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

**GASTON CAPERTON**  
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**CHARLES B. WATKINS**

**v.**

**Docket No. 89-20-723**

**KANAWHA COUNTY  
BOARD OF EDUCATION**

**D E C I S I O N**

Grievant, Vice-Principal at DuPont High School, filed a grievance on August 31, 1989, alleging,

The job of principalship at DuPont High School was determined very unfairly based upon remarks made that were not true, were biased and did not reflect the true past record of my experience at DuPont High.

The position was actually an acting principalship. The remarks the grievance refers to were comments made by T. Joe Snodgrass, who had been Principal at DuPont High during the 1987-1988 and 1988-89 school years and then became an acting director of the "eastern area" of Kanawha County, at a meeting on August 22 of all three directors, all three assistant superintendents and Associate Superintendent John W. Lyons, where the the relative merits of the three candidates for the position were discussed. The meeting was informal and apparently without reference to any files. In the administrators' exchange of views Mr. Snodgrass, while stating that Grievant was a loyal employee, also expressed

that he was concerned about Grievant's initiative and personal growth. That day Mr. Lyons, acting on the consensus of the administrators, recommended to Superintendent Richard Trumble that candidate Jimmie Compton be appointed to the position. Grievant, upon being notified that his appointment was rejected, on August 23 met with Mr. Lyons, who let him know that the failure of his immediate supervisor to recommend him had been a primary reason why he had not been selected.

The September 6 Level I decision by Mr. Snodgrass was a notification that "Interviews will be conducted next week for the position of Acting Principal at DuPont High School." The candidates were interviewed and Mr. Compton was again selected. A Level II hearing was held on October 3 and an adverse decision issued November 17.<sup>1</sup> Consideration was waived at Level III and Grievant appealed to Level IV, where at hearing the parties agreed to rely on the evidence presented at Level II.<sup>2</sup>

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<sup>1</sup>At Level I the grievance was essentially granted, at least in part, since further administrative proceedings were instituted. Accordingly, upon Grievant's being denied the position again under those proceedings, filing and processing a new grievance would apparently have been the proper method to follow. However, since Respondent has accepted the adopted approach and imposing another would be burdensome at this stage, it is being allowed.

<sup>2</sup>While a December 27, 1989, appeal form was submitted, it made no statement of grievance and failed to indicate whether there had been any decisions issued at the lower levels. Such decisions were requested but were not sent  
(Footnote Continued)

Grievant argues that the August decision was improper for a variety of reasons. However, those contentions need not be addressed directly since the later decision, based on the interviews and perusal of the applicants' files, supplanted it. What occurred in August must be examined only for the purpose of determining whether Mr. Snodgrass's remarks tainted the later review of Grievant's qualifications and, if those remarks created such a flaw in the selection process, whether the flaw was so significant that, if the flaw had not been present, he reasonably might have been the successful candidate. See Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

While the grievance alleges that Mr. Snodgrass's remarks were false and biased, no evidence was submitted on those charges. Rather, Grievant complains on appeal that the comments of Mr. Snodgrass irreversibly flawed the selection process and that, because Mr. Snodgrass had failed to evaluate him at any time during the two years of his supervision of Grievant, such failure violated the requirement of West Virginia Board of Education Policy 5300(6) that each employee "know how well he is performing his job" and be given "the opportunity of improving his job performance."

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(Footnote Continued)

until January 22, 1990. The hearing was held February 28. Proposed findings of fact and conclusions of law were submitted by Grievant March 28; Respondent relied on the Level II decision as its submissions.

Mr. Snodgrass admitted he had failed to evaluate Grievant due to his own neglect and, as Respondent concedes, clearly Policy 5300(6) was violated.<sup>3</sup> It is Respondent's position that

[t]he grievant had no duty to cause his own evaluation to be completed by his supervisor. However the failure to evaluate, coupled with the grievant's own failure to take any action to remedy the situation, is not sufficient to compel his placement in the position.<sup>4</sup>

Respondent's concession that Grievant had no duty to assure that Mr. Snodgrass properly evaluate him is correct. Moreover, when an employee has not been evaluated he is entitled to accept that he is doing at least a satisfactory job and, in the absence of evaluations, public policy demands that all doubts be in the employee's favor and his work performance be considered exemplary. Additionally, where an employee has been positively evaluated, it is inappropriate for the supervisor nevertheless to consider his performance wanting, see Tracewell v. Wood Co. Bd. of Educ., Docket No. 90-54-019 (Mar. 30, 1990), or, upon the

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<sup>3</sup>Mr. Snodgrass's failure to inform Grievant by evaluation of his concerns is especially troubling since the perceived inadequacies may have been readily rectifiable. Mr. Snodgrass's complaint regarding Grievant's alleged lack of initiative was that Grievant did not do things on his own, i.e., that he had to tell him to everything, according to Mr. Lyons' testimony. Grievant may have thought that Mr. Snodgrass would have resented his taking on duties not specifically delegated to him; any failure of Grievant's may have been due to his misunderstanding of Mr. Snodgrass's style of administration.

<sup>4</sup>This is a conclusion of law of the Level II evaluator, relied on by Respondent. See n. 2.

employee's applying for another position, to advise the employer that his performance has serious shortfalls. Accordingly, since Grievant's missing evaluations must be considered as very favorable, it was inappropriate and therefore a flaw in the process for Mr. Snodgrass to denigrate his performance at the August meeting.

The remaining issue on the merits is what effect, if any, the flaw had on the final selection, after the September interviews.<sup>5</sup> The interviewers were four of the seven administrators who had been at the August meeting. While they interviewed each of the three original applicants, Grievant, Mr. Compton and Roger Kelley, the evidence presented related essentially to the relative merits of Grievant and Mr. Compton; limited information was presented on Mr. Kelley's credentials. Respondent submitted the "Applicant Profile[s]" of Grievant and Mr. Compton, which were provided the interview committee. They show a similar "GPA" for both applicants and that each had a "Master's + 30," secondary teaching certification, and administrative certification as a "Principal Jr/Sr 7-12." Grievant's

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<sup>5</sup>Mr. Lyons essentially denied that the interviews were conducted because of the grievance, stating that "I felt it would be best that we come back after we get school open, we had time to do it, take time to interview all three, and that is what we did." Tr. 67. He further stated that the August decision was in order to have someone in the position when school started, "[T]he first football game and everything was starting that week, and we knew that we would have time later on when school opened to come back and interview." Tr. 70.

profile shows that he has been employed by Respondent since 1968, and has been Vice-Principal at DuPont since 1978, prior to that having been a "teacher/coach," including three years in Ohio prior to his being hired by Respondent. Mr. Compton's date of hire was 1971, and his profile shows that he has been a Vice-Principal at South Charleston High School since 1988, having been a Vice-Principal at St. Albans Jr. High for the four years prior to that and a teacher there for the thirteen earliest years of his professional employment.

Mr. Lyons was the only witness on how the applicants were considered. He stated that "everything was reviewed," including their personnel files. When asked about the importance of the evaluations on file, he stated that, if an applicant had a bad evaluation, that would essentially eliminate him from consideration. Tr. 67. When asked about the fairness to Grievant resulting from there being no recent evaluation in his file, he replied that the interviewers did "have the word of the immediate supervisor, the person who had worked with him." Tr. 47.

On the interviews, he testified that each candidate was asked the same questions on school improvement, "general questions," and each was asked to do a school profile. Mr. Compton was first on the questions and answers, with Kelley "a close second," and Grievant third. The interviewers gave "consensus" scores on the questions of 21.25 out of a possible 25 for Mr. Compton and 16.5 for Grievant. The

"consensus" interview summary for Grievant was that he had the strength of "Problem Analysis" but the weaknesses of "Knowledge of the School Improvement Process[,]" Written Communication Skills[, and] Lack of depth in conflict resolution." Mr. Compton's listed strengths were "Knowledge of the School Improvement Process[,]" Knowledge of Effective Schools Research[,]" Conflict Resolution[, and] Problem Analysis[.]" Consensus was reached by the interviewers' comparing their findings. While Mr. Lyons discussed other relative credentials that were considered in August, no further evidence was presented on how the applicants were rated in September.

As indicated, there is little difference in the quality of Grievant's and Mr. Compton's education and professional credentials, as indicated by their profiles, and there was no evidence indicating that the interview committee did not consider those as similar. Grievant's administrative experience was more extensive and the fact that he had been the vice-principal at the same school as the principalship at issue arguably might have added to his qualifications. See Slone v. Putnam Co. Bd. of Educ., Docket No. 89-40-665 (Feb. 7, 1990); Ramsey v. Mineral Co. Bd. of Educ., Docket No. 28-88-234 (Aug. 29, 1989). The evaluations of Grievant on file from 1986 and 1987 were positive. The only substantial discrepancy was on how the applicants impressed the panel on interview. However, that discrepancy could have indeed been caused by the perception the interviewers had of

Grievant caused by Mr. Snodgrass's remarks since they were the same individuals who had heard those remarks in August. Grievant may very well be correct in asserting,

It is inconceivable that the persons conducting the candidate interviews could have done so with a fair and open mind. The circumstances are somewhat akin to a Judge telling a jury to disregard highly prejudicial statements which have already been made.

Even more importantly, and what alone carries Grievant's burden of establishing that if Mr. Snodgrass had not made the remarks he may have been selected was Mr. Lyons' testimony supporting that those remarks were considered by the interviewers in the place of Grievant's evaluations and that bad evaluations disqualified an applicant. Clearly Mr. Snodgrass's remarks were considered like a bad evaluation and Grievant had no chance at being selected. It therefore must be found that those remarks significantly flawed the final selection process and that Grievant is entitled to relief.

Grievant requests fashioning of equitable relief plus costs and attorney fees. Because the position was an acting position, since filled on a permanent basis by an individual not involved in this case,<sup>6</sup> a novel question of what relief should be granted arises.<sup>7</sup> The normal remedy when a

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<sup>6</sup>Respondent has notified the undersigned that Grievant has not protested that appointment.

<sup>7</sup>W.Va. Code §18-29-5(b) authorizes a hearing examiner to "provide such relief as is deemed fair and equitable in accordance with the provisions of this article[.]"



grievant has proven a flaw in the selection process but has not additionally shown that, as a matter of law, he was the most qualified applicant, is that the respondent board of education is ordered to properly review the credentials of the applicants, make a new, untainted determination, and, if the grievant is found to be the most qualified applicant upon that determination, to place him into the position and provide backpay. See, e.g., Tracewell; Bayza v. Marshall Co. Bd. of Educ., Docket No. 89-25-538 (Feb. 26, 1990). However, in this case such a further consideration would be a theoretical exercise since no instatement to the position could result from it. Moreover, while further interviews would be necessary, no cooperation could be expected of the other applicants because no extant position is involved; only the resolution of this grievance is at issue. Accordingly, the particular facts of this case require the fashioning of a remedy applicable to them only. The obviously equitable relief would be that Grievant be provided damages in the form of backpay, the difference between his salary during the time the position was filled by Mr. Compton and the salary he would have earned as Acting Principal of DuPont High School, and that relief is accordingly ordered.

Grievant's request for attorney fees must be denied because hearing examiners have no authority to grant such relief. See Smarr v. Wood Co. Bd. of Educ., Docket No. 54-86-062 (June 16, 1986); W.Va. Code §18A-2-11. Finally, under the grievance procedure any costs must be borne by the

party incurring such expenses. W.Va. Code §§18-29-6, 18-29-8.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. Grievant, Vice-Principal at DuPont High School, was not evaluated by his supervisor, T. Joe Snodgrass, during the school years 1987-1988 and 1988-1989.

2. Grievant applied for the position of Acting Principal of DuPont High School in August 1989.

3. At a meeting of administrators on August 22 Mr. Snodgrass expressed concerns of his about Grievant's initiative and personal growth, in particular indicating that Grievant had to be told what needed to be done before he would take action.

4. Another candidate, Jimmie Compton, was selected for the position upon the recommendation of those administrators.

5. Mr. Snodgrass's remarks had a negative impact on the selection process, being the primary or at least a primary reason why Grievant was not recommended.

6. A new selection process was initiated in September wherein the same three candidate were interviewed by a panel

composed of some of the administrators who had heard Mr. Snodgrass's remarks and made the initial recommendation.

7. The panel members considered the personnel files of the applicants, including their evaluations. They essentially considered the remarks of Mr. Snodgrass as his evaluation of Grievant.

#### Conclusions of Law

1. If a grievant establishes 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, he is entitled to relief. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

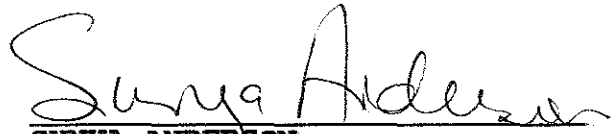
2. Where an employee has not been evaluated, public policy demands that his work performance be considered exemplary and it is thus improper for an agent of the employer to represent that performance as lacking. Moreover, by establishing that the individuals who made the September selection were they who had heard Mr. Snodgrass's remarks and relied on them in August and, most importantly, that the remarks were essentially considered by them as Mr. Snodgrass's evaluation of him, Grievant established such a significant flaw.

3. Because further consideration of the qualifications of the applicants could not result in any instatement to the position since it no longer exists and therefore

would be an exercise only to resolve this grievance, the particular facts of this case entitle Grievant to backpay.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to provide Grievant back pay, consistent with this decision.

Either party may appeal this decision to the Circuit Court of Kanawha 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

  
**SUNYA ANDERSON**  
**HEARING EXAMINER**

**Date: April 23, 1990**