, although not with credentials attained since the previous selection process. If it is determined that Grievant is the more qualified applicant, or if he and Ms. Means are, in essence, equally qualified, he shall be instated as Principal/Teacher, Hometown Elementary, and shall be awarded back-pay and -benefits commencing with school year 1989-90, less offset for regular wages he has received from Respondent since then.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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: February 7, 1990