WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARGARET FLEMING,

Complainant,

v. DOCKET NO. EA-172-77 Amended

MARION COUNTY BOARD OF EDUCATION,

Respondent.

FINAL DECISION AND ORDER

I. Proceedings

This case came on for hearing on April 15, 1981, at the Marion County Courthouse, Fairmont, West Virginia before a hearing panel composed of the undersigned Hearing Examiner and Hearing Commissioner Iris Bressler. The complainant appeared in person and by her attorney, Mr. Franklin D. Cleckley. The Human Rights Commission appeared by its staff attorney, Ms. Gail Ferguson. The respondent appeared by its counsel, Mr. Anderson.

On or about November 10, 1976 the complainant, Margaret Fleming, filed a complaint, duly verified, with the Human Rights Commission of the State of West Virginia, alleging that the respondent, Marion County Board of Education, had discriminated against her on the basis of her age in violation of West Virginia Code 5-11-9(a), in that said Board of Education had refused to promote her to the position of Principal at the Rivesville Elementary School while promoting a younger and less qualified person to that position.

On March 13, 1981, the Human Rights Commission, by Howard D. Kenney, its Executive Director, served written notice of hearing upon the parties pursuant to West Virginia Code 5-11-10. The said notice appointed a hearing panel composed of a Hearing Examiner, Robert F. Cohen Jr., and a Hearing Commissioner, Iris Bressler, and set the date of hearing as April 15, 1981.

On April 2, 1981, the respondent, by Howard Charlton, Acting Superintendent of the Marion County Board of Education, filed its answer, duly verified, to the amended complaint. The answer denied that Margaret Fleming was refused the promotion to Principal of Rivesville Elementary School because of her age, and further denied that the job was filled by a less qualified applicant.

On April 6, 1981, pursuant to Section 7.09 of the administrative regulations of the Human Rights Commission a pre-hearing conference was held before the undersigned Hearing Examiner, at which the complainant appeared by her attorney, Franklin D. Cleckley and the respondent appeared by the Prosecuting Attorney of Marion County, Charles E. Anderson. The matters determined at the pre-hearing conference were summarized by the Hearing Examiner in a Pre-Hearing Statement dated and served upon the parties on April 7, 1981. This Pre-Hearing Statement was read into the record at the hearing (Tr. 3-6).

After full consideration of the entire testimony, evidence, motions, briefs and arguments of counsel, and the Hearing Examiner's recommendation, the Commission makes the following Findings of Fact and Conclusions of Law.

II. Findings of Fact

1. Mrs. Margaret Fleming is a resident of Rivesville, Marion County, West Virginia. She was born May 26, 1914, and was 62 years old at the time of the events giving rise to this complaint. (Tr. 135, 171).

2. The respondent, Marion County Board of Education, is a political subdivision of the State of West Virginia. At the time of the events giving rise to this complaint, Mr. T. J. Pearse was Superintendent of Schools of Marion County and Mr. Orval Price was Assistant Superintendent in charge of

elementary education. Mr. Pearse died prior to the hearing in this case. At the time of the hearing, Mr. Howard Charlton was serving as Acting Superintendent. (Tr. 12, 13, 127, 184, 211-212, 227).

3. At the time of the events giving rise to this complaint, Mrs. Fleming had been employed by the Marion County Board of Education as a teacher for approximately 30 years. She began this work in 1944 at the Minister's Run Elementary School, where she taught about 36 students in grades 1 through 8, for two years. She was the only teacher at this school, and performed all administrative work connected with this school. From 1947 to 1953, Mrs. Fleming worked as a substitute teacher in the elementary schools of Marion County and, for a few months, in Monongalia County. She then taught for a year at the Grant Town Elementary School and a year at the Baxter Elementary School. From 1957 until her retirement, Mrs. Fleming taught at the Rivesville Elementary School. (Tr. 103-108).

4. In 1966, Mrs. Fleming was selected by the then-Superintendent of Schools, B.G. Pauley, to initiate a pilot reading program known as ITA (Initial Teaching Alphabet) in the Rivesville Elementary School. This program was successful under Mrs. Fleming's supervision, and she instructed teachers in other Marion County schools in how to implement it. The program was ultimately discontinued because of lack of teaching materials. (Tr. 15-16, 71, 77, 85-86, 99, 112-120, 161, 201-202).

5. For six summer terms, from 1966 to 1971, Mrs. Fleming worked in the Head Start program in Marion County. During three of those terms she served as head teacher, in which capacity she supervised other regular school teachers as well as support staff (janitors and cooks) and parent volunteers.

As head teacher, Mrs. Fleming had decision-making responsibility related to organizing the program and taking care of materials and supplies. She was responsible for a substantial amount of paperwork required by this federal program. Although there was a Head Start coordinator for the entire county, Mrs. Fleming did not have supervision on a daily basis. It is not clear to what extent Mrs. Fleming's work in the Head Start program was recorded in her personnel file. (Tr. 60-64, 67, 104, 109-112, 157-158, 172, 201, 215-216, 221-222, 228-229).

6. Mrs. Fleming received an A.B. degree from Fairmont State College in 1960, and a Master of Arts degree in Elementary Education from West Virginia University in 1961. She has completed 33 hours of courses beyond the Masters level, pertaining to school administration and principalship. In addition to her teaching certificates, Mrs. Fleming received a Professional Administrative Certificate for elementary and junior high school in August, 1973. She renewed this certificate twice, and had it in June, 1976. (Tr. 51, 121-125, 128, 173).

7. Mrs. Fleming's reputation as a teacher was excellent. She worked well with other teachers and also with parents in the community. She was respected by her students, parents, other teachers, and the school administration. (Tr. 15-16, 60-64, 66-68, 70-74, 76-79, 85, 87, 93-100, 202).

8. During her employment, Mrs. Fleming did not have experience as a teaching principal, or as an assistant principal or acting principal. A "teaching principal" is a person who has an assignment as a classroom teacher as well as the administrative position of principal in a school. The job entails administrative as well as teaching responsibilities. This position

exists in the elementary school division of the Marion County Schools but not in the secondary school division. The job of "assistant principal" which exists at Marion County high schools and one elementary school, is comparable to that of "teaching principal". The position of "acting principal" is created on an ad hoc basis when a regular principal retires or becomes unable to work during a school term. (Tr. 39-41, 83-84, 91, 171, 193, 199-200, 207-209, 214, 222-223).

9. The State of West Virginia requires that a supervising principal in any state public school system possess a Professional Administrative Certificate. The State does not require that a supervising principal have prior experience as a teaching principal, assistant principal or acting principal. (Tr. 19, 51, 78, 124, 195-196).

10. The Marion County Board of Education has a written policy of hiring the "best qualified person" for the position of supervising principal. Beyond that requirement, there are apparently no other written guidelines for hiring a principal. At the time of the events giving rise to this complaint, the Board of Education did not have a written procedure for the evaluation of its personnel. (Tr. 45, 195-196, 216, 217, 220).

11. One of the factors taken into consideration in the hiring of a supervising principal in Marion County is whether the applicant has experience as a teaching principal, assistant principal or acting principal. The purpose of this policy is to ensure that a supervising principal has knowledge of both teaching and administrative work. The kinds of administrative work performed by a teaching principal relate to lunch programs, Title I programs, special education programs, bookkeeping, and reports to be filed with county and

state offices. (Tr. 40, 45, 89, 192-193, 205, 208, 223-225).

12. Two disinterested witnesses who have been principals of Marion County elementary schools, Louise Arnett and Nick Fantasia, testified that their experience as teaching principals was very valuable to them when they became supervising principals. Mrs. Arnett also testified that the necessary things in being an effective principal include classroom experience and rapport with other teachers, parents and students. She believed that Mrs. Fleming possessed these qualities and would have been an effective principal. Mrs. Arnett described the administrative skills needed by a principal as including the ability to make decisions and stick by them, the ability to get people to work together and the willingness to undertake the responsibilities of being over a staff. Although she did not have personal knowledge of Mrs. Fleming's administrative ability, she felt that Mrs. Fleming would certainly be able to make decisions and abide by them, and had the necessary rapport with people. (Tr. 78-79, 83, 84-85, 86-87, 208).

13. The factor of experience as a teaching principal, assistant principal or acting principal as one of the considerations in hiring a supervisory principal is known to many people employed by the Marion County Board of Education. However, Mrs. Fleming did not become aware of this factor until 1976. (Tr. 42, 46, 89, 141-142, 164-165, 173-174, 192-193, 205).

14. There was considerable evidence presented as to seven supervising principals in the Marion County schools who allegedly lacked prior experience as a teaching principal, assistant principal or acting principal:

a. June Ball was supervising principal of Watson Elementary School in 1976. Mrs. Fleming testified that Ms. Ball did not have teaching principal

experience prior to becoming supervising principal. Neither Mr. Price nor Mr. Charlton knew whether or not Ms. Ball had prior experience as a teaching principal. (Tr. 48-49, 149, 232).

b. Paul Vincent was supervising principal at Fairview Elementary School in 1976. He did not have experience as a teaching principal in West Virginia prior to becoming supervising principal. However, he had served previously as a teaching assistant principal in Cincinnati, Ohio for several years. (Tr. 50, 148-149, 231).

c. Louise Arnett was supervising principal at East Dale School in 1976. Prior to that she had been transferred from Rivesville to Pleasant Valley School in January of some year to assist a supervising principal who was going to retire. When the supervising principal was absent, Mrs. Arnett served as acting principal. She performed this function, which she characterized as a "teaching principal" for a semester, and became the supervising principal at Pleasant Valley School upon the other principal's retirement. (Tr. 50-51, 80, 83-84, 148, 230-231).

d. Merle Lowe Moon was supervising principal at Barnes School in 1976. She did not have experience as a teaching principal prior to becoming supervising principal. Mr. Price thought that Ms. Moon had become an acting principal when someone retired in the middle of a year, and then had moved up to supervising principal. He said that this had happened once during his experience in the Marion County school system. Mr. Charlton testified that Ms. Moon was an acting principal at Pleasant Valley School for a half year and then was made supervising principal. (Tr. 49-50, 90-91, 148, 199-200, 230).

e. Janet Crescenzi was supervising principal at Jayenne School. Mrs. Fleming testified that Ms. Crescenzi did not have teaching principal experience prior to becoming a supervising principal. Mr. Charlton did not know whether or not Ms. Crescenzi had such experience. (Tr. 149, 231-232).

f. Mary Foreste was supervising principal at Rivesville Elementary School in 1976, when she retired. Mrs. Fleming testified that Ms. Foreste did not have teaching principal experience prior to becoming a supervising principal. Mr. Charlton did not know whether or not Ms. Foreste had such experience. (Tr. 149, 232).

g. William Ferguson was appointed as supervising principal at Rivesville High School in 1976. He was then about 32 years old. He had not previously served as a teaching principal, assistant principal or acting principal. (Tr. 43-44, 150, 225-226).

In general Mr. Price and Mr. Charlton did not dispute the complainant's contention that there were at least some supervising principals who had been appointed as such without prior experience as a teaching principal, assistant principal or acting principal (Tr. 46, 142, 224). Based on the evidence presented, this Hearing Examiner finds that June Ball, Janet Crescenzi, and Mary Foreste on the elementary school level, and William Ferguson on the secondary school level, were appointed by the respondent as supervising principals without prior experience as teaching principal, assistant principal or acting principal. Paul Vincent and Louise Arnett both had such experience before their appointments as supervising principal. As to Merle Lowe Moon, the question is rather difficult. The testimony regarding Ms. Moon's experience as acting principal is remarkably similar to Mrs. Arnett's history, particularly

in that Mr. Charlton identified the school where Ms. Moon was acting principal as Pleasant Valley. Moreover, Mr. Price testified that the phenomenon of a teacher becoming acting principal in the middle of a school year had occurred only once within his knowledge.

15. In 1976, the procedure used by the respondent in taking applications from persons to fill positions as elementary school principals was rather informal. Around the time a person seeking a principalship received his or her Professional Administrative Certificate, the person would notify the Superintendent or Assistant Superintendent in charge of elementary education, orally or in writing, that he or she sought a job as principal. (Tr. 19, 82-83, 125-126).

16. The Superintendent of Marion County Schools had sole discretion as to whom to recommend to the Marion County Board of Education to fill the position of principal for an elementary school. In exercising his discretion, the former Superintendent, Mr. Pearse, occasionally consulted with the Assistant Superintendent in charge of elementary education and with the Personnel Director. The Assistant Superintendent has had a greater role in the process in the last few years, since job vacancies have been posted since 1977 or 1978. (Tr. 14-15, 33, 39, 80-82, 191, 211-213, 220, 232-234).

17. No person past the age of 60 has been appointed to the position of school principal in Marion County within at least the last 25 years. (Tr. 155, 170, 185, 216, 227).

18. In 1972, Mrs. Fleming submitted forms to the Board of Education stating that she would receive her Professional Administrative Certificate in 1973 and that she wished to be considered for a principalship. She

indicated that she would like to be principal at Rivesville Elementary School because she knew the children and community there. (Tr. 125-126, 161-162).

19. After receiving the Professional Administrative Certificate, Mrs. Fleming met with Mr. Pearse in 1973 to make a verbal application for a principalship. Mr. Pearse told her that she did not have to do anything more to apply for the position and that her qualifications were sufficient. (Tr. 127-130, 162).

20. In the following years Mrs. Fleming continued to speak with school administrators regarding her desire to be a principal. On one occasion she asked Mr. Price about the principalship at Barnes School because she had heard that the principal there would be retiring. Mrs. Fleming was not offered this position, and it was given to another woman, who was younger than Mrs. Fleming. On another occasion, Mr. Pearse referred her to Mr. Price, who in turn referred her to John Tennant, who was then Personnel Director. Mrs. Fleming met with Mr. Tennant in 1975. Mr. Tennant said that Mrs. Fleming's qualifications were excellent, and that she did not need any recommendations, but that he was concerned about her age, "the years [she] had left to give". (Tr. 47-48, 131-133, 154-155, 163).

21. In June, 1976, Mrs. Fleming met with Mr. Price. She was accompanied by her sister Helen Carpenter, who is also a teacher. Mrs. Fleming told Mr. Price that Ms. Foreste, the supervising principal at Rivesville Elementary School was going to retire, and asked to be considered for that position. Mr. Price stated that she was qualified for the job. When asked by Mrs. Fleming whether there would be any bar to her receiving the position,

Mr. Price responded that her age might be a consideration. (Tr. 17-18, 25-26, 33-35, 42, 55-58, 134-138, 168-169, 188).[1]

22. Mrs. Fleming did everything necessary to apply for the position of principal at Rivesville Elementary School, and was fully qualified for this position. Among her qualifications was considerable administrative experience. (Tr. 19-20, 41, 86, 105-106, 109-120, 122-124, 127, 128, 132, 137, 141, 172-174).

23. The position of principal at Rivesville Elementary School became vacant in the latter part of July, 1976, when Ms. Foreste submitted a resignation letter to Mr. Pearse. On August 4, 1976, Mr. Pearse recommended that the Board of Education hire James Pulice as the principal of Rivesville Elementary School, and the Board hired Mr. Pulice. (Tr. 20-23, 26, 138, 184, 196-197, 213).

24. Mr. Pearse did not consult with Mr. Price in making his recommendation of Mr. Pulice to be principal of Rivesville Elementary School. There were no interviews conducted in connection with this hiring. Mr. Price never compared the credentials of Mrs. Fleming and Mr. Pulice, and did not know if Mr. Pearse made such a comparison. Mr. Price never talked with Mr. Pearse regarding why Mr. Pulice was hired for the position rather than Mrs. Fleming. Neither Mr. Price nor Mr. Charlton indicated any knowledge why Mrs. Fleming

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[1]There is some dispute in the evidence concerning this statement by Mr. Price. At one point in his testimony, he stated that his only reference to age at this meeting was to Ms. Foreste's age (Tr. 188). However, elsewhere in his testimony, he stated that he did refer to age in discussing the need for continuity of the elementary school program and his concern about hiring "a principal who only had a year or two to serve" (Tr. 35). It is to be noted that the respondent's Proposed Finding of Fact No. 5 acknowledges that Mr. Price did say Mrs. Fleming's age might be a consideration. This Proposed Finding of Fact has been incorporated directly in this decision.

was not hired as principal of Rivesville Elementary School in 1976. (Tr. 22, 32-33, 36-39, 41, 139, 165, 189-191, 196-197, 220).

25. After discovering that she had not been hired as principal of Rivesville Elementary School, Mrs. Fleming sent a letter of inquiry to Mr. Pearse on August 18, 1976. By letter of August 30, 1976, Mr. Pearse referred Mrs. Fleming to Mr. Price. Mrs. Fleming then wrote to Mr. Price on September 2, 1976. On September 7, 1976, Mr. Price wrote Mrs. Fleming, inviting her to meet with him. A meeting between Mr. Price and Mrs. Fleming took place approximately on September 14, 1976, at which time Mr. Price said that Mrs. Fleming had no inadequacies but that Mr. Pulice had been awarded the principalship at Rivesville Elementary School because he had prior experience as a teaching principal. Mr. Price did not remember this meeting. Subsequent to this meeting, Mrs. Fleming did not again contact any school administrators regarding being hired for a principalship. (Complainant's Exhibits Nos. 1-4; Tr. 26-31, 139-143, 164-167, 188).

26. At the time he was hired as principal of Rivesville Elementary School, Mr. Pulice held a Masters degree in School Administration from West Virginia University and a Professional Administrative Certificate. He had worked as a teacher in Marion County schools for about three or four years. During the 1975-76 school year, Mr. Pulice had been the teaching principal at Baxter Elementary School and before that he had taught at Dunbar School, where the principal used him as an assistant to help with administrative tasks. He had not taught at Rivesville Elementary School. In 1976, Mr. Pulice was about 25 years old. (Tr. 22-25, 41, 44, 156-157, 191).

27. After the meeting with Mr. Price in June, 1976, Mrs. Fleming became upset, nervous and depressed. She felt humiliated at being told she was "too old". Subsequently, she lost patience when around her family. She had crying spells of an hour's duration approximately once a week and wanted to go out driving about once a week. She asserted that her work suffered. She did not see a doctor about these problems, although her husband urged her to do so. (Tr. 151-153, 178-183).

28. After the summer of 1976, Mrs. Fleming continued to teach at Rivesville Elementary School for three more years. She retired on June 20, 1979 at age 65. She has not worked since this time. (Tr. 103, 142-143, 151-152, 167).

29. Mrs. Fleming testified that in 1976 she intended to continue working until she was 70 years old, which was the mandatory retirement age. However, according to Mr. Price and Mr. Charlton, in 1976 the mandatory retirement age was 65. Subsequently, the law was changed to permit a teacher to continue working until age 70. This change became effective on January 1, 1979. (Tr. 150-151, 167, 189, 197-199, 229).

III. Conclusions of Law

1. The complaint in this matter was properly and regularly filed by Margaret Fleming, in accordance with the procedure required by the West Virginia Human Rights Act. West Virginia Code 5-11-10.

2. The respondent, the Marion County Board of Education, at all times referred to herein, is and has been an employer within the meaning of Section 9(a) of the West Virginia Human Rights Act. West Virginia Code 5-11-3(d) and 5-11-9(a).

3. At all times referred to herein, the complainant, Margaret Fleming, is and has been a citizen and resident of the State of West Virginia. West Virginia Code 5-11-2 and 5-11-3(a).

4. At all times referred to herein, the West Virginia Human Rights Commission has had and still has jurisdiction over the parties and the subject matter of this proceeding.

5. There are no decisions by the Supreme Court of Appeals of West Virginia on the issue of employment discrimination based on age. However, the age discrimination provisions of federal and West Virginia law are substantially identical.[2] Thus, the federal decisions regarding age discrimination in employment, while not controlling, are relevant and are cited as helpful precedents.

6. To prevail, it is necessary that the complainant prove by a preponderance of the evidence that age was a determining factor in respondent's decision not to appoint her as principal of Rivesville Elementary School. Age need not be the only motivating factor in the respondent's decision, but on the other hand age must be proven to be more than merely "a" factor in the decision. The courts which have addressed this issue have held that plaintiffs alleging age discrimination must establish that age was "a producing cause" or "a significant factor" in the employer's action, in the sense that "but for" the employer's intent to discriminate based on age,

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[2]Section 4(a)(1) of the federal Age Discrimination in Employment Act, 29 U.S.C. §623(a)(1) provides that "It shall be unlawful for an employer--to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;". Compare West Virginia Code 5-11-9(a) and 5-11-3(h).

the adverse action against the employee would not have occurred. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1111-1112 (4th Cir. 1981); Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980); Smith v. University of North Carolina, 632 F.2d 316, 337 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979); Laugesen v. Anaconda Company, 510 F.2d 307, 315-317 (6th Cir. 1975), cert. denied, 422 U.S. 1045 (1975).

Since direct evidence of discrimination is likely to be unavailable to the complainant, and since the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant, the courts have found that in an age discrimination case the complainant is entitled to prove his or her case inferentially, according to the standards set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Loeb v. Textron,Inc., supra, 600 F.2d at 1014-1019; Smith v. University of North Carolina, supra. Under the McDonnell Douglas formulation, the complainant establishes a prima facie case if he or she proves (a) that the complainant belongs to the protected class, (b) that the complainant applied and was qualified for a job for which the employer was seeking applicants, (c) that despite his qualifications, the complainant was rejected for the job, and (d) that after the complainant's rejection, the job remained open and the employer continued to seek applications from persons of the complainant's qualifications. The requirements of a McDonnell Douglas prima facie case are not inflexible, but must be appropriately tailored to the factual situation. Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 101 S.Ct. 1089 (1981); Loeb v. Textron,Inc., supra, 600 F.2d at 1016-1017.

If the complainant establishes a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination "by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. [citation omitted] It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Texas Department of Community Affairs v. Burdine, supra, 101 S.Ct. at 1094. The employer need not prove the legitimate, nondiscriminatory reason, but must only articulate it. This is solely a burden of production. Loeb v. Textron, Inc., supra, 600 F.2d at 1011-1012.

If the employer articulates a legitimate nondiscriminatory reason for his action, the complainant may still prevail either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is a pretext and unworthy of credence. Thus, the ultimate burden of proof rests on the complainant. The standard is preponderance of the evidence. McDonnell Douglas v. Green, supra, 411 U.S. at 804, 93 S.Ct. at 1825; Texas Department of Community Affairs v. Burdine, supra, 101 S.Ct. at 1094-1095; Loeb v. Textron,Inc., supra, 600 F.2d at 1012, 1014.

The courts have also recognized that the McDonnell Douglas formulation will not neatly apply to every case of alleged employment discrimination. Three types of cases have been described: a "pure" or "classic" McDonnell Douglas case, where proof of discrimination is entirely by inference; a case where the McDonnell Douglas issues are not involved because the complainant

is relying entirely on direct evidence of discriminatory motive; and a case where the McDonnell Douglas elements represent a significant part of the complainant's total evidence but where there is also other evidence, direct or circumstantial, that supports an inference of discrimination. Loeb v. Textron, Inc., supra, 600 F.2d at 1017-1018; Spagnuolo v. Whirlpool Corp., supra, 641 F.2d at 1113; Smith v. University of North Carolina, supra, 632 F.2d at 335.

7. The complainant herein has established a prima facie case that the respondent discriminated against her on the basis of her age. In terms of the types of discrimination cases, this is a case which involves both McDonnell Douglas elements and also two other lines of evidence of discriminatory intent. This finding of a prima facie case is based on the following reasoning:

a) The complainant has established a prima facie case in accordance with the McDonnell Douglas requirements. In particular,

(1) Mrs. Fleming was 62 years old in 1976, at the time when she was rejected for the position of principal of Rivesville Elementary School. She was thus within the protected class of persons between the ages of 40 and 65 years old. West Virginia Code 5-11-3(q).

(2) Mrs. Fleming applied and was qualified for the position of principal of Rivesville Elementary School, a job which became vacant in July, 1976.

(3) Mrs. Fleming was rejected for the position of principal of Rivesville Elementary School despite her qualifications.

(4) Mr. Pulice, who was about 25 years old, was appointed as principal of Rivesville Elementary School on August 4, 1976.[3]

b) The complainant has also offered direct evidence of discriminatory intent on the respondent's part. Mrs. Fleming had actively sought a principalship beginning in 1973. When she met with the respondent's Personnel Director, Mr. Tennant, in 1975, Mr. Tennant said that although her qualifications were excellent, he was concerned about her age. Mrs. Fleming's testimony as to this conversation was uncontradicted. Then, in June, 1976, Mrs. Fleming met with Mr. Price, the Assistant Superintendent for elementary education. Mr. Price told her that although she was qualified to be principal of Rivesville Elementary School, her age might be a bar. There is no reason to believe that Mr. Tennant and Mr. Price, as agents of the respondent Marion County Board of Education, were not articulating the respondent's actual policy in these conversations. This direct evidence of discriminatory intent has considerable probative value in this case.[4]

c) The complainant has offered further circumstantial evidence of age discrimination in the fact that no person past the age of 60 has been appointed to the position of school principal in Marion County within at

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[3]Obviously, when an employer actually hires a person other than the complainant for a vacant position, the McDonnell Douglas requirement of the position remaining open and the employer seeking other applicants has been satisfied.

[4]In Hodgson v. First Federal Savings and Loan Association, 455 F.2d 818 (5th Cir. 1972), the Court found that a notation of "too old for teller" by the employer's personnel officer on the application of a 47-year-old woman for the job of bank teller, combined with a similar notation on another application and the fact that of 35 tellers and teller trainees hired in a 13-month period, none were over 40 and all were in their teens and twenties, constituted a "strong prima facie case" of age discrimination. 455 F.2d at 821-823.

least the last 25 years. This fact was admitted by the respondent's witnesses, and no explanation for it was offered.[5]

The respondent asserts that the complainant has failed to establish a prima facie case. This argument is largely based on the facts that the late Mr. Pearse was solely responsible for the decision to appoint Mr. Pulice rather than Mrs. Fleming to the position of principal of Rivesville Elementary School, that Mr. Price had no imput into this hiring decision, and that Mr. Tennant was not the Personnel Director in August, 1976. However, the fact that Mr. Pearse was unavailable to testify due to his untimely death cannot be a reason to bar the complainant's case. The respondent did not produce any witnesses who were members of the Marion County Board of Education in August, 1976 to testify as to how the decision to appoint Mr. Pulice was made. Nor did the respondent produce any notes or memoranda from Mr. Pearse's files. Moreover, the explicit purpose underlying the McDonnell Douglas approach is to permit the complainant to make out a prima facie case so as to raise an inference of discrimination. "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949-2950 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866 (1977). The prima facie case under McDonnell Douglas is not conclusive, but

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[5]The fact that the respondent appointed several people who were over 40 years old to principalships (Tr. 170) does not lessen the inference of discrimination here. Since the Age Discrimination in Employment Act was created to protect older workers, discrimination within the 40 to 65 year old group is also prohibited. 29 CFR 860.91. Polstorff v. Fletcher, 452 F. Supp. 17, 24 (N.D. Ala. 1978).

rather serves the purpose of requiring the employer to articulate a legitimate, nondiscriminatory reason for the decision in question. In this case, Mrs. Fleming certainly has carried her burden of establishing a prima facie case.

8. The respondent has succeeded in articulating a legitimate, nondiscriminatory reason for its failure to hire Mrs. Fleming as principal of Rivesville Elementary School. The reason articulated by the respondent is that Mrs. Fleming lacked experience as a teaching principal, a qualification possessed by Mr. Pulice.[6]

The complainant argues that the respondent has failed to produce evidence of a legitimate, nondiscriminatory reason for its action within the requirements set forth in Texas Department of Community Affairs v. Burdine, supra, 101 S.Ct. at 1094. It is quite true that an employer must offer actual evidence of a legitimate, nondiscriminatory reason, and cannot meet its burden of production merely by an answer to the complaint or by argument of counsel. Burdine, supra, 101 S.Ct. at 1094 n.9. Although neither Mr. Price nor Mr. Charlton testified at the hearing that Mrs. Fleming's lack of experience as a teaching principal was the reason why Mr. Pearse did not recommend her for the principalship, Mrs. Fleming herself testified that when she met with

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[6]There was also testimony by Mr. Price and Mr. Charlton regarding their concern in 1976 regarding elementary school principals whose jobs were going to be eliminated because of the consolidation of schools. However, Mr. Pulice was not principal at a school which was going to be eliminated due to consolidation, and there was no clear evidence presented that because of Mr. Pulice's transfer from Baxter Elementary School to Rivesville Elementary School any principal's job was saved from elimination. (Tr. 20-22, 47, 52-53, 191-192, 194, 214-215, 218-219). In any event, the respondent has not presented this issue as a legitimate, nondiscriminatory reason in its Proposed Findings of Fact and Conclusions of Law.

Mr. Price in September, 1976, he told her that Mr. Pulice was appointed principal of Rivesville Elementary School because he had experience as a teaching principal (Tr. 141-142, 143). This evidence, although modest at best and presented by the complainant herself, is sufficient as an articulation of the respondent's legitimate, nondiscriminatory reason. Moreover, the explanation is "legally sufficient to justify a judgment for the [respondent]", if not found to be a pretext. Burdine, supra, 101 S.Ct. at 1094.[7]

9. The factor of teaching principal experience, as a legitimate, nondiscriminatory reason for the hiring of Mr. Pulice rather than Mrs. Fleming, is found to be a pretext within the meaning of the McDonnell Douglas formulation of issues. This conclusion is based on the following considerations:

a. Although Mrs. Fleming spoke with school administrators regarding her desire to become a principal on numerous occassions beginning in 1973, the factor of teaching principal experience was not expressed to her until 1976. This testimony is uncontradicted by the respondent. If experience as a teaching principal really was viewed by the respondent as essential for the position of supervising principal, then one would expect that Mrs. Fleming would have told this at some point before 1976. Instead, she

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[7]In its Proposed Findings of Fact and Conclusions of Law (page 5), the respondent states that the Human Rights Commission's file contains a letter dated December 1, 1976 which was sent by Mr. Pearse to Mr. Marshall P. Moss, the Commission's Compliance Director. This letter, according to the respondent, "clearly states Mr. Pearse's position in reference to the hiring of Mr. Pulice over Mrs. Fleming was based on her not having a teaching principal background". However, this letter was not offered into evidence by the respondent at the hearing. Moreover, it is questionable whether Mr. Pearse's letter to Mr. Moss would constitute admissible evidence.

consistently told that her qualifications were sufficient or excellent for a principalship.

b. At the hearing, Mr. Charlton was specifically asked why Mr. Pulice was appointed as principal of Rivesville Elementary School. He did not say that it was because of Mr. Pulice's experience as a teaching principal, but rather referred to the need to place principals of elementary schools whose jobs were going to be eliminated due to consolidation (see footnote 6, supra).[8] This testimony, in response to the direct question regarding Mr. Pearse's reasons, is totally inconsistent with the respondent's proferred legitimate, nondiscriminatory reason for not hiring Mrs. Fleming. As such, it must be found to significantly undercut the credibility of that reason.

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[8]In relevant part, the testimony was:

> Q. In fact, you don't know or have any information whatsoever about what caused Mr. Pearse to arrive at the decision to recommend Mr. Pulice for that job?
>
> A. Yes, I do, sir.
>
> Q. Let me hear you.
>
> A. I've already stated.
>
> Q. Let's hear it again.
>
> A. Mr. Pearse felt he had the obligation to transfer the personnel from the different schools so that the principals that he had hired at that time would not have to be demoted at the time that the consolidation took place. (Tr. 218).

c. The evidence establishes that at least three persons (June Ball, Janet Crescenzi and Mary Foreste) and possibly a fourth (Merle Lowe Moon) were appointed as supervising principals of elementary schools in Marion County without prior experience as a teaching principal, assistant principal or acting principal. Additionally, William Ferguson was appointed as a supervising principal of a secondary school without such prior experience. When asked about the appointment of Mr. Ferguson as a supervising principal, Mr. Charlton spoke of the flexibility needed in the program and the qualities of Mr. Ferguson. (Tr. 223-226). One assumes that similar considerations operated with regard to the appointments of Ms. Ball, Ms. Crescenzi and Ms. Foreste as supervising principals. With this much flexibility in an unwritten policy, Mrs. Fleming's lack of teaching principal experience cannot be accepted as the actual reason (or at least the full reason) for her not being appointed as principal of Rivesville Elementary School in August, 1976.

d. The purpose of the respondent's teaching principal policy is to ensure that a supervising principal has knowledge of both teaching and administrative work. Mrs. Fleming, in fact, had extensive administrative experience during her 30 years as a teacher prior to 1976. She taught for two years at a one-room school where she performed all of the administrative work connected with the school. Mr. Price himself acknowledged that this work was essentially equivalent to teaching principal experience. (Tr. 41). Mrs. Fleming also performed administrative work in connection with implementing the ITA reading program. Mrs. Arnett confirmed that Mrs. Fleming's organizing of the ITA reading program required administrative skills. (Tr. 86). Most importantly, Mrs. Fleming served as head teacher in the Head Start program for three summers. In this capacity, she supervised other teachers, support

staff and parent volunteers, had decision-making responsibility and was responsible for a substantial amount of paperwork connected with the program.[9] In official terms, Mrs. Fleming was never assigned a position called "teaching principal". But on an actual basis, her administrative experience was as great as that of Mr. Pulice.

e. Mr. Price testified that by being a teaching principal, one gains administrative experience relating to lunch programs, Title I programs, special education programs, bookkeeping, and reports to be filed with county and state offices. (Tr. 40, 193). Mr. Fantasia testified that a teaching principal learns how to fix up attendance reports and handle the federal programs of milk, etc. (Tr. 208). The evidence establishes that Mrs. Fleming's experience included involvement with these aspects of school administration, or with equivalent aspects of school administration.

f. Mr. Price indicated that a supervising principal has to be able to deal with and initiate programs, to handle parents, and to handle conflicts between teachers, staff members, teachers and cooks, teachers and each other, and teachers and parents. (Tr. 190). Mr. Charlton stated that the qualities of a supervising principal include capabilities of curriculum construction, capabilities of organization and administration of schools, capabilities of leadership and capabilities of being able to do the job which the administration thinks is best for the school. (Tr. 226).

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[9]At various times during the hearing in this case, the respondent intimated that Mrs. Fleming's experience in the Head Start program would not have been included in her file with the Board of Education. (Tr. 158, 215-216). However, Mr. Charlton could not testify that information regarding Mrs. Fleming's experience in the Head Start program was not in her file. (Tr. 221-222).

Mrs. Arnett stated that a supervising principal should have classroom experience, rapport with other teachers, parents and students, the ability to make decisions and stick by them, the ability to get people to work together, and the willingness to undertake the responsiblities of being over a staff. (Tr. 78-79, 86-87). No witness testified, or even intimated, that Mrs. Fleming lacked any of these qualities and abilities. Mrs. Fleming's reputation was as an excellent teacher who earned the love of her students and the respect of parents in the community, as demonstrated by the testimony of former student Bradley A. Crouser and parents Margarette Wright, Galen Dwight Kennedy, Paul Wayne Davis and Gary Lee Poling. Mrs. Arnett, a principal herself, explicitly stated that Mrs. Fleming demonstrated that she fully possessed all of the qualities, abilities and experience articulated at the hearing as being essential to an effective principal.

10. The preponderance of the evidence demonstates that age was a determining factor in the respondent's decision not to appoint the complainant as principal of Rivesville Elementary School in August, 1976. This conclusion is based upon the McDonnell Douglas analysis stated herein, as well as the direct evidence of discriminatory intent and the fact that no person past the age of 60 has been appointed principal of a Marion County school within at least the last 25 years. Hence, it is found that the respondent unlawfully discriminated against the complainant on the basis of her age

within the meaning of West Virginia Code 5-11-9(a).[10]

11. Since it has been found that the respondent unlawfully discriminated against the complainant because of her age, Mrs. Fleming is entitled to monetary relief. West Virginia Code 5-11-10. No evidence as to the sum of money to which the complainant would be entitled if she prevailed was submitted at the hearing. It was agreed that such information would be tendered in the complainant's Proposed Findings of Fact and Conclusions of Law and that the respondent would be entitled to submit information in opposition in its Proposed Findings of Fact and Conclusions of Law. (Tr. 236, 240).

In her Proposed Findings of Fact and Conclusions of Law, Mrs. Fleming requested the following relief: (a) damages in the amount of $11,688.00, representing the difference between what her salary as a principal would have been during the 1976-77, 1977-78 and 1978-79 school years and what her salary as a teacher actually was during those years; (b) damages in the amount of $46,451.00, representing what her salary as a principal would have been during the 1979-80 and 1980-81 school years, assuming that she had continued her employment with the respondent during those years; (c) damages

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[10]There were indications at the hearing that the respondent's unwillingness to hire an older person as a principal might have been grounded in concern for the continuity of school programs. (Tr. 35, 57, 169). Such a concern might be considered as a bona fide occupational qualification so as to justify age discrimination. However, to establish the bona fide occupational qualification exception, an employer must show (a) that the bona fide occupational qualification which it invokes is reasonably necessary to the essence of its business, and (b) that it has reasonable cause for believing that all, or substantially all, persons within the class would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis. Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976); Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978). The respondent in this case has offered no such proof, and hence a bona fide occupational qualification exception cannot be considered.

in the amount of $779.24, representing the money deducted from her retirement fund for insurance which she would not have had to pay if she had been appointed as principal in 1976; (d) general compensatory damages in the amount of $10,000.00 for pain, suffering, trauma, anxiety and frustration; and (e) an attorney fee of $1,250.00 based on a total of 25 hours of time at an hourly rate of $50.00[11] The respondent's Proposed Findings of Fact and Conclusions of Law did not include any information or argument on the issue of damages. Accordingly, it must be assumed in the absence of any information from the respondent, that the information submitted on behalf of the complainant was accurate. Hence, this information will be accepted as the basis for the complainant's relief in this case, except where such relief is found to be unjustified.

12. The Commission concludes that the complainant is entitled to the following relief in this case:

a. Damages in the amount of $11,688.00, which represents the difference between what Mrs. Fleming's salary as a principal would have been during the 1976-77, 1977-78 and 1978 school years and what her salary as a teacher actually was during those years, are awarded. Mrs. Fleming continued her employment with the respondent through these three years, and retired on June 20, 1979. The amount of salary and other compensation which a complainant would have received if he or she had not been refused employment, minus amounts actually received in other employment, is an accepted measure of damages in an age discrimination case. Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974); Laugesen v. Anaconda Company, supra, 510 F.2d at

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[11]The complainant has not requested relief in the form of reinstatement.

317-318. Her degree classification and years of experience for this period would be M.A. +30 with 19 years experience. (Complainant's proposed Damages, Par. 3). There exists a multiplier called a "Principals Index", which is used to calculate the difference between a principal's salary and a teacher's salary. For the 1976-77 and 1977-78 school years the Principals Index was 1.18. For the 1978-79 school years the Principals Index was 1.21. (Complainant's proposed Damages, Par. 4). Principals are paid for 10.5 months of employment in a school year while teachers are paid for 10 months of employment. (Complainant's proposed Damages, Par. 5). The following chart reflects the difference between what Mrs. Fleming would have been paid as a principal and what she was paid as a teacher during these three years:

Year	10 Months Teacher's Salary	10.5 Months Principal's Salary[12]	Difference
1976-77	$13,993	$17,337	$3,344
1977-78	15,460	19,155	3,695
1978-79	17,188	21,837	4,649
TOTAL:	$46,641	$58,329	$11,688

Back pay in the amount of $11,688.00 in this case is clearly authorized by law. West Virginia Code 5-11-10.

b. Although requested by the complainant, no damages are awarded for the 1979-80 and 1980-81 school years. In analogous discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., the courts have held that a plaintiff is not entitled to back pay damages for periods of time that he voluntarily removes himself from the workforce.

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[12]In Paragraph 6 of the complainant's proposed Damages, a similar chart heads this column as "10 Months Principals Salary". Since principals are paid for 10.5 months of employment, and since the complainant's proposed figures work out when calculated on the basis of 10.5 months, it is assumed that the heading of this column as "10 Months Principals Salary" was a typographical error.

Taylor v. Safeway Stores, 524 F.2d 263 (10th Cir. 1975.)[13] Mrs. Fleming's claim for damages after her retirement in 1979 is predicated on her testimony that in 1976 she intended to continue working until age 70. (Tr. 150-151, 167). This testimony as to Mrs. Fleming's state of mind was not corroborated by any witness. The complainant's witnesses at the hearing included her husband, Alvis Fleming, and her sister, Helen Theresa Carpenter. Another witness was Galen Dwight Kennedy, the President of the PTA at Rivesville Elementary School since 1975. (Tr. 70). Mrs. Fleming had discussed her application for the principalship with Mr. Kennedy after she was denied the position. (Tr. 169-170). None of these witnesses indicated that Mrs. Fleming's retirement was due to the rejection of her application for a principalship. Moreover, Mrs. Fleming continued to teach for another three years after the respondent's discriminatory decision. She retired at age 65, a normal (if not mandatory) retirement age. There was no indication whatsoever that the respondent in any way forced her to retire in 1979. Hence, there is insufficient basis for an award of back pay damages for the time period after Mrs. Fleming's retirement, due to lack of proof that the discriminatory acts of 1976 caused the complainant's retirement in 1979.[14]

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[13]Taylor v. Safeway Stores, supra, held that a discriminitee is not entitled to back pay damages for the period of time after his unlawful discharge when he went to college. No cases have been found dealing with the issue of damages for the period of time after a person voluntarily retires.

[14]Additionally, the complainant was under a duty to mitigate the damages by what she could have earned with reasonable diligence. Williams v. Albemarle City Board of Education, 485 F.2d 232 (4th Cir. 1973), on reh., 508 F.2d 1242 (4th Cir. 1974). If back pay damages for the 1979-80 and 1980-81 school years were proper in this case, then they would have to be reduced by the amount of money that the complainant would have earned as a teacher had she continued in her employment during those two years. Such figures were not tendered by the complainant.

c. Damages in the amount of $779.24, which was deducted from Mrs. Fleming's retirement fund for insurance which she would not have had to pay if she had been appointed as principal, are awarded. This was a fringe benefit for principals which was not available to teachers. Fringe benefits are recognized as an element of back pay. Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 263 (5th Cir. 1974); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3rd Cir. 1976), cert. denied, 429 U.S. 1041 (1977). The fringe benefit in question here would appear to be in the nature of an increased retirement fund, which type of benefit should be included in a back pay award. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 234-235 (N.D. Ga. 1971).

d. General and incidental damages of $3,000.00 for pain, suffering, trauma, anxiety and frustration, are awarded. Such damages were specifically authorized by the West Virginia Supreme Court of Appeals in State Human Relations Commission v. Pearlman Realty Agency, ___ W. Va. ___, 211 S.E.2d 349 (1975).[15] An award of general damages is appropriate in this case on the basis of the testimony of Mrs. Fleming and her husband that after the meeting

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[15]Many courts, including the Court of Appeals for the Fourth Circuit, have held that damages for pain and suffering are not permissible under the federal Age Discrimination in Employment Act. Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979); Walker v. Pettit Construction Co., 605 F.2d 128 (4th Cir. 1979), on reh., 611 F.2d 950. These holdings are based on the language of federal statute, and are not applicable to a case arising under West Virginia state law. Moreover, the federal Age Discrimination in Employment Act does specifically provide for an award of liquidated damages in addition to back pay, 29 U.S.C. §626(b), and this kind of relief has not been recognized in the West Virginia state law relating to employment discrimination.

with Mr. Price in June, 1976, the complainant became upset, nervous and depressed. She felt humiliated at being told that her age might bar her from becoming a principal. Subsequently, she lost patience around her family and had crying spells of an hour's duration once a week. During her testimony, Mrs. Fleming became visibly upset in the courtroom, at the point that she was describing her feelings. The federal courts have recognized that older workers who are the victims of age discrimination do not suffer in an economic sense alone: "The [Age Discrimination in Employment] Act was intended to alleviate the serious economic and psychological suffering of people between the ages of 40 and 65 caused by widespread job discrimination against them." Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D. N.Y. 1973), aff'd, 489 F.2d 752 (2nd Cir. 1974) (Emphasis added). However, the full amount of general damages proposed by the complainant is not accepted. Mrs. Fleming's psychological and emotional problems were not so severe as to require medical attention. Nor was there any indication that she used any medication to treat the condition. Moreover, although Mrs. Fleming testified that she "couldn't do [her] work" (Tr. 153), this testimony was uncorroborated by those who knew her in her employment. Galen Dwight Kennedy, for example, as PTA President worked with Mrs. Fleming for one year before her rejection for the principalship and for three years after that event. Yet Mr. Kennedy did not indicate that Mrs. Fleming's work as a teacher suffered in her last three years of employment. It is found, therefore, that an appropriate award of general and incidental damages in this case is $3,000.00.

e. An attorney fee in the amount of $1,250.00 is awarded, as requested by the complainant. An award of attorney fees is authorized by Section 9.02(b)(1) of the administrative regulations of the West Virginia Human Rights Commission. The complainant's attorney, Franklin D. Cleckley, represented that he performed 25 hours of work in this case. Although no specific break-down of these hours was tendered, it is found that the representation of 25 hours of work is fully credible. The record shows that Mr. Cleckley assisted Mrs. Fleming in filing her complaint; on April 6, 1981 Mr. Cleckley attended the pre-hearing conference; on April 15, 1981 Mr. Cleckley represented Mrs. Fleming at the hearing, which lasted for approximately six hours; after the hearing Mr. Cleckley submitted Proposed Findings of Fact and Conclusions of Law, a total of 26 pages supplemented by a letter. It is assumed that Mr. Cleckley's work in this case also involved assisting Mrs. Fleming while the Commission investigated her complaint and preparation for the hearing. Mr. Cleckley has been involved in this case for over five years since the filing of the complaint. As to the proposed hourly rate of $50.00 this is found to be entirely reasonable. Mr. Cleckley is known to this Commission as a Professor of Law at the West Virginia University School of Law, who has an extensive trial practice and who specializes in the law of employment discrimination. Mr. Cleckley's conduct of the hearing and Proposed Findings of Fact and Conclusions of Law were of excellent quality.

IV. Order

Pursuant to the above findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The respondent, Marion County Board of Education, its officers, employees and agents, are hereby ORDERED to cease and desist from engaging in any employment practices which discriminate against persons on account of their age.

2. The respondent is hereby ORDERED to pay to the complainant, Margaret Fleming, the sum of $15,467.24.

3. The respondent is hereby ORDERED to pay to the Complainant's attorney, Franklin D. Cleckley, the sum of $1,250.00.

Respectfully submitted,

Apr 16-82

Jeffrey O. McGeary
Chairperson