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MARSHA ROTH

v.

Docket No. 35-89-025

OHIO COUNTY BOARD OF EDUCATION

DECISION

Grievant Marsha Roth, professionally employed by respondent Ohio County Board of Education, has been assigned to teach Learning Disabled classes at Ritchie Elementary School since September 1988. On January 19, 1989 she advanced a grievance to level four¹ in which she stated:

Nature of grievance: Misrepresentation of [OCBE's] posting on June 10, 1987 for the position of Preschool Handicapped Teacher. My transfer from Learning Disabilities Teacher to that of Preschool Handicapped Teacher, of which I was told to be certified by Mr. James Freeland, and later told by Dr. Barbara Fassig

¹The grievance was filed at level one November 9, 1988; a nineteen-page addendum supplemented the filing, basically grievant's account of events leading to the grievance, some documentation and a breakdown of monetary damages she stated were due her. The level one evaluator was without authority to rule and the matter proceeded to a level two hearing November 21, 1988. Adverse decisions followed at levels two and three December 8, 1988, and January 9, 1989, respectively. The level two transcript and exhibits were made part of the record herein.

[that] I would be required to go on permit towards the required 24 hours of EISE certification causing me an increased financial responsibility to obtain the required certification.

Relief Sought: Reimbursement for additional expenses incurred. Increased financial obligations, loss of wages/Reimbursement for expenses in addition to a stipend payment comparable to stipend received by students enrolled in [West Virginia University's] EISE [Early Intervention Special Education] program.

Clarification, in writing, as to the responsibility of Ohio County School employees involved in the grievance, as to their obligations and responsibilities as defined by state and federal guidelines. (Mr. James Freeland, Dr. Larry Jones, Mrs. Patricia Soloman, Miss Kathy Finsley)

A hearing convened April 5, 1989, but after some introductory remarks was continued to May 25, 1989, by agreement of the parties, to allow time for negotiations in an effort to resolve the grievance. Those negotiations were not successful, and prior to the May 25 rescheduled level four hearing, grievant's representative wrote to OCBE's counsel that grievant wished to retain her originally-stated relief and to add a request for reinstatement to her former position. Following the May 25 hearing, briefing was completed August 30, 1989.

A brief summary of the grievant's credentials and employment history is in order. She testified that as of Spring 1987 she had completed a Masters plus thirty-six hours coursework. Her West Virginia teaching license reveals that she held dual specializations/certifications for K-12 Mental Retardation (MR), which includes Trainable Mentally Impaired (TMI) and Educable Mentally Impaired (EMI), and K-12 Special Learning Disabilities (LD). For at least the 1986-87 school year, she was assigned to teach LD/EMI at Elm Grove Elementary School under the

principalship of Dr. Barbara Fassig, who had begun her tenure at the Elm Grove school that year. Mr. James Freeland was OCBE's Special Education Coordinator at that time. Grievant bid on and accepted a teaching position for a newly-instituted preschool handicapped program at the Elm Grove school beginning the 1987-88 school year. Due to certification requirements revealed to grievant on March 15, 1988, and her subsequent inability to meet them, she could not be retained in the preschool handicapped position at Elm Grove. Consequently, in September 1988 she had to resign the preschool position and transfer to Ritchie Elementary School as a teacher for K-6 LD/EMI students, remaining there throughout the rest of the 1988-89 school year.

Grievant protests the circumstances surrounding her acceptance of the preschool position and her loss of the original Elm Grove LD/EMI job. She argues that she was damaged in this situation as a direct result of misrepresentations and other error on the part of OCBE's administrators. Grievant contends that OCBE must make her whole by reinstating her to her original position and reimbursing her for expenses incurred. OCBE "does not necessarily concede that the grievant is entitled to any relief under the facts and circumstances in this case," OCBE's Proposals, p. 1, but initially asserts that if there is any culpable party it would be the State Department of Education (WVDE) due to its indecision in establishing certification requirements for the preschool handicap program statewide. It further argues that grievant failed to timely file this grievance on March 15, 1988, thus barring her from relief; that she

could not be retained in the preschool program because of her failure to obtain the required certification, and state law requires that a teacher hold valid certifications or licenses in her subject areas; and that at no time did any of OCBE's agents make any guarantees about grievant's continuing certifications in the preschool handicapped position.

Accounts of how grievant secured the preschool teaching position were not seriously disputed. In the spring of 1987 grievant, who was approximately four or five months pregnant, was approached by Mr. Freeland and Dr. Fassig about whether she would be interested in the yet-to-be-initiated preschool program at the Elm Grove school. According to grievant, she was told the program's enrollment would be approximately eight children. While expressing interest in the position, grievant also voiced concerns about her present certifications and made quite clear that she was not interested in further schooling at that time. According to the grievant, T2.8, she reminded them of her pregnancy because "they would probably want someone else for the job. And they said no. They assured me that things could be worked out and I was the person for this job."

Grievant also stated that Mr. Freeland assured her that he would check with officials in Charleston about her certification concerns and, furthermore, that the job description would be tailor-made for her, T4.7. Grievant revealed that, due to the categorical placement of students in the program, Mr. Freeland and Dr. Fassig only voiced concerns that she did not hold the Behavioral Disordered (BD) certification because BD students

might eventually become part of the group to be served requiring grievant's certification in that area. She said she told them that she would be willing, at some point in the future, to take the few additional hours she needed for her already-begun BD certification program.²

Mr. Freeland's direct testimony at level two about certification matters was somewhat uncertain.

Q: Did you check on certification requirements with [WVDE] subsequent to [grievant] being appointed to [the preschool] position?

A: Yes, I did, and there would have been one or two people that I spoke with -- one of two.

At one point in time Ghaski Lee was working with the preschool program, but she was also involved in monitoring and receiving complaints, and we may have spoken to her about certification in addition to other things.

Also, towards -- more recent in terms of -- for this program, more closely to the beginning of this program, Pam George came aboard and I believe that I spoke with her regarding certification.

One of those two persons, though, I contacted regarding certification.

Q: What was the nature of their response?

A: It was my understanding that if we provided a categorical program that the person needed to be certified in the areas that they would be serving, in other words, the students falling under specific categories and if that person was certified in those areas.

T2.16-17. When asked by OCBE's counsel at level four about his interaction with WVDE while the preschool program was in its

²Grievant conceded under cross-examination that Mr. Freeland told her there would be no guarantees regarding future certification, but that he had done so in the context that the program's future was dependent on year-to-year funding and could not be guaranteed.

genesis period, Mr. Freeland was equally nonspecific as to when or with whom his contacts were made, see T4.63-68, but he said he thought he spoke with Pam George. According to Ms. George, Coordinator, Preschool Handicapped, Office of Special Education, WVDE, Mr. Freeland did not inquire of her about categorical program requirements for preschool handicapped programs for the 1987-88 school year, as she so related in a February 10, 1989, letter to grievant in response to a query about the matter. Gr. Ex.6, 5/25/89.

The distinction is important. A categorical program required that the teacher be certified in each and every identifiable handicap, physical or otherwise, for the target group the program would serve. A non-categorical structure would require that the teacher be certified in preschool handicapped. In any event, Mr. Freeland determined that the program's requirements could be met if structured and staffed on a categorical rather than a non-categorical basis.³ Thereafter, on June 10, 1987, OCBE posted the following position:

³A field-of-study leading to preschool handicapped certification, not previously available in the State's college system, was emerging as a special education program at West Virginia University. See Gr. Exs. 3-4, 5/25/89, and T4.13-19.

TITLE: Preschool Handicapped Teacher

QUALIFICATIONS:⁴ Valid [WV] Teaching Certificate with
special education endorsements in
Learning Disabilities (LD)
Educable Mentally Impaired (EMI)
Trainable Mentally Impaired (TMI)
Orthopedically Impaired (OP) or
Physically Handicapped (PI)
or certified in Preschool Handicapped
or eligible for a permit with an
appropriate program[m]atic level
endorsement and agrees to pursue full
certification.

T2.16-17.

Grievant was the sole applicant⁵ for the posted position and, after interview with Dr. Fassig, a formality according to Fassig, T2.24, she was duly recommended and employed by OCBE for the position. At the time grievant was employed for the pre-school handicapped program, which eventually served twenty-one three-, four- and five-year-old children, she did not hold

⁴At the level four hearing, Mr. Freeland admitted to seeking grievant out for the position, but it was only because he knew she was a good teacher. He also admitted that he had devised the written qualifications for the position, but stated he did so from his "professional judgment" about the anticipated disabilities of the students who were to be served in the new program.

In fact, the qualifications he listed were what he believed to be grievant's certifications since grievant related to Dr. Fassig that she believed she had the orthopedic certification, see n.11.

⁵According to the grievant, while matters were still in the planning stage, Mr. Freeland asked her to assist him with preparing requisitions for needed materials and equipment for the program and she complied. During her 1987 summer work with the extended year program, grievant continued the project to secure materials for the yet-to-come preschool handicapped program.

preschool certification for teaching children younger than kindergarten in any discipline nor did she hold either the OP or PI specializations for any age group, according to her teaching credentials.

On August 27, 1987, grievant officially began her tenure in her new assignment but subsequently took medical leave from mid-September until early November.⁶ Mr. Freeland resigned from the coordinator's position and assumed grievant's former LD position at the Elm Grove school, he apparently being the only applicant for the position, T4.123.⁷ On November 1, 1987, OCBE hired Kathy Finsley as Special Education Coordinator.

⁶Grievant conducted home visits with her students for two weeks. On September 14 she began classes but her child was born ten days early on September 15, 1987, and she requested a maternity leave through October 27. During her maternity leave, the grievant was contacted at home by Dr. Fassig and asked to participate in the selection of the program's aide. Grievant conducted the interview in her home. She also made several visits to area schools in conjunction with the program's needs. On October 27 she suffered a health problem requiring hospitalization until November 3, but still attended a meeting on the 5th about a prospective student for the program. Grievant returned to work on November 6, 1987. Gr. Level One filing Addendum.

⁷Mr. Freeland began his duties in the EMI/LD position at Elm Grove in August 1987 when grievant began her duties in the preschool handicapped position. During cross-examination Mr. Freeland said his decision to go back to the classroom was a personal career decision and if grievant's position had not become available, "I probably would have gone to another school." T4.90.

Inexplicably, Mr. Freeland was apparently not interested in the preschool handicapped teaching position, although he was not fully certified at the time he was employed for grievant's former EMI/LD position and was required to go on permit in LD in order to qualify for the position, T4.122.

Toward the third week in November, the grievant spoke with Ms. Finsley about her concerns of the high preschool enrollment, twenty-one students. Ms. Finsley, in turn, inquired about grievant's certification for the preschool position. In response, grievant told her the information relayed by school officials, namely, that she did possess adequate certification for the position.⁸ On November 23, 1987, grievant experienced further medical difficulties and took another medical leave, remaining off-duty until at least beyond mid-March 1988.

According to grievant, she was contacted by telephone by school officials about various problems relating to the preschool program's administrative needs during her leave-time, even while in Boston recuperating from surgery in December 1987. She said nothing was ever mentioned to her on those various contacts that there was any problem with her certifications.

On March 15, 1988, grievant was informed, via a telephone call, that she would have to go on permit, retroactive to the beginning of the 1987-88 school year, and take additional coursework to retain her position. Dr. Fassig testified that she had been informed by Dr. Larry Jones, OCBE's then Assistant Superintendent in charge of student services, "to call [grievant] regarding her certification because the students

⁸Needless to say, it was perfectly understandable that grievant should believe and state to Ms. Finsley that she was correctly placed in the preschool handicapped teaching position as she had, indeed, been so employed by OCBE.

could not be served categorically because our program was not categorical." T2.27.

Ms. Finsley testified about this matter at level two. She said she became aware of grievant's potential certification problem in December 1987 when OCBE's Personnel Director Patricia Soloman, Dr. Jones and she met to review and discuss the status of county-wide special education staff who were on permit and those who might have to go on permit. She stated that she subsequently called Ms. George at WVDE to discuss preschool-handicapped certification matters, T2.36-37, and whether grievant needed to be put on permit, T2.44. At the level two hearing, grievant attempted to determine the special education director's overall role in certification matters, but Ms. Finsley made clear that her work did not entail "dealing with certification," T2.46. However, she agreed with OCBE's representative that she worked with the personnel director reviewing and comparing staff certifications and job requirements to ensure that the entire special education staff were properly certified, and she agreed with grievant's representative that she would check with WVDE about a special education teaching candidate's certifications if directed to do so by the personnel director.

After further meetings in March 1988 with the personnel director and other school officials and being fully informed of her options, i.e., get permitted and committed to the twenty-four-hour academic program leading to the preschool handicapped certification or lose the preschool position at Elm Grove,

grievant embarked on the required classes at West Virginia University. Grievant's personal situation, including family demands because her second child was not then a year old and continuing health concerns brought on by her battle with Crone's Disease, forced her abandonment of the program during Summer 1988. Subsequently, she was transferred to an LD position at Ritchie Elementary School effective the end of September of the 1988-89 school year where she remains to date.

The record in this case presents at first blush a somewhat hard-to-understand series of events and circumstances with respect to grievant's employment for the preschool position and her ultimate transfer from that position and assignment to Ritchie School. However, from grievant's perspective, she has been wrongfully displaced from her original LD position because she was incorrectly hired for the preschool program in the first place.⁹ From OCBE's perspective, grievant has only lost the preschool handicapped position, an event for which it is blameless and she at fault; therefore, she is entitled to no relief on the matter. The other bad actor is WVDE because it changed the "rules of the game for school year 1988-89." If OCBE's

⁹Grievant seemed to suggest, among other things, an ulterior motive for Mr. Freeland's and perhaps Dr. Fassig's efforts in seeking her out and facilitating her employment in the preschool position, i.e., so Mr. Freeland could assume her LD/EMI position. This notion was not developed and certainly not proven. However, the evidence does tend to establish that both Mr. Freeland and Dr. Fassig had an inordinate interest in grievant not fully explained simply by their testimony that they knew she was a good teacher and hard worker. See generally, n.4,8 and related testimony.

perspective and position were to be upheld, a determination would have to be made that the events which occurred in Spring 1987, including grievant's employment for the preschool-handicapped program, were of no consequence in this grievance and matters should instead focus on Spring 1988 when question of grievant's retention in the position was made known to her.

OCBE's shortsightedness and efforts to "pass the buck" all the way back to the grievant cannot be sustained because events that led to her employment as preschool handicapped teacher cannot be ignored. Moreover, other facts and law cannot be ignored. A county board of education must employ the most qualified applicant for a professional teaching position, W.Va. Code §18A-4-8b(a), but implicit in the mandate is that the employing entity at the time of hiring ensures that the successful applicant meets, or has arranged to meet, minimum requirements for the posted position.

Other statutory guidance is given to a county board of education with respect to its responsibilities in the placement of professional personnel. Code §18A-2-1 provides in pertinent part:

The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. . . . All personnel so nominated and recommended for employment for subsequent assignment shall meet the certification, licensing, training and other eligibility classifications as may be required by provisions of this chapter and by state board regulation (emphasis added).

Code §18-5-4 provides that a school board "may employ such qualified teachers, or those who will qualify by the time of entering upon their duties (emphasis added), necessary to fill

existing or anticipated vacancies for the current or next ensuing school year."

The statutes simply do not authorize a board of education to hire now, certify later. When grievant was employed for the preschool position by OCBE she did not possess OI or PH certifications,¹⁰ minimum qualifications on the job posting if she were to be considered since she was not certified in preschool handicapped. Further, she had only been administratively advised of concerns and possible need for additional schooling

¹⁰At level four, the grievant testified that she did not know until the level two hearing that she did not possess orthopedic certification in West Virginia. She said her Pennsylvania teaching certificate listed her with mentally retarded and physically handicapped certifications, thus, she believed she had orthopedic impaired certification when the preschool handicapped position was planned and posted and had indicated such to Dr. Fassig and Mr. Freeland. She stated that she further believed herself to be so certified in West Virginia because of previous employment with OCBE serving physically handicapped students. She agreed with OCBE's counsel that she now knew, despite seven years' teaching for OCBE, that it was her responsibility to ensure that her various certifications and endorsements were properly recorded on her teaching certificate.

This appears to be a reasonable requirement and reporting duty for a teacher since school administrators could not possibly know whether a teacher, newly-entering the system and possessing an out-of-state degree, had possible multiple fields for which she could be West Virginia-certified. And certainly an established teacher should inform the proper officials to adjust her certificate when additional endorsements are attained because school administrators concerned with such matters can only rely on the certification documents before them. The critical factor in this case is that grievant had been in OCBE's system for seven years and had grievant's credentials on file. It is inconceivable that OCBE could employ the most qualified applicant for a professional position based on the candidate's mere oral assurances that he or she was West Virginia-licensed and certified in the relevant academic area or areas. It would appear that the threshold duty to verify, at hiring and not later, is OCBE's.

in the BD certification which, at the time, she had not quite finished. Finally, as is clear from the record, there was no hint given that a permit was needed, for she certainly would have declined considering the position if it meant an imminent need to begin a whole new program of study for additional certification.

Moreover, while it is true that teachers must meet changing certification requirements with respect to a specific assignment they wish to retain and, in addition, keep their employers apprised of new certifications earned and other academic accomplishments in that regard, a county board of education has the prime responsibility to ensure that newly-developed educational programs, as well as long-standing programs, are structured in compliance with WVDE standards and staffed with properly-certified or -permitted personnel at the onset and thereafter. See Cruciotti v. Ohio Co. Bd. of Educ. Docket No. 35-86-110 (Sept. 4, 1986). Clearly, if the teaching staff of a school system had the expertise and time to perform the necessary functions of structuring and staffing programs and exercising other such professional judgments, there would be no need to employ an administrative staff.

The evidence is overwhelming in this grievance that responsible OCBE school administrators simply did not do their "homework" in the first place, that is, when the preschool program was initially formulated and grievant was actually employed for it. Mr. Freeland and Dr. Fassig admitted that they conducted no research or made no determinations about the

adequacy of grievant's certifications prior to their recommendations that she be employed for the position and posited that such considerations were not their duty but instead the duty of OCBE's personnel office.

Ms. Soloman made clear her authority and duty to advise and act when employees needed permit status and certification renewal, but at the same time also made abundantly clear that she either could not or would not assume responsibility for how grievant happened to be hired for a position for which she was not certified. She testified on direct examination at level four that she had to place grievant on retroactive permit for 1987-88 because she was not properly certified in that position when the school year began. And, T4.153, "[w]hy?":

Because she didn't have preschool certification and she didn't have all those other certifications she needed to serve those kinds, that's my understanding, I don't know. Cause I don't understand the special education programs, so I can't really speak to that.

When asked during cross-examination about whose responsibility it was to check on certification requirements for the new preschool program, Ms. Soloman replied, "I don't know, I don't think it's mine." She did indicate that when a principal's determination and recommendation about an employment was forwarded to her, she did not necessarily further review the applicant's credentials. She continued to profess that she had no knowledge about who was responsible for the initial certification determinations for the employment of the teacher for the preschool program, see generally T4.155-162.

At level four Ms. Finsley related that she had been employed by WVDE's Special Education office in Charleston from July 1986 until her employment with OCBE in November 1987 and was completely unaware of grievant's application in 1987 for OCBE's preschool position. The gist of Ms. Finsley's testimony, T4.129-133, was that her communications with Ms. George in December 1987 affirmed her own belief that OCBE's preschool program would have to be non-categorical because of the difficulty in predetermining students' needs and having a teacher certified in all the various disabilities. "And we had a problem even if we weren't looking at the preschool handicapped and that was that the way the job had been posted and those kinds of things," T.133.¹¹ She said also that grievant's not being orthopedically certified would require a "permit situation" regardless. None of this was relayed to grievant in December 1987. According to Ms. Finsley, it was because grievant was on sick leave. Nevertheless, according to

¹¹ Apparently there were other problems with the preschool program that were not of grievant's doing. For example, grievant said Mr. Freeland told her approximately eight children were to be serviced for the 1987-88 school year. Grievant stated in a January 31, 1989, letter to Ms. George, Gr.Ex.5, that she mentioned to Dr. Jones and other OCBE administrators about the twenty-one pupil classload for the preschool class from its inception in 1987, but that the situation did not change. She asked Ms. George what she knew of that situation as regards the 1987-88 school year. Ms. George responded that a complaint about an excessive "caseload" for OCBE's preschool handicapped program had been filed in Fall 1988, and WVDE's special education office had issued OCBE a "Letter of Findings" on December 14, 1988, Gr. Ex. 6.

grievant's un rebutted testimony, she received calls about other school matters though, even in December 1987.

Despite repeated attempts throughout the level two and four proceedings, grievant was utterly unable to secure a pronouncement from any person holding an administrative position at the time she was hired about who was responsible for verifying her credentials as a prospective employee for the preschool position. Dr. Jones, who represented OCBE at the level two hearing, was unable to attend the level four hearing, and his evidence was obtained via response to grievant's written interrogatories. He, however, offered no enlightenment about how grievant's certification adequacy was authenticated or verified before she was employed for the preschool program in 1987. For example:

[Q] Who is responsible for checking to see if a professional employee is certified for position placement?

[A] In accordance with [Code] [§]18A-3-1, the teacher is responsible for being certified for the position he or she holds. [WVDE] compares the list of teachers to the positions for which they are employed, and determines who are in need of permits. [OCBE's] Personnel Director is responsible for preparing the certified list.

Jt. Subm., 6/16/89.¹² Admittedly, the question could have been clearer in reference to grievant's initial employment for the

¹²In pertinent part, Code §18A-3-1 states:

Any professional educator, . . . who is employed within the public school system . . . shall hold a valid teaching certificate licensing him to teach in the public schools in the specializations and grade levels as shown on his certificate for the period of

(Footnote Continued)

preschool position. However, there is no ambiguity in that the question spoke of position placement, not retention of a held position, and had nothing to do with teaching permits. On another query, Dr. Jones stated that he completed the second month report in the 1987-88 school term indicating that the preschool students were non-categorical. Apparently no one saw fit to inform grievant of this reported program change, from categorical to non-categorical, despite its impact upon her.

It is abundantly clear from this record that, although WVDE may have given OCBE's administrators some strongly-worded advice on how to structure and staff the preschool handicapped program, i.e., non-categorically instead of categorically, in December 1987, it did not mandate such action because the overall game rules were the same in December 1987 as in January 1987, as discerned by a close scrutiny of OCBE's administrators' testimony. OCBE administrators made a decision in December 1987 that the program was non-categorical because the program had not been

(Footnote Continued)

his employment. If a teacher is employed in good faith on the anticipation that he is eligible for a certificate and it is later determined that he was not eligible, the state superintendent of schools may authorize payment by the county board of education to the teacher for a time not exceeding three months or the date of notification of his ineligibility, whichever shall occur first.

In grievant's case, her certification status was not brought into question when she was employed for the preschool position. Her employment was not based on a good-faith assumption that she would attain some identified and needed certificate at a later date. However, her license to teach was on file with OCBE and it knew or should have known then that she was not eligible or qualified for the position.

properly structured or staffed categorically in the first place. In addition, OCBE did not suggest at hearing or in its formal fact/law proposals that grievant submitted false credentials or otherwise intentionally provided misinformation about the certifications she held when she was initially approached about the preschool teaching position or when she was considered and subsequently employed. Hence, it is clear that grievant did not engineer the events which led to her obviously wrongful employment.

The timeliness issue raised by OCBE must be addressed. OCBE argues that the date when grievant first heard of the certification requirement, March 15, 1988, is the time and event which tolls her filing deadline and makes no contentions as to a later date. Here again OCBE is shortsighted. Given the facts in this case, it would be difficult to fix in time a single event which gave rise to the grievance, because a series of events including many actors began in Spring 1987 and culminated after the start of the school year in September 1988 when grievant had to transfer to Ritchie School. Certainly March 15, 1988, was not the last occurrence of a series of events which ultimately damaged this grievant, because at that point she was not aware of a damage nor had she actually sustained a damage. She accepted OCBE's assessment that she would lose her preschool position if she did not embark on coursework and agreed to the terms and conditions of the continued preschool employment. The damage occurred to grievant when she lost her preschool assignment at Elm Grove and had to be transferred to Ritchie.

Therefore, for the purpose of this grievance, it is found that grievant would have timely filed her grievance within fifteen days of her transfer to Ritchie, the last occurrence of a series of events wrought by OCBE in which she was wrongfully hired for the preschool position, displaced from her original LD position and placed finally in an LD position at Ritchie School. An earlier filed grievance might have been premature and speculative. See Lyons v. Wood Co. Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). In this case OCBE did not contend or argue that grievant's filing timelines began to toll when she was transferred and, in fact, did not make that date part of the record herein. It has been held that issues not fairly raised by the parties are not addressed or considered by the West Virginia Education and State Employees Grievance Board. Ryan v. Wood Co. Bd. of Educ., Docket No. 54-86-332-3 (Sept. 1, 1987).

OCBE violated W.Va. Code §18A-4-8b(a) when it employed a non-qualified applicant, grievant herein, for a professional position. A grievant is damaged for not being instated to a position for which he or she was entitled. Millikin v. Ritchie Co. Bd. of Educ., Docket No. 43-87-278-3 (Sept. 20, 1988); Fankhouser v. Brooke Co. Bd. of Educ., Docket No. 05-87-250-3 (Feb. 11, 1988). Likewise, under some circumstances, a grievant can be damaged for being instated or assigned to a position for which he or she was not qualified or entitled. Cruciotti v. Ohio Co. Bd. of Educ., supra. In both cases relief must be granted for the wrongdoing and damage. Based on OCBE's wrongful employment of grievant in 1987 and the facts and circumstances

in the instant matter, it is not unreasonable to find that grievant was damaged by OCBE's actions which resulted in her transfer to Ritchie School and is entitled to reinstatement to her original LD position at Elm Grove Elementary School to make her whole in that regard. See generally W.Va. Code §18-29-5(b); Millikin; Fankhouser; Clevenger v. Harrison Co. Bd. of Educ., Docket No. 17-86-261-3 (Apr. 10, 1987); Burdette v. Summers Co. Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986).

It cannot, however, be determined that grievant is entitled to reimbursement for expenses she voluntarily incurred toward additional certification in preschool handicapped studies, despite some unfortunate circumstances with regard to her loss of possible stipends offered by State authorities, see Gr. Exs. 3-4, 5/25/89, and T4.13-19, had she been timely noticed of and enrolled in the program. Grievant has attained permanent professional enhancement by her endeavor; thus, a finding is made that she has not been financially damaged as she contends.

In addition to the foregoing factual and legal determinations, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant was sought out by some of OCBE's administrators in Spring 1987 to initiate teaching in a preschool handicapped program and was generally assured that all was in

order with the program's structure and her present certifications.

2. Grievant was employed for the preschool teaching position and did not meet minimal certification requirements, categorically or non-categorically, even though her credentials were on file with OCBE, and it knew or should of known she was not qualified and fully certified for the position.

3. School officials knew in December 1988 that the program was structured and staffed improperly. In order to rectify the situation and meet WVDE requirements, school officials notified grievant on March 15, 1988, that she had be retroactively placed on permit status for 1987-88, and she had to embark on summer university classes to remain in the program, by permit, for the ensuing year, 1988-89.

4. When grievant's health necessitated that she drop out of the college program qualifying her to remain teaching in the preschool program, she was transferred to an LD position in an inconveniently-located school because her former position was then held by OCBE's former Special Education Coordinator whose one last official act as coordinator was to ensure compliance with WVDE requirements for structuring and staffing the preschool handicapped program at the school from which grievant was displaced.

5. Grievant's voluntarily-incurred expenses in Summer 1988, for which she has been granted some tuition reimbursement, are of permanent professional benefit, and she has shown no

legal basis for recovery of her expenditures as she has not shown monetary damage in that regard.

6. In Fall 1988 the grievant filed a grievance on the issue of her employment status because the wrongful assignment created an ongoing situation whereby she ultimately was deprived of her original assignment as LD/EMI teacher at Elm Grove Elementary School and transferred to Ritchie School.

7. Grievant is entitled to reinstatement to her original position as LD/EMI teacher at Elm Grove Elementary School in order that she be made whole on the issue of the wrongful assignment.

CONCLUSIONS OF LAW

1. School law requires that professional educators hold a valid teaching licence or certification to teach in the area for which he or she has been employed. W.Va. Code §18A-3-1.

2. A county board of education must employ the most qualified applicant for a professional teaching position, W.Va. Code §18A-4-8b(a), and implicit in the mandate is that the employing entity, at the time of hiring, ensures that the successful applicant meets or will meet minimum requirements for the posted position. W.Va. Code §§18A-2-1, 18-5-4.

3. "School laws and regulations require a county board of education to assign its teachers to instruct only those courses for which the teacher is fully and appropriately certified unless certain instructional and professional considerations

justify otherwise." Cruciotti v. Ohio Co. Bd. of Educ., Docket No. 35-86-110 (Sept. 4, 1986).

4. While teachers must meet changing certification requirements with respect to a specific assignment if retention is desired, a county board of education has the prime responsibility to ensure that its educational programs are structured in compliance with WVDE standards and staffed with properly certified personnel at the onset and thereafter. Cruciotti.

5. OCBE's staff members with the expertise and where-withal to ensure requirements would be met for the new preschool handicapped program did not avail themselves of the opportunity to fully determine that WVDE's requirements for structuring and staffing the new program were accomplished.

6. OCBE agents and administrative staff charged with the responsibility of structuring and staffing the preschool handicapped program erred in 1987-88 when the program was developed and violated Code §18A-4-8b(a) when grievant was wrongfully employed therein.

7. Grievant's status for continued employment at a school she served well and favored, namely Elm Grove Elementary School, was compromised when OCBE wrongfully employed her for academic year 1987-88 in a position and program for which she was not qualified.

8. Issues not fairly raised by the parties are not addressed by the West Virginia Education and State Employees Grievance Board, Ryan v. Wood Co. Bd. of Educ., Docket No. 54-86-332-3 (Sept. 1, 1987), and OCBE did not contend or argue

that grievant did not timely file her grievance after she was transferred to Ritchie School.

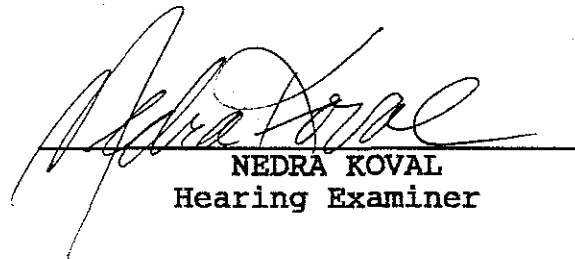
9. In accordance with W.Va. Code §18-29-5(b), a hearing examiner may fashion or grant fair and equitable relief not inconsistent with Code §§18-29-1 et seq. or other prevailing regulations or laws. Clevenger v. Harrison Co. Bd. of Educ., Docket No. 17-86-261-3 (Apr. 10, 1987); Burdette v. Summers Co. Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986).

10. "Pursuant to W.Va. Code §18-29-5(b), the [West Virginia Education and State Employees Grievance Board] is vested with the authority to provide relief not inconsistent with regulation or law and may instate [a] grievant[] to a position to which he or she may be entitled." Millikin v. Ritchie Co. Bd. of Educ., Docket No. 43-87-278-3 (Sept. 20, 1988); Fankhouser v. Brooke Co. Bd. of Educ., Docket No. 05-87-250-3 (Feb. 11, 1988).

Accordingly, this grievance is **GRANTED** to the extent that grievant is entitled to reinstatement to her previously-held position as LD/EMI teacher at Elm Grove Elementary School with restoration of any and all benefits thereto, and the respondent Ohio County Board of Education is **ORDERED** to initiate grievant's transfer to that position effective immediately. Grievant's request to recover personal expenses she voluntarily incurred to meet certification requirements for the preschool handicapped position for academic year 1988-89 after she was informed of the situation in March 1988, is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED: February 28, 1990



NEDRA KOVAL
Hearing Examiner