BILLY J. MELTON, .

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Grievant, .

.

v. . Docket No. 93-20-487

.

WEST VIRGINIA DEPARTMENT .

OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Billy J. Melton (Grievant) challenging his termination by the Kanawha County Board of Education (KCBE). Grievant was terminated from his position as a prevocational teacher at KCBE's Carver Career and Technical Education Center (Carver) on November 18, 1993, for failure to maintain a valid teaching certificate as required by W. Va. Code § 18A-3-2. This grievance was submitted directly to Level IV on November 24, 1993, in accordance with W. Va. Code § 18A-2-8.

A Level IV hearing commenced in this Board's office in Charleston, West Virginia, on January 11, 1994. During that hearing, KCBE took the position that W. Va. Code § 18A-3-2 effectively prohibits a board of education from continuing to employ a teacher who is no longer in possession of a valid teaching certificate for a particular specialization or grade level asrequired by the West Virginia Department of Education (DOE). See Rogers v. Kanawha County Bd. of Educ., Docket No. 93-20-447 (Mar. 23, 1994). Thus, KCBE was compelled to terminate Grievant in order to comply with DOE regulations. In response, Grievant argued, among other things, that DOE's certification requirements, as applied to the peculiar facts and circumstances of Grievant's employment situation, represented an abuse of discretion. Accordingly, the undersigned administrative law judge issued an Order dated January 11, 1994, joining DOE as an essential party in accordance with Rule 4.11 of the Procedural

Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 (1989).

On February 7, 1994, a second evidentiary hearing was conducted with DOE and KCBE participating as Respondents. After several witnesses testified at that hearing, including Dr. Henry Marockie, State Superintendent of Schools, the hearing was adjourned and this matter was held in abeyance, affording Grievant opportunity to appeal his earlier denial of certification to DOE's Certification Appeals Board (CAB). Subsequently, a CAB hearing was conducted on August 22, 1994, and a decision adverse to Grievant was rendered by Hearing Examiner David Stewart on September 12, 1994. Grievant appealed that decision to the Circuit Court of Kanawha County (Case No. 94-AA-248) on October 12, 1994.

On March 27, 1995, Grievant's counsel wrote to advise that the "accreditation portion" of this matter was now in Circuit Court and requested that the evidentiary record in this matter be completed. Accordingly, a third hearing was conducted on June 23, 1995. KCBE did not appear at that hearing. However, on July 5, 1995, the undersigned received a "Settlement Agreement and Release of All Claims" entered into between Grievant and KCBE on October 27, 1994. Upon receipt of the settlement agreement, DOE requested a ruling on the Motion to Dismiss it had submitted at the February 7, 1994, hearing, contending that it was not an "employer" within the meaning of W. Va. Code § 18-29-2(f). (See footnote 1)

On July 24, 1995, the undersigned issued an Order denying Respondent's Motion to Dismiss and dismissing KCBE as a party to this matter, consistent with the October 1994 settlement agreement. That Order is incorporated and attached hereto as Appendix A. Thereafter, Respondent DOE and Grievant filed timely written arguments and this case became mature for decision on August 22, 1995.

DISCUSSION

Despite the rather extensive and complex procedural history of this matter, as recited above, the sole remaining issue in this controversy is relatively narrow. Grievant contends that the State Superintendent of Schools, Dr. Marockie, acted arbitrarily and capriciously in August 1993 when he failed to exercise hisauthority under W. Va. Code § 18A-3-3 to grant an exception to policy and allow Grievant to teach for KCBE at Carver during the 1993-94 school year. On August 18, 1995, Grievant's counsel wrote to Dr. Marockie seeking his intervention as follows:

Dear Dr. Marockie,

Bill Melton has been teaching at George Washington Carver since 1989. He comes out of an educational background with a masters degree in industrial type work and also he has had many years of practical experience in automotives and industrial work. He was assigned to teach at risk students. His job was to undertake, not only teach those students, but to motivate them to get back into the main stream educational work. He has been extremely successful and has received commendations in his efficiency reports since he has been at Carver. In other words, he has been an exceptional teacher. He enjoys teaching and wants to teach throughout the end of his career. He is now 62 years old and would hope to teach until he is at least 65. A couple of years ago there apparently was a change in classification. He was told of this but was never given a letter fully explaining it. He was told he would have to get some credits at Marshall University the summer before last. He inquired into that and was told that the courses were not being offered. He then went back to teaching. He also had some serious health problems, but he went back to teaching on a teaching permit. He has been told that a permit such as that can only be given on a one-time one-year basis.

This year he has been told by the County Board that unless he enrolls at Marshall University for these courses he would not be permitted to teach. Upon further investigation with the personnel at the State Board, he is now told that he cannot teach this year even if he does take the courses at Marshall University because it is impossible to extend the permit except beyond a one-year basis. We learned this week before last.

Both Mr. Melton and I are totally perplexed. He and I asked the question of the people who have changed this classification or at least have tried to implement it, "What was the basis of the change in classification?" We were told basically that it was a change in number and that the real basis of the change in terms of how it would affect Mr. Melton was not known. In other words, it is our understanding that somebody simply changeclassifications and there was no real change in substance, as it affects Mr. Melton.

Mr. Melton was asked to devise the program which he was to teach when he went to George Washington Carver. He did so. The program they are using is the one he has himself provided for them. He and I both asked whether the change in classification meant that there would be any change in his teaching duties or in the substance of the course he was to teach. We were advised that there would be none. In other words he is going to teach the same course which he has taught all these years and which he himself in effect devised and wrote for the system. Some three years ago the North Central Evaluation team went over his course in detail and approved it.

Now, it would appear, that he is going to be unable to teach and will have to take a year off and comply with the certification requirements before he can come back and teach. All this, without any real explanation as to why this is necessary, and an admission that it is not necessary on the basis of any change in substance as to what he is doing. He was also advised that these courses are only offered at Marshall University which is a 120 mile round trip for him each day plus the expenditure of, we believe, around $1,000.00 tuition type fees.

Mr. Melton is left no alternative but to appeal this matter because he simply cannot understand why he has not been fully advised so all these matters could have been taken care of in a way which would have permitted him to have taught school this year.

When we met the state officials the other day they indicated that there would have been no opportunity to get this matter on the appeals docket which sat a few days after our meeting. Of course Mr. Melton would not have known he needed to appeal because he was working on the assumption the [sic] he could have gone to Marshall this fall and continued teaching, as he had been advised by the county officials.

We were advised that the next appeal docket will be in November.

I respectfully request that you take one of the following actions with respect to Mr. Melton. First would you please make a ruling that he can continue to teach pending the outcome of the appeal process. Our reason for this is that if he is teaching and wins the appeal he will simply continue to teach. On the other hand, if he is not permitted to teach and wins the appealthen he would be entitle to back wages and the system would have to find some place in which to place him in the middle of the year. All of this would be to the disadvantage of the system. Mr. Melton does not want to sit at home and appeal the case and then take money for not working. What he wants to do is work for the good of his students as he has always done and to be in the teaching process at the time all of this is going on. Secondly, in the alternative, would you please make a ruling that he may be permitted to teach and to in the meantime take the educational program which is going on at Marshall University. Also, he is aware of the difficulty of finding someone to replace him efficiently at this late date. He feels the students will suffer.

Mr. Melton has until Friday, August 20, 1993, to enroll at Marshall, if you permit him to do so.

In view of all the above would you please take some action to keep this man

> **in the school system so that he might be of benefit to the students and to the system and have an opportunity to conclude his career without having to take a year off and spend a considerable amount of money so that he might be eligible to teach again.**
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> **Mr. Melton and I both will be very delighted if you would choose to interview him personally so that you might judge for yourself his motivation and his good intentions. We would be happy to come to your office any time for that purpose and I believe that you will be very impressed [sic] Mr. Melton's attitude and the serious manner in which he takes his obligations as a teacher.**

G Ex X.

By letter dated August 31, 1993, Dr. Marockie responded, noting that no further extension of Grievant's permit was permitted and, without completing the required course work, Grievant was not eligible for certification. This response is entirely consistent with DOE Policy 5202 § 7A(5), 126 C.S.R. 136, the Legislative Rule promulgated in compliance with W. Va. Code § 18A-3-2a to govern issuance of professional teaching certificates.

In addition, Respondent notes that DOE similarly issued Policy 5203, 126 C.S.R. 155, creating a Certification Appeals Board andotherwise establishing a specific appeal procedure for individuals who disagree with local board or DOE determinations regarding certification matters. Grievant has pursued this avenue for redress to the Circuit Court level.

As of the time Grievant sought Dr. Marockie's intervention, Grievant claimed to have received misleading and confusing information from officials with KCBE and Marshall University that substantially contributed to his failure to obtain the certification required to teach the industrial occupations course at Carver. Although Grievant developed the course of instruction he was teaching at Carver, prior to the beginning of the 1991-92 school year KCBE determined that this course was not properly "coded" with DOE and reported a change in the curriculum code (or "classification" as referred to in the letter above) to DOE. As a direct result of this coding change, Grievant was required by DOE regulations to obtain certification in "pre-vocational exploration," a certification he did not previously possess.

Thus, by the time Grievant sought relief from Dr. Marockie, he was already in a situation where he had failed to obtain the required certification, albeit due to mitigating and

extenuating circumstances. Moreover, the teaching permit he had been issued in accordance with DOE Policy 5202 had expired, and his one-time extension authorized by Policy 5202 would likewise expire before the beginning of the school year. Under these circumstances, Dr. Marockie's decision to rely on the § 18-29-1 education grievance procedure to resolve Grievant's dispute with KCBE and the Policy5203 certification appeals process to adjudicate the merits of his request for a waiver of the one-time permit extension provision in Policy 5202 represents a reasonable exercise of his discretionary authority to act on these matters. See Walker v. Kanawha County Bd. of Educ., Docket No. 20-86-157-1 (July 7, 1986). While the Superintendent could have elected to exercise his discretion more generously, Grievant has failed to demonstrate that his decision constituted an abuse of discretion.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by KCBE from 1974 to 1982 and from 1987 to 1993 as a vocational teacher at Carver.

2. Prior to the 1991-92 school year, KCBE changed the code on the industrial exploration course Grievant taught and notified DOE of this change. G Ex 1.

3. As a result of the "coding" change described in Finding of Fact Number Two, Grievant was required to obtain "prevocational industrial" certification.

4. Grievant was issued a permit to teach prevocational industrial courses for the 1991-92 school year.

5. KCBE requested and obtained a one-time extension of the permit described in Finding of Fact Number Four for the 1992-93 school year, based upon Grievant's inability to complete the course work required to obtain certification.

6. As of August 1993, Grievant had not completed the course work required to obtain prevocational industrial certification and he was informed that he was not eligible for further extension of his teaching permit under DOE policy.

7. On August 18, 1993, Grievant, through counsel, wrote to Dr. Henry Marockie, State Superintendent of Schools, requesting Dr. Marockie's intervention in granting either a waiver

of or exception to the certification requirement or permit extension rule.

8. Dr. Marockie declined to grant the relief requested, responding to Grievant in writing on August 31, 1993.

9. On October 18, 1993, KCBE terminated Grievant's employment based upon his failure to maintain a valid teaching certificate as required by W. Va. Code § 18A-3-2.

CONCLUSIONS OF LAW

1. In a grievance which is not disciplinary in nature, the grievant has the burden of proving each allegation in his complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.17 (1989); Mahon v. Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995); Mohn v. Kanawha County Bd. of Educ., Docket No. 93-20-500 (June 27, 1994).

2. Grievant failed to establish that the State Superintendent of Schools either acted in an arbitrary and capricious manner, or abused his substantial discretion, in failing or refusing to grant a waiver or policy exception allowing Grievant to teach withoutcompleting the college course work required for appropriate certification, or to override a DOE policy limiting extensions of teaching permits to only one year. See Walker v. Kanawha County Bd. of Educ., Docket No. 20-86-157-1 (July 7, 1986).

Accordingly, the grievance is DENIED.

Any 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: November 30, 1995

Footnote: 1Respondent renewed this motion in its post-hearing submission, citing additional authorities, none of which the undersigned finds persuasive. Because DOE promulgates rules directly influencing the employment relationship between Grievant and KCBE, joining DOE as an essential party effectuates the purposes of the education grievance procedure described in W. Va. Code § 18-29-1. See Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979); Walker v. Kanawha County Bd. of Educ., Docket No. 20-86-157-1 (July 7, 1986).