



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

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

LARRY G. TRACEWELL

v.

Docket No. 90-54-019

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

I. PROCEDURAL HISTORY

Larry G. Tracewell, a teacher at Respondent Wood County Board of Education's Franklin Junior High School (FJHS), filed a grievance at Level I on December 28, 1988, charging a "Failure to follow policies in the hiring of [Parkersburg South High School (PSHS) vocational instructor] Gary D. Kiger [over me] as Assistant Principal at [FJHS]" and seeking instatement to the position. After denials there¹ and Level II² and W.Va. Code §18-29-4(c) waiver at Level

¹ The Level I evaluator was Grievant's immediate supervisor, FJHS Principal Kenneth R. Hart, who also made the original hiring decision contested herein. See this Decision, infra.

² The Level II hearing transcript and decision constitute the bulk of the record upon which this Level IV Decision is based.

At the Level II hearing, Grievant added an allegation
(Footnote Continued)

III, Grievant advanced his claim to Level IV, where it met with success. Tracewell v. Wood Co. Bd. of Educ., Docket No. 89-54-166 (Aug. 15, 1989) ("Tracewell I"). On November 28, 1989, the Circuit Court of Wood County, West Virginia, ordered Tracewell I reversed and remanded to Level II for the taking of further evidence. The Bd. of Educ. of the Co. of Wood v. Tracewell, C.A. No. 89-P-159.³ On remand, supplemental evidence was taken and a revised Level II decision issued, again upholding the choice of Mr. Kiger for the FJHS post.⁴ Level III again waived, and Grievant reinstated his

(Footnote Continued)

that he "has not been promoted or allowed advancement through the system, has been rejected for any and all applications for positions which he has made, has twice been placed on the RIF list," and that "there has been some deliberate effort on the part of the Board of Education or its agents to keep him from advancing through the system not[]withstanding his qualifications." T. 2. Also at this time, he stated appointment to the FJHS job "or some comparable position" would satisfy his claim. T. 3. Since the grievance, as originally posed, involved only the FJHS selection process, and since these other allegations have not been further pursued by Grievant, they will not be considered herein except as they apply to the FJHS post. At any rate, it would be inappropriate for this Grievance Board to order Grievant's placement into "some comparable position." See Hammond v. Logan Co. Bd. of Educ., Docket No. 89-23-044 (Apr. 17, 1989), n. 1.

³ See also Opinion, Circuit Court of Wood Co., W.Va., Oct. 16, 1989.

Although perhaps somewhat artificial, for purposes of clarity it is deemed that, at the point of remand, Tracewell I ended and the instant case ("Tracewell II") began.

⁴ The relief sought in Tracewell I was granted since the only evidence of record was that Grievant was the sole applicant for the FJHS job who held the required certification in administration. T. 29. On appeal to the Wood County Circuit Court, Respondent's counsel presented

(Footnote Continued)

complaint at Level IV on January 18, 1990. Thereafter, it was agreed that this dispute could be resolved on the basis of the record below, including all the Tracewell I data. With the submission of the parties' memoranda by March 14, 1990,⁵ the case is mature for disposition.

II. PERTINENT FACTS

Respondent delegated its authority to Mr. Kenneth Hart, FJHS Principal, to review the applicants for the school's vacancy and make a hiring recommendation to Superintendent of Schools Dr. William D. Staats. Despite Grievant's protestations to the contrary, such procedure is clearly an appropriate method for filling vacancies. See, e.g., Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988). Mr. Hart appeared at Level II, at which Respondent was represented by its Assistant Superintendent for Secondary Schools, William F. Gainer, and testified at length as to why he considered Mr. Kiger more qualified than Grievant. That testimony, in part, was as follows:

(Footnote Continued)

information that this evidence may have been incomplete, and remand was allowed for investigation of the issue. On remand, it was clarified that all fourteen original candidates held the credential in question.

⁵ At the parties' request, a responsive schedule was utilized. Accordingly, there is an opening memorandum from Grievant, a reply from Respondent, and a rebuttal.

Memoranda submitted in Tracewell I have also been considered in the drafting of this Decision.

I was concerned in terms of scholarship as well as attendance. Also, I noted that Mr. Kiger's recommendations in his file were outstanding. I also looked at the evaluations. . . as being "exceeds performance standards" as contrasted to Mr. Tracewell's "meets performance standards." Mr. Kiger has made numerous contributions to the Wood County School System. . . . He's worked in four different schools in the county and, of course, he's allowed us to look at him or watch him over the course of eleven years as contrasted to Mr. Tracewell's seven years. During that time, he's been very faithful in his attendance; he's very faithful to the county in general. . . . He's a very civic-minded individual.

. . .

[Although he had zero administrative experience and zero experience at FJHS, Mr. Kiger was the runner-up candidate for two other positions.] Mr. Gainer and I live only two houses away and very often, over the back fence, we discuss what's going on in the work[]site and I was aware that Mr. Kiger had applied and been runner-up at Hamilton Junior High [HJS]. I was also aware that he had been the runner-up at PHS [Parkersburg High School] for the athletic director's job there by virtue of. . . [then-PHS Principal] Kincaid's recommendation which is in Mr. Kiger's folder.

. . .

[Mr. Kiger was] familiar with the socio-economic and academic level. . . of students that attend Franklin [due to his experience with them attending vocational classes at PSHS]. . . . Mr. Tracewell has had an opportunity to become familiar with that caliber of student but he has been unsuccessful, on occasion, in coping or identifying with that level of student [although]. . . I have not [made any such remark in any of his evaluations].

. . .

[That all of Kiger's experience was in Wood County and that he had approximately three or four years more in this county than Mr. Tracewell] was a consideration; however, my main consideration was on the quality of service rather than the term. . . . [The candidates' high school or college scholastic records] was a consideration. . . .

. . .

[I was not aware of Mr. Kiger's attendance record until after my recommendation, but Mr. Tracewell's] did play a part in that I knew Mr. Tracewell had been absent on a number of occasions.

. . .

Mr. Tracewell has helped us with coaching; he's been relatively unsuccessful with his coaching experiences at Franklin, but he has been involved with athletics, yes. . . . Mr. Tracewell has been quite good about volunteering his help when it comes to chaperoning and those kinds of things with the school dances and things of that nature. However, that's somewhat offset by the fact that he is, from time to time, not what I consider loyal in his taking care of day to day responsibilities. He has been known to leave campus without authorization and as I said, has not been good about leaving plans or preparation for teachers in his absence and has missed considerably more days in his seven years of employment than Mr. Kiger has in his eleven.

. . .

I believe Mr. Tracewell's values as far as discipline are quite high. . . [that is significant.] [Also, it's] correct [that his experience of running a school would be of some merit] I knew that Mr. Kiger was the style of person, through his references and recommendations, that. . . students would come to voluntarily to seek advice or answers to questions, etc., that he was very open and fair with them. I don't think that students at Franklin routinely do that with Mr. Tracewell from my observation.

. . .

I've been commended a number of times on my usual choice of candidates for teaching positions, teachers at Franklin, employees; and I believe that ordinarily when I look at a beginning teacher at our school, I look at someone with whom I can work. I look at the person primarily and from all I can gather, Mr. Kiger is the type of person that, to quote Mr. Kincaid, he said, "I would be most happy to have Mr. Kiger as an assistant principal because I know he is loyal and reliable and the job would be accomplished in a commendable manner." I respect Mr. Kincaid's judgment and at the same time, I think that I myself do a fairly good job of choosing candidates. Loyalty is a very important criteria as well the attendance and scholarship, but the person is the most important thing. For example, just prior to Christmas break this year, in the teacher's lounge as I was passing through, Mr.

Tracewell was commenting about his experience in senior high school when he struck one of the teachers there knocking him to the floor and seemed to take great pride in having done so. I chose myself to select someone who was student body president in high school, and Mr. Tracewell has, on occasion, indicated to me that when I've asked him about his circulation with other teachers in the building, that he does not intermingle to any real extent with them, that he said that he did not need that kind of interpersonal relationship, that food and sex were his only necessities. Certainly, if we were to select someone to work as an assistant principal or any kind of an administrative office, he has to deal with all kinds of people on a day-to-day basis. I felt that Mr. Kiger would probably be a more appropriate person that had the desire to work with people.

T. 35-42, 58.

Mr. Hart's statement must be viewed as an accurate explanation as to why Grievant was unsuccessful in his bid for the FJHS job, since he, Hart, was given the responsibility to review the applicants' qualifications. See Wall v. Putnam Co. Bd. of Educ., Docket No. 89-40-561 (Nov. 22, 1989). Other facts relevant to this grievance and uncontroverted are as follows: Grievant had worked in other school systems, including one in the State of Delaware and those of Monongalia and Upshur Counties, West Virginia, and had had some degree of college-level teaching and coaching background; Grievant had eight years' successful experience as an Assistant Principal at Buckhannon-Upshur High School (BUHS) in Upshur County, West Virginia, before returning to his native Wood County in 1981; Mr. Kiger had eleven years'

seniority,⁶ but no administrative experience at the time of his application for the job in question; Mr. Kiger had missed 36 days' work over those eleven years, and Grievant was absent 57½ days in his seven years with Respondent; and, after Mr. Hart interviewed the fourteen FJHS candidates and reviewed their attendant written essays, Grievant was not among the four finalists.⁷

III. APPLICABLE LAW AND POLICY

W.Va. Code §18A-4-8b(a) provides, in pertinent part, "A county board of education shall make decisions affecting promotion and filling of any . . . position occurring on the basis of qualifications." Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986), has interpreted this provision to mean that, if the top candidates are equally qualified, or if a review of qualifications is inconclusive, seniority then comes into play as "the determinative factor." At 62.

Wood County Policy 4111.1, "Personnel Promotion Policy," states in part:

⁶ Seniority is measured as time-in-service with the given county board of education. Slone v. Putnam Co. Bd. of Educ., Docket No. 89-40-665 (Feb. 7, 1990). Therefore, Grievant had only seven years' seniority, for pertinent purposes, in 1988.

⁷ That Grievant's administrative certification was permanent and Mr. Kiger's provisional is of no moment. Mankin v. Logan Co. Bd. of Educ., Docket No. 89-23-548 (Feb. 6, 1990).

General qualifications, in addition to specific qualifications for a position, which should all be considered in making promotions include: General culture; social attitudes; inspirational power; values and breadth of experience, both educational and other; academic or training achievement; perseverance in seeking goals, especially those which pertain to the candidate's education or training; health; adaptability; "common sense"; philosophy, both general and as relates to schools and education; contributions made to the system or organization in which he/she has served.

IV. DISCUSSION

While Grievant was not among "the top four" applicants for the FJHS post after interview, several questionable evaluation criteria were used in the assignment of rankings. Further, the record is unclear as to what information, precisely, Mr. Hart had at his disposal prior to the selection of Mr. Kiger⁸ and what was compiled after the fact in defense of his choice.⁹ However, Grievant has succeeded in

⁸ Mr. Hart definitely did have certain information, e.g., Gr. Ex. 1-5, but not other, e.g., Gr. Ex. 7 (Grievant's written rebuttal to Respondent's reasons for his non-selection), 8 (newspaper clippings of Grievant's academic achievements, student and professional athletic careers, military history, community affairs involvement, etc., and 9, additional letters of reference. T. 21. Grievant suggested Mr. Hart would have had this latter-referenced evidence had his interview been in-depth, T. 22; due to the outcome herein, the "depth" of the meeting need not be assessed. However, it is noted that both the employer and the applicant have certain facilitative roles during an interview. See Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989), n. 25.

⁹ While perhaps not the most significant, the most extreme example of this is Mr. Hart's testimony that Mr. Kiger is performing well as FJHS' Assistant Principal, e.g., T. 43. Clearly, whether or not Mr. Kiger is doing well at FJHS may not be introduced as justification that the earlier decision that he was "most qualified" was correct.

proving, by a preponderance of the evidence, that the selection process was flawed to the point that, had the flaws not existed, he might have been awarded the FJHS assistant principalship; therefore, this case will be sent back to Respondent for a renewed review of the relative entitlements of Grievant and Mr. Kiger for the job.¹⁰

A. Attendance/Lesson Plans

First of all, Mr. Hart's consideration of Grievant's work-attendance rate as a factor to his detriment was totally inappropriate. According to Grievant, he has never been counseled for leave abuse or "excessive absenteeism," T. 10, and the record is uncontroverted that all leave he has taken has been permitted him by law, per Code §18A-4-10. "It is against public policy for a board of education. . .to consider an employee's proper use of his or her leave to which he or she is entitled when considering his or her qualifications for a position." Mitchem v. Wayne Co. Bd. of Educ., Docket No. 50-88-244 (Mar. 23, 1989).¹¹ Although Mr.

¹⁰ Since the other twelve candidates have not contested Mr. Kiger's selection, it may fairly be assumed that none of them desires to further pursue the FJHS job.

¹¹ This case is distinguishable from Pyles v. Lewis Co. Bd. of Educ., Docket No. 21-88-103 (Jan. 31, 1989), in which a formal-evaluation comment that an itinerant art teacher's attendance "could be improved" was allowed to stand. Pyles was not a job-selection case; furthermore, there was no allegation that the grievant's overall performance rating

(Footnote Continued)

Hart claimed that he had, "on more than one occasion," "raised. . . question with him [Grievant] about absentee problems," T. 30, when asked for examples, Mr. Hart could not provide them; instead, he simply recounted two times when personnel filling in for Grievant had had difficulty finding needed in-room materials, including lesson plans. Id. Mr. Hart was queried as to whether these incidents with substitutes were documented; his reply was, "I do have somewhere." T. 31. No written account of any such problems was offered into evidence. Mr. Hart agreed that Grievant always left a copy of his weekly lesson plans in FJHS' main office, as was required of him, but that a teacher's failure to leave an additional copy in his room is "contrary to my instructions." T. 32. Grievant denied ever being criticized for his lesson plan preparation procedures, T. 10; however, at one point, Grievant admitted he did not always leave copies of lesson plans in his room. Gr. Ex. 7. He explained that he did not have a traditional classroom, but rather a desk and file cabinet in the janitor's portion of the gymnasium's locker room. He added that there was no adequate place to store materials and that the area was subject to

(Footnote Continued)

was lowered or otherwise affected by the remark.

As an aside, Mr. Hart's failure to review Mr. Kiger's attendance records for abuse prior to the completion of the selection process, if such was to be a significant factor for candidates' comparison, was error. See Ginn v. Hardy Co. Bd. of Educ., Docket No. 88-16-185 (Dec. 9, 1988) (applicants must be judged utilizing same basic criteria).

vandalism, hence his decision to not leave grade books, lesson plans, and other materials lying around. Id.

B. Scholarship

Scholarship, the other primary concern of Mr. Hart, was likewise inequitably viewed. Mr. Hart admits he did not have Grievant's college transcripts, T. 40, although he asserted that the West Virginia University "Dean's list" was cited on Grievant's resume. Id. At some point, however, Mr. Hart may have become aware that Grievant had been placed on academic probation on four occasions during his college career. Mr. Gainer, at Level II, presented evidence of Grievant's academic difficulties and contended it was highly relevant. T. 24-25. While this fact is not necessarily inappropriate for consideration in this case, it must be balanced against Grievant's academic successes, which appear to be many. See, e.g., T. 63. Finally, there is no record what "scholarship" data Mr. Hart had on Mr. Kiger, or when, although it can be fairly assumed that at least some college transcript information on both men was lodged in Respondent's personnel files.

C. Seniority/Familiarity

Mr. Hart's statement that Mr. Kiger had "been watched longer" than Grievant by the Wood County Schools must be discounted as an invalid usage of seniority. Dillon. Certainly, familiarity with the county, the local area, and

even the school in question may be included in an analysis of qualifications, see Slone v. Putnam Co. Bd. of Educ., Docket No. 89-40-665 (Feb. 7, 1990), and Ramsey v. Mineral Co. Bd. of Educ., Docket No. 28-88-234 (Aug. 29, 1989); however, to say that an eleven-year employee is "better" in any facet of qualifications than a seven-year staffer simply because the former has worked longer in the county exceeds the bounds of propriety. As for pure familiarity with the system, however, Mr. Kiger was given a superior rating because he has taught at several schools in the county, although never at FJHS, and is familiar with FJHS' population due to working with them in PSHS' vocational program. Grievant has been at FJHS for several years, but Mr. Hart characterized him as "unsuccessful, on occasion, in coping or identifying with that level of student." T. 39. Interestingly, however, Mr. Hart conceded he had never mentioned this in a formal evaluation of Grievant's performance. Id. While under certain circumstances it is appropriate to consider evaluative information outside an employee's formal performance review, Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (Nov. 7, 1988), this sort of data would not appear to be covered by that exception to W.Va. Board of Education Policy 5300(6)(a), "Any decision concerning promotion. . .should be based upon such [formal] evaluation, and not upon factors extraneous thereto."

D. Evaluations/References

Respondent repeatedly referenced Mr. Kiger's performance evaluations, which for the three years preceding his FJHS selection were "exceeds performance standards" (EXPS) while Grievant's were the lower "meets performance standards" (MPS), the only other option being "does not meet performance standards" (DNMPS). While comparative review of applicants' job evaluations is perfectly appropriate,¹² it must be remembered that Mr. Kiger and Grievant were being evaluated as teachers, not as administrators. Further, Grievant had been a secondary administrator in Upshur County, West Virginia, for several years before moving to Wood County, and although no formal performance evaluations related to that service are of record, reference letters written by his then-superiors and colleagues, Gr. Ex. 2, would indicate his work there was exemplary.¹³

¹² Mr. Kiger's evaluations included no narrative explanations of his ratings; Grievant's contained brief comments, but only in those areas he was given a superior score.

¹³ It is unclear whether formal performance evaluations of Grievant's service as BUHS Assistant Principal were conducted or exist.

For several years prior to Respondent's switch to the EXPS, MPS, DNMPS system, both Grievant and Mr. Kiger earned a "satisfactory" rating on a "satisfactory/unsatisfactory" scale. More complete narrative statements in support of the rankings did appear on these earlier documents. Gr. Ex. 3, Resp. Ex. 3.

Mr. Kiger's reference letters were judged more favorable than Grievant's, notably because Grievant's were generally several years older. This factor is relevant; however, again, the vacant position was administrative, and most of Grievant's references, which were unarguably highly favorable, were from individuals who had worked with him as Assistant Principal, BUHS, a position he was re-offered without his solicitation in 1986. T. 19.¹⁴

E. Administrative Experience/Perseverance

As noted supra, Grievant had several years' administrative experience, while Mr. Kiger had none. A related factor that was considered was the candidates' persistence in seeking administrative positions. According to Respondent, this information was relevant toward determining the applicants' "perseverance in seeking goals, especially those which pertain to the candidate's education or training," a "general qualification for promotion" under Wood County Policy 4111.1. Although the interpretation of a policy by the body which promulgated it and is charged with overseeing it will generally be given deference, Habursky v. Recht, 375 S.E.2d 760 (W.Va. 1988), Respondent's application of Policy 4111.1's "perseverance" standard in this case was

¹⁴ It is interesting, although perhaps not significant, that Mr. Kiger did not submit a reference letter from his then-current immediate supervisor, the PSHS principal. Level II Decision.

unreasonable, arbitrary and capricious and cannot stand. To credit a person for applying for all available higher positions, even though he might be content in his current placement or not qualified for advancement, or to criticize him for not doing so, is not a fair measure of perseverance or qualifications. However, even if it were, Grievant's past applications for at least four Wood County administrative jobs, see T. 11-13, were somehow discounted. In addition, Grievant was inexplicably criticized as lacking perseverance for his failure to apply for one certain job, namely, the HJS assistant principalship. T. 52.¹⁵

Mr. Hart also considered that Mr. Kiger was twice the "runner-up" for past administrative positions, namely, the HJS assistant principalship and the PHS athletic director's job. These latter considerations are troubling for several additional reasons. For example, the timing of neither Mr. Kiger's HJS nor his PHS application was clarified; certainly, Mr. Kiger's credentials could have been improved, or

¹⁵ Particularly since Policy 4111.1 also mandates that "all declared candidates" for a promotion shall be interviewed whenever possible, it seems unlikely that Respondent desires its employees to apply for all vacant higher positions. However, that is the message that is sent if persons are penalized for not seeking each available promotion, or at least specific ones highlighted by Respondent.

Grievant was also criticized for his failure to respond to a countywide memorandum directed at all employees with administrative aspirations. Resp. Ex. 8. While Mr. Kiger did react to the memo, Grievant's explanation that he did not do so because he was focusing on compiling his FJHS application materials, T. 13, was quite plausible.

could have suffered detriment, since then. See Smith v. Lincoln Co. Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990), pp. 3-4. And, more crucially, simply because someone was "in second place," or any "place" for that matter, when the final decision on a given job is made is sometimes a function of the idiosyncrasies of the post; the identity of the individuals who applied; and the number of candidates. See id.¹⁶

F. Miscellaneous

Mr. Hart charged that Grievant had "left campus without permission," T. 41; however, he had no documentation of or details on this, and again, Grievant convincingly denied the allegation. T. 60. Further, Grievant has never been counseled for the problem or cited for it in a formal evaluation, so its usage against him is questionable. W.Va. Board

¹⁶ Although such information has been deemed inappropriate for consideration, it is interesting that Grievant's "placement" among the candidates for the various jobs for which he has applied over the years was apparently not reviewed.

In what may have been another "placement" error, Respondent, in its opening Memorandum of July 7, 1989, cites as a black mark against Grievant that he, while in Upshur County, had unsuccessfully sought BUHS' head football coaching job for several years. It is rather incredible that this information, gleaned from a highly favorable reference letter, Gr. Ex. 2-A, might have been used out-of-context against Grievant; furthermore, simply because he was not chosen for a given job many years ago is of no moment. It is noted Grievant did serve as head football coach at Buckhannon-Upshur Junior High School for one year, during which he enjoyed an undefeated season. Gr. Ex. 1-A.

of Education Policy 5300(6)(a). Mr. Hart conceded that Grievant had been quite good about volunteering and chaperoning, and that he "has helped us with coaching" although "he's been relatively unsuccessful with his coaching experiences at Franklin." T. 41. The record does not reveal the significance of the "unsuccessful" commentary or to what aspect of Grievant's coaching experience it is directed, e.g., win-loss ratio, relationship with student-athletes, etc.

Grievant denied ever, in his life, hitting a teacher or making a statement about doing so, opining that the conversation Mr. Hart overheard perhaps related to some trouble Grievant's son was then having with a coach at the school he attended, which has been resolved. See generally T. 58-62. Finally, Grievant characterized the "food and sex" remark as a "locker-room talk" joke he had engaged in with Mr. Hart behind the closed doors of the principal's office. He admitted there was a time when "all the [FJHS] teachers were against us [Grievant and his wife, also an FJHS faculty member]. . . [but] we worked our way back and I'd say there's not a teacher at that school right now that I would not associate with or they would not associate with me in any way." T. 62.¹⁷

¹⁷ In regard to interpersonal relationships, Mr. Hart considered the fact that Mr. Kiger was student body president, Williamstown High School, as relevant. T. 58.
(Footnote Continued)

Lastly, Mr. Hart's view that "the person" is the most important qualification is somewhat enigmatic. Mr. Hart characterizes himself as one with background and expertise in selecting applicants for vacant positions. T. 58. The record reflects he indeed has had much administrative experience in Wood County which presumably has included extensive participation in interviewing and job-filling. However, and as understandable as this may be, emphasis on the quality "someone with whom I can work" as a primary qualification, id., is a rather subjective and highly-suspect starting point. Certainly, all relevant factors should be considered in filling a vacancy, see State ex rel. Oser v. Haskins, 374 S.E.2d 184 (W.Va. 1988), including certain "intangibles," see Higgins v. Bd. of Educ., Randolph Co. , 286 S.E.2d 682 (W.Va. 1981), and Wheeler v. Randolph Co. Bd. of Educ., Docket No. 42-88-253 (Apr. 28, 1989); however, the focus must be credentials, and at least initially, those should be quantifiable and measurable, e.g., proper certification, years of relevant experience, etc. See Johnson v. Cassell, 387 S.E.2d 553, 555 (W.Va. 1989). It appears that, in an effort to "view the whole person," Mr. Hart failed to consider the applicants in as balanced and

(Footnote Continued)

Grievant explained he had been freshman class president at PHS, statewide Treasurer at Boys' State, and had held a number of other leadership roles as a student and professional. T. 61, Gr. Ex. 7. Apparently, these were not thought relevant by Mr. Hart, or unknown to him.

ordered a manner as is mandated by Code §18A-4-8b(a), Dillon, and their progeny.¹⁸

In addition to the foregoing findings of fact and conclusions of law, the following formal ones are made.

FINDINGS OF FACT

1. Grievant, a teacher at Franklin Junior High School (FJHS) for seven years, made application for an Assistant Principal vacancy at the school in 1988. Gary D. Kiger, a teacher at another of Respondent's schools, was selected.

2. At the time, Mr. Kiger had eleven years' seniority with Respondent, while Grievant had only seven. However, Grievant had eight years' experience as an Assistant Principal in Upshur County, West Virginia, while Mr. Kiger had no such administrative experience. Grievant's Assistant Principal work was rated as exemplary by his Upshur County references.

3. For the past three years, Grievant's teaching had been formally rated at a "meets performance standards"

¹⁸ Nepotism has been vaguely referenced by Grievant at times during these proceedings, since Mr. Hart and Mr. Kiger's father were colleagues and personal friends some years back. Respondent's reply has consistently been that that relationship was irrelevant to the selection of Mr. Kiger and further, although it is rather beside the point, that Grievant's wife and sister-in-law also have been hired to work at FJHS.

There simply has been no hard evidence of nepotism and Grievant's related charge, to the extent it has not been abandoned, is summarily dismissed.

level, while Mr. Kiger's had been scored "exceeds performance standards."

4. Grievant's attendance record was considered to his detriment. He had never been counseled about or advised of a problem in this area, and all leave he had utilized was permitted by W.Va. Code §18A-4-10. Mr. Kiger's attendance record was not analyzed until after his hiring.

5. Mr. Kiger's "runner-up" status for two previous administrative vacancies were considered as significant and positive.

6. The fact that Mr. Kiger had "allowed" Respondent eleven years "to watch him" while Grievant had only seven years with the county was considered in Mr. Kiger's favor.

7. Certain informal comments made by Grievant which were misunderstood, albeit somewhat reasonably, were used against him in the selection process.

8. Certain evaluative information, e.g., difficulty relating to FJHS students, leaving FJHS' campus without authorization, and inappropriate handling of lesson plans, none of which never had been called to Grievant's attention or mentioned in formal performance evaluations, were considered negative factors in his application for promotion to FJHS Assistant Principal.

9. FJHS Principal Hart, Respondent's designee to review applicants and make a recommendation, utilized the intangible and subjective quality "someone with whom I can work" as a "screening" qualification in his search.

CONCLUSIONS OF LAW

1. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner not arbitrary or capricious." Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986), syl. 3.

2. "[D]ecisions of a county board of education affecting . . . promotions and the filling of vacant . . . positions must be based primarily upon the applicants' 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.

3. Seniority, in and of itself, as opposed to years of experience or familiarity with a county school system, may not be considered an aspect of qualifications.¹⁹

¹⁹ Although the Supreme Court of Appeals of West Virginia, in Dillon, found fault with the Wyoming County Schools' failure to evaluate and compare "the qualifications, including seniority, of all applicants for . . . [the] position," 351 S.E.2d 65, it earlier in the same decision noted, "if the applicant with the most seniority is also the most qualified person for the job, seniority does not truly come into play." At 62. Apparently, the reference to "seniority" on page 65 is not just to length of service,
(Footnote Continued)

4. A county board of education must consider all relevant information that is presented to it, already in its possession, or known to it and reasonably obtainable by it, in assessing the relative qualifications of job applicants. See State ex rel. Oser v. Haskins, 374 S.E.2d 184 (W.Va. 1988). Generally, evaluative information outside formal performance evaluations may not be reviewed. W.Va. Board of Education Policy 5300(6)(a).

5. In determining qualifications, in the first instance objective and readily measurable criteria such as certification, years of experience, etc., must be looked to. See Johnson v. Cassell, 387 S.E.2d 553, 555 (W.Va. 1989). Thereafter, more "intangible" qualities, such as "elan, enthusiasm, leadership and talent," may be factored in. See Higgins v. Bd. of Educ., Randolph Co., 286 S.E.2d 682 (W.Va. 1981); Wheeler v. Randolph Co. Bd. of Educ., Docket No. 42-88-253 (Apr. 28, 1989).

6. A county board of education must utilize the same basic criteria to evaluate all applicants for a vacancy. See Ginn v. Hardy Co. Bd. of Educ., Docket No. 16-88-185 (Dec.

(Footnote Continued)

but to an "element of qualification" centered upon "constant improvement of his or her professional skills," "professional accomplishment," and "invaluable practical knowledge" and derived from length of service. See generally Dillon. Since "seniority does not truly come into play" if the most senior candidate is the most qualified, the cited page 62 reference to seniority must be to length of service alone. Therefore, the conclusion must be reached that seniority itself is not a facet of qualifications, while the accoutrements of seniority, e.g., experience, certainly are.

9, 1988). For example, if work-attendance record is a significant factor, it cannot consider the record of one applicant without also reviewing those of others. However, "It is against public policy for a board of education. . .to consider an employee's proper use of his or her leave to which he or she is entitled when considering his or her qualifications for a position." Mitchem v. Wayne Co. Bd. of Educ., Docket No. 50-88-244 (Mar. 23, 1989).

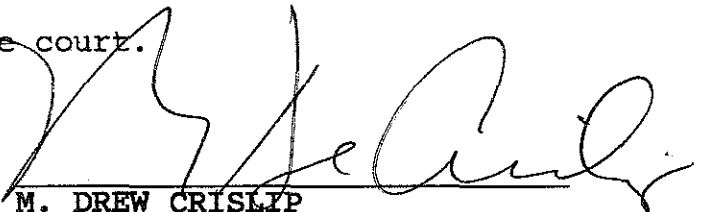
7. A county board of education may not consider whether an individual has applied for other jobs, or that individual's ranking among candidates for those jobs, in determining his qualifications for a subsequent vacancy.

8. 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 reasonably might have been the successful candidate. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). In this case, Grievant has demonstrated a number of errors in the selection process which, at least when cumulatively viewed, constitute such a flaw.

Accordingly, this grievance is **GRANTED**, to the extent that Respondent is ordered to forthwith re-evaluate Grievant and Mr. Kiger for the position of Assistant Principal, FJHS. Both Grievant and Mr. Kiger shall be permitted to present additional information in support of his application, but

only information dating back to the time of the original selection; no credential either has obtained since then may be considered. If Grievant is determined to be the most qualified candidate of the two, he is to be instated into the FJHS job effective school year 1990-91²⁰ and given backpay as if he had been the original successful applicant, less any appropriate offset.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: March 30, 1990

²⁰ Inasmuch as the 1989-90 term has nearly concluded, the undersigned is attempting to "provide such relief as is deemed fair and equitable" not only to Grievant and Respondent but also to the pupils of Wood County. See Code §18-29-5(b).