ELIZABETH HUNTER,

Grievant,

v. **Docket No. 99-13-229**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Elizabeth Hunter (Grievant), a teacher formerly employed by Respondent Greenbrier County Board of Education (GCBE) at its Rupert Elementary-Junior High School (Rupert), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that GCBE improperly dismissed her.

A hearing, pursuant to W. Va. Code §18A-2-8, was conducted before GCBE on December 9, 1998. Grievant was represented at this hearing by Gary Archer of the West Virginia Education Association. The grievance was denied at Level I, on January 7, 1999, by Rupert Principal Sandy Aldridge (Aldridge); and at Level II, on January 26, 1999, by Dwight D. Livesay. After some confusion and miscommunication, the parties apparently waived participation at Level III, pursuant to W. Va. Code §18-29-4(c).

A Level IV Hearing was held before the undersigned administrative law judge on August 4, 1999. Grievant was represented at this hearing by Walt Auvil, Esq., and GCBE was represented by Erwin L. Conrad, Esq. This matter became mature for decision with the receipt of the parties' written proposals on September 7, 1999.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is a teacher formerly employed by GCBE at Rupert.

2. Grievant held a Professional Teaching Certificate (certificate) with the specialization “Multi-Subjects” and the grade assignment “K-8,” and bearing an expiration date of June 30, 1998.

3. On January 20, 1998, GCBE's Director of Personnel, Ellsworth Buck (Buck), sent Grievant a memo, reminding her that her certificate was about to expire; that she needed six hours of renewal credit before the 1998 - 1999 school year; and that certification is an individual matter.

4. To renew her certificate, Grievant was to have earned six semester hours of appropriate academic credit during the certificate's five-year term. Grievant earned five hours of such credit.

5. Grievant's certificate expired on June 30, 1998.

6. During late August and early September, 1998, Grievant observed and reported to GCBE that a teaching aide had grabbed and shaken a student, causing bruises. Grievant's report was substantiated by the W. Va. Department of Health and Human Resources, and the aide was charged with misdemeanor battery.

7. By letter dated November 12, 1998, the W. Va. Department of Education informed Grievant that her application for certificate renewal was denied, as she did not have six semester hours of appropriate academic credit.

8. By letter dated November 19, 1998, GCBE Superintendent Stephen L. Baldwin (Baldwin) informed Grievant that he had been informed by the W. Va. Departmentof Education that she had not met licensure requirements; that it is illegal for GCBE to employ someone who is not qualified to function in her position; that having a non-certified employee in a position requiring certification would result in loss of full accreditation; that the annual audit would reveal that GCBE was illegally paying a non-certified employee; that he had, during his tenure as Superintendent, accepted the resignation of one employee and terminated two others due to lack of certification; and that he would recommend her termination to GCBE.

9. By letter dated December 9, 1998, GCBE informed Grievant that her employment was terminated, based on her failure to maintain licensure. (See footnote 1)

10. By letter dated January 19, 1999, the W. Va. Department of Education informed Buck that GCBE could not pay Grievant as she was ineligible for licensure, and noted that her contract required that she maintain licensure as a condition of her employment.

11. W. Va. Department of Education Policy 5202, § 126-136-6.1.1 states that it is the teacher's responsibility to maintain valid licensure and be familiar with renewal requirements.

12. Grievant has since been recertified.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by apreponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31,

1992). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant states: "I feel my termination of Dec. 9, 1998 was unfair. It would be advantageous for me to return to my students upon verification of my recertification." Grievant argued at Level IV that her claim that her dismissal was "unfair" also included a claim of retaliation, based upon her reporting of child abuse by a co-worker, the incident referred to in Finding of Fact six.

Because this grievance involves the most serious of disciplinary actions, dismissal, and because Grievant, by appealing directly to Level IV under W. Va. Code § 18A-2-8, has not had the opportunity to develop her case at Levels I, II, and III, the undersigned concludes that she should be permitted to argue, at Level IV, that part of the unfairness she perceives is based upon retaliation or reprisal.

"Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injuryitself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed her protected activity within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va. 52, 365 S.E.2d 251 (1986), Ruby v. Ins. Comm'n. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

By reporting alleged child abuse, Grievant arguably engaged in activity protected by W. Va. Code § 6C-1-1 et seq., our state's "whistleblower law." W. Va. Code § 6C-1-3(a) provides as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

This Grievance Board has jurisdiction to adjudicate an employee's claims of retaliation in violation of this statute. Beheler v. Logan County Bd. of Educ., Docket No. 98- 23-276 (Dec. 12, 1998). GCBE was clearly aware of her protected activity, as Baldwin was subpoenaed to testify at the aide's criminal trial, and because the incident generated considerable local publicity. However, as will be noted below, GCBE provided a valid, non-retaliatory reason for its decision to dismiss Grievant: the fact that she was not licensed to perform her teaching duties. GCBE also argued persuasively that Grievant's failure to renew her teaching license occurred approximately two months before she reported the alleged abuse. Given these facts, the undersigned cannot conclude that a retaliatory motivation can be inferred from Grievant's adverse treatment. Frank's Shoe Store, supra.

Although GCBE did not make reference to W. Va. Code §§18A-2-7 and 18A-2-8 as the basis for Grievant's dismissal, it appears to be a termination for "incompetency" within the meaning of W. Va. Code §18A-2-8. Rogers v. Kanawha County Bd. of Educ., Docket No. 93-20-447 (Mar. 23, 1994). "Incompetency" is defined to include "lack of ability, legal qualification, or fitness to discharge the required duty." Black's Law Dictionary 390 (Abridged 5th Ed. 1983) (emphasis added). It should be noted that no evidence whatsoever was introduced to show that Grievant was not a “competent” teacher in the practical sense of that word, only that she lacked the licensure, required by law, to continue serving in her teaching position.

W. Va. Code § 18A-3-2 requires that “[a]ny professional educator. . . who is employed within the public school system of the state shall hold a valid teaching certificate licensing him or her to teach in the specifications and grade levels as shown on the certificate[.]” W. Va. Department of Education Policy 5202, § 126-136-6.1.1 states that it is the teacher's responsibility to maintain valid licensure and be familiar with renewal requirements.

___At the Level IV hearing in this grievance, Grievant argued that, because she reportedthe incident referred to in Finding of Fact six, GCBE did not make the same accommodations for her lack of licensure that it did for other teachers. Grievant's argument amounts to an allegation of discrimination. (See footnote 2)

W. Va. Code § 18-29-2(m) defines discrimination as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a prima facie case of discrimination, a

grievant must prove:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. Of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Id.

Grievant has failed to establish a prima facie case of discrimination. Grievant proved that she was similarly situated, in a pertinent way, to one or more other teachers who hadlost their licensure. However, she failed to show that she was, to her detriment, treated by her employer in a manner that these other teachers were not.

GCBE presented the credible testimony of Buck and Baldwin to show that other teachers whose licensure lapsed either resigned or were dismissed. Grievant was unable to point to any GCBE teachers who were permitted to teach without a valid teaching certificate.

Grievant did show that GCBE permitted several teachers to teach outside of their areas of specialization or grade assignment. However, in each instance, GCBE was able to clearly distinguish Grievant, who was not licensed to teach at all, from, for example, a teacher who was licensed, but teaching temporarily outside her specialization while seeking the appropriate endorsement for her license, or a teacher who was licensed, but teaching temporarily outside her specialization, because she was the most qualified applicant for a position, and W. Va. Department of Education policy permitted an exception under the circumstances.

Joyce O'Dell, Coordinator of Certification for the W. Va. Department of Education, testified that the only way Grievant could have remained as a teacher would have been for her position to be posted, for her to apply, and for no licensed teacher to apply. However, Buck and Baldwin testified that teaching licenses with the specialization “Multi-Subjects” and the grade assignment “K-8” are the

most common licenses possessed by applicants in Greenbrier County, and that position postings requiring this license always draw many licensed applicants.

This Grievance Board has consistently held that, to qualify for a classroom teachingposition vacancy in West Virginia, a person must hold the appropriate certification. McComas v. Lincoln County Bd. of Educ., Docket No. 98-22-246 (Oct. 7, 1998). See Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991); Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990); Ashworth v. Putnam County Bd. of Educ., 89-40-560 (Oct. 31, 1989).

It is clear from the record in this grievance that, by statute, GCBE cannot employ an unlicensed teacher under the circumstances present in this grievance; that it would have been illegal for GCBE to continue to pay Grievant; (See footnote 3) that Grievant's contract required that she maintain licensure as a condition of her employment; and that maintaining that licensure was Grievant's responsibility. Accordingly, Grievant has failed to establish a case of discrimination. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Grievant was dismissed for "incompetency" within the meaning of W. Va. Code §18A-2-8. Rogers v. Kanawha County Bd. of Educ., Docket No. 93-20-447 (Mar. 23,1994). "Incompetency" is defined to include "lack of ability, legal qualification, or fitness to discharge the required duty." Black's Law Dictionary 390 (Abridged 5th Ed. 1983).

3. To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed her protected activity within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va.

52, 365 S.E.2d 251 (1986), Ruby v. Ins. Comm'n. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

4. Grievant failed to establish a prima facie case of retaliation.

5. W. Va. Code § 18A-3-2 requires that any professional educator employed within the public school system of the state shall hold a valid teaching certificate licensing him or her to teach in the specifications and grade levels as shown on the certificate.

6. To qualify for a classroom teaching position vacancy in West Virginia, a person must hold the appropriate certification. McComas v. Lincoln County Bd. of Educ., Docket No. 98-22-246 (Oct. 7, 1998). See Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991); Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990); Ashworth v. Putnam County Bd. of Educ., 89-40-560 (Oct. 31, 1989).

7. W. Va. Department of Education Policy 5202, § 126-136-6.1.1 states that it is the teacher's responsibility to maintain valid licensure and be familiar with renewal requirements. 8. To establish a prima facie case of discrimination, Grievant must show:(a) that she is similarly situated, in a pertinent way, to one or more other employee(s); (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and, (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing. Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96- T&R-215 (Sept. 24, 1996).

9. Grievant failed to establish a prima facie case of discrimination.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated October 14, 1999

Footnote: 1

It appears that GCBE was out of compliance with W. Va. Code § 18A-3-2, which requires that any professional educator employed within the public school system of the state shall hold a valid teaching certificate, for approximately one month.

Footnote: 2 *Grievant also argued that GCBE could have granted her a leave of absence until she renewed her certificate. However, documentary evidence and testimony adduced at Level IV established that granting a leave of absence was discretionary with GCBE; that such leave must be requested in writing and was not; that such leave may only be granted to an employee; and that Grievant was no longer an employee of GCBE when she made her oral request for a leave of absence.*

Footnote: 3 *Respondent pointed out that retaining unlicensed teachers on the payroll contributed to a state takeover of the Logan County School system.*