ROBERT BASS AND .

PHILLIP FITZWATER, .

.

Grievants, .

.

v. . DOCKET NO. 92-20-214

.

KANAWHA COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Robert Bass and Phillip Fitzwater (Grievants) alleging that they were improperly released from employment by the Respondent Kanawha County Board of Education (KCBE) pursuant to a reduction-in force (RIF) action at the end of the 1991-92 school year. This matter is before this Grievance Board on remand from the Circuit Court of Kanawha County under an Order from Judge Tod J. Kaufman dated October 25, 1993. (See footnote 1) Following the West Virginia Supreme Court of Appeals' action refusing to hear KCBE's appeal from that Order, an evidentiary hearing in this matter was held in this Board's office in Charleston, West Virginia on August 25, 1994. Upon receipt of post-hearing submissions fromthe parties, this matter became mature for decision on September 12, 1994.

The scope of review in this matter is governed by the Remand Order, which provides as follows:

> The Administrative Law Judge for the West Virginia Education and State Employees Grievance Board on October 1, 1992 denied the grievance of appellants. That decision held that the grievants failed to establish any "manipulation of the system in order to protect the employee from being bumped" and it further held that the grievants failed to establish that there was an abuse of discretion or any violation of statute in their being terminated from employment. The June 3, 1992 decision of the Kanawha County Board of Education stated, "The grievance is denied." The school board determined that the employment of the grievants was properly terminated

pursuant to West Virginia Code §18A-4-7a.

The record in this matter is very limited, consisting solely of the March 21, 1992 Kanawha County Board of Education Reduction in Force (RIF) hearing. The parties relied on this record as their Level II hearing and requested that this decision be based on the record compiled at the lower levels. Neither grievant testified at the RIF hearing.

Both appellants were teachers at Carver Career Center when their employment was scheduled for termination in the Spring of 1991. Because it was shown at the 1991 RIF hearing that a less senior teacher at the Center, holding the same certification, had not been scheduled for release, appellants were retained.

The respondents discovered at the 1991 RIF hearing that the class the senior teacher was teaching had been improperly coded. Consequently, in January 1992, the class code was changed. The record states the content of the program remained unchanged from the prior year; with the new coding, the program received merely a new title. The decision of the Administrative Law Judge indicated that neither the less senior teacher, nor the appellants held the certification to teach the newly coded class. The less senior teacher applied for a permit to teach the newly coded class and it was granted. Thus, the less senior teacher began teaching the newly coded class and began classes at Marshall University to meet certification requirements. The appellants are, in turn, let go because they don't have the certification.

It is at this point where the record is not clear. It is unclear to the Court whether or not the Appellants knew that a program whose substance did not change required a different certification. The record states that the Appellants did not apply for a permit or attempt to get further certification because they were certified to teach in the program where they were placed before termination. Were appellants aware that a change in code and title only, not in program content, created a new position requiring a different certification than they held? If not, appellants did not have notice of a position opening or of the certification requirements for the position as required by West Virginia Code §18A-4-7(a) (sic).

Accordingly, it is hereby ordered that this matter be and the same is REMANDED to the West Virginia Education and State Employees Grievance Board for further proceedings consistent with this opinion. The Grievance Board is to make new findings of fact and conclusions of law which, of course, either party can appeal if they so elect. . . . .

The parties were given broad latitude in presenting evidence at the August 25, 1994 hearing in this matter. However, it is apparent from the foregoing text of the Remand Order that the factual inquiry at this stage in the proceedings is limited to the question of what notice, if any, Grievants received regarding changes in a course being taught by less senior but comparably certified instructors. (See footnote 2) In that regard, Robert Bass testified that he taught Building Construction at Carver Career Center (CCC) for six years. KCBE proposed to eliminate Mr. Bass' position at the end of the 1990-91 school year. Following a hearing on this proposed reduction-in-force (RIF), KCBE elected to retain Mr. Bassafter it was shown that he had seniority over other teachers with the same certification. Mr. Fitzwater, whose position was likewise slated for elimination, was also retained, but transferred to CCC where he was not assigned any teaching duties for the 1991-92 school year.

At the time of the 1991 RIF, two other vocational teachers with less seniority than Grievants, Mr. Hardy and Mr. Melton, were teaching a course at CCC entitled "Exploration, Industrial Occupations." Grievants, as well as Mr. Hardy and Mr. Melton, were in possession of Technical and Industrial (T&I) certificates which authorized them to teach a variety of vocational courses. Grievants were also qualified to teach the "Industrial Occupations" course at CCC based upon their T&I certifications.

Mr. Bass testified that he was told by Norma Miller, Principal at CCC, around the beginning of January 1992 that his position was being RIF'ed at the end of the 1991-92 school year. Mr. Bass stated that he told Ms. Miller that he intended to grieve. In a later conversation, Mr. Bass indicated that Ms. Miller told him that the program would be changed to "something that he (Bass) was not qualified to teach."

By the end of January 1992 KCBE had changed the coding of the "Industrial Occupations" course with the State Department of Education to indicate that this was a "prevocational" course. Thus, teaching this course required a prevocational endorsement to the T&I certificate. In addition, the title of the course was changed to "Prevocational Exploration" sometime around January1992. There was no change in course content. KCBE did not believe changing the job title or course code resulted in a newly created position. Thus, there was no posting of the Prevocational Exploration course after the title and certification requirement changed. Mr. Bass approached KCBE's permit specialist and was correctly informed that he was not eligible for a permit to teach Prevocational Exploration. Mr. Bass also contacted Marshall University (MU) in regard to taking the necessary courses to obtain certification to teach Prevocational Exploration and was told by someone in "Dr. Olsen's office" that

the classes were not available. Mr. Bass indicated that MU was the only institution that provided courses in this particular area of certification. He later learned that Mr. Hardy had made arrangements to take the necessary courses at MU. Subsequent to termination of his employment, Mr. Bass completed the necessary prevocational courses at MU.

Mr. Fitzwater similarly testified that he was in possession of a T&I certificate at the time of his RIF at the end of the 1991-92 school year. Mr. Fitzwater never saw a job posting for a teacher to teach Prevocational Exploration at CCC. Neither of Grievants were approached by anyone from CCC or KCBE in regard to taking the necessary courses to obtain additional certification in Prevocational Exploration. After being notified by Ms. Miller that his position was being eliminated through a RIF action, Mr. Fitzwater conferred with Mr. Bass who agreed to check with MU on the availability of prevocational courses. He was later advised by Mr.Bass that he had called MU and learned that such courses were not then available.

William Milam, KCBE's Director of Personnel, testified that the teachers who were teaching Prevocational Exploration at CCC were issued permits to continue teaching those courses after the certification requirement was changed during the 1991-92 school year. Because neither Mr. Bass nor Mr. Fitzwater were currently assigned teaching duties requiring prevocational certification, they were not eligible for a permit. Mr. Milam testified that the decision to eliminate Grievants' positions was not made until approximately January of 1992 and that such decisions are enrollment-driven.

The critical question raised by Judge Kaufman in his Remand Order is, "Were appellants aware that a change in code and title only, not in program content, created a new position requiring a different certification than what they held?" Remand Order, Bass v. Kanawha County Bd. of Educ., Case No. 92-AA-309 (Oct. 25, 1993). Based upon all of the evidence developed at the Level IV hearing and contained in the entire record, the short answer is "no." Grievants were not provided either actual or constructive notice of this change in coding by KCBE until it was too late for them to obtain the additional certification which would have allowed them to retain their jobs by "bumping" other comparably certified teachers with less seniority. While the rationale for Judge Kaufman's conclusion that KCBE was required to provide notice of either a position opening or a new certification requirement toGrievants under W. Va. Code § 18A-4-7a is not apparent to the undersigned, this Grievance Board is nonetheless bound by this legal conclusion as "the law of the case." See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 304 (1943).

Accordingly, the singular evidentiary issue on remand having been resolved adverse to the Respondent, it is necessary to fashion a remedy for Grievants consistent with the intent of the Remand Order. Therefore, pursuant to W. Va. Code § 18-29-5(b) the undersigned finds that, given the passage of time and the impracticality of reaccomplishing the personnel actions at issue to comply with these rulings, affording a fair and equitable remedy to Grievants requires that KCBE restore them to their positions at CCC as of the time they were dismissed, with appropriate backpay and seniority.

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

FINDINGS OF FACT

1. Grievants were employed as vocational teachers at KCBE's Carver Career Center (CCC) during the 1991-92 school year.

2. Following a personnel hearing related to the proposed reduction-in-force (RIF) of Grievant Bass in March 1991, KCBE officials determined that the course then titled "Exploration, Industrial Occupations" being taught at CCC by two vocational teachers with less seniority than Grievants, Mr. Hardy and Mr. Melton, was improperly coded.

3. As of the end of the 1990-91 school year, Grievants were eligible to teach the "Industrial Occupations" course described in Finding of Fact Number 2, based upon their holding Technical and Industrial (T&I) certifications, the same certifications held by Mr. Hardy and Mr. Melton.

4. By the end of January 1992, KCBE officials notified the State Department of Education that the course described in Finding of Fact Number 2 had been re-coded as a prevocational course. KCBE also changed the title of the course in question to "Prevocational Exploration."

5. As a result of the change in coding described in Finding of Fact Number 4, teachers holding only a T&I certification (to include Grievants, Mr. Hardy and Mr. Melton) were no longer eligible to teach the retitled "Industrial Occupations" course as a prevocational endorsement is necessary to teach prevocational courses.

6. KCBE did not consider the change in coding and course title as resulting in the creation of a new position and did not post notice of a vacant position.

7. KCBE requested and obtained permits from the State Board of Education allowing Mr. Melton and Mr. Hardy to continue teaching the "Prevocational Exploration" courses for the remainder of the 1991-92 school year.

8. As a result of the permit process described in Finding of Fact Number 7, the less senior teachers then teaching "Prevocational Exploration" necessarily became aware of the fact that the newcoding for the courses they were teaching required a prevocational endorsement to their T&I certification.

9. Grievants learned of the change in coding informally after Grievant Bass was told that he would be given a RIF notice for the end of the 1991-92 school year and they were then unsuccessful in enrolling for the necessary courses to obtain the prevocational endorsement.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

2. Grievants were not given notice that a change in code and title only, but not in program content, of a course they were previously eligible to teach required a different certification, and, pursuant to the "law of the case," Grievants "did not have notice of a position opening or of the certification requirements for the position as required by [W. Va. Code § 18A-4-7a]." Remand Order, Bass v. Kanawha County Bd. of Educ., Case No. 92-AA-309 (Oct. 25, 1993). See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 304 (1943).

Accordingly, the grievance is **GRANTED** . KCBE is hereby **ORDERED** to reinstate Grievants to their former positions at Carver CareerCenter as of the time of their dismissal at the end of the 1991-92 school year, with full backpay, less any appropriate set-off, and seniority.

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.

LEWIS G. BREWER

Administrative Law Judge

Dated: November 4, 1994

Footnote: 1This case was reassigned to the undersigned as the Administrative Law Judge who issued this Board's prior decision in Bass v. Kanawha County Board of Education, Docket No. 92-20-214 (Oct. 1, 1992) was not available.

Footnote: 2Accordingly, Grievant's argument that KCBE's action in changing the class title for the course being taught by another employee was arbitrary and capricious, or resulted from favoritism toward a relative of the Assistant Superintendent who caused the change to be made, will not be addressed as it falls outside the scope of the Remand Order.