TIM ROGERS, .

.

Grievant, .

.

v. . DOCKET NO. 93-20-447 .

KANAWHA COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Tim Rogers (hereinafter Grievant), an employee of the Kanawha County Board of Education (hereinafter KCBE), alleging a violation of W. Va. Code §§18A-24-2, 18A-2-8 and 18A-4-7a, in regard to the termination of his employment for failure to obtain appropriate certification as a classroom teacher. Following receipt of a letter dated October 22, 1993, advising of KCBE's final decision to terminate his employment, Grievant appealed directly to Level IV on October 27, 1993, in accordance with W. Va. Code §18A-2-8 (1993). Grievant elected to waive his right to a hearing at Level IV and have this grievance decided upon the basis of the record below as developed at his termination hearing. (See footnote 1)

The pertinent facts in this grievance are not in controversy. Accordingly, the following findings of fact are derived from the record below:

FINDINGS OF FACT

1. Grievant was hired by KCBE in 1987 to work in a learning disabilities position at East Bank High School. Transcript of termination hearing at 8-9 [hereinafter cited as "T at "].

2. Inasmuch as Grievant's position required certification in learning disabilities, he was issued a teaching permit and allowed five years to obtain the necessary certification. T at 9, 12.

3. Beginning in the 1990-91 school year, Grievant was placed in the Resource Room at East Bank, a position which required additional certification in behavioral disorders excluding Autism and

mental retardation. T at 9-10.

4. No additional time was authorized to obtain the additional certifications required by this position. However, KCBE obtained authorization for Grievant to teach out of field for the 1992-93 school year, allowing him an additional year to obtain the required certifications. T at 10.

5. Grievant is currently certified to teach social studies, grades 7-12. T at 8, 13.

6. As of October 1993, Grievant had not obtained the certifications required for his Resource Room position. T at 10, 12.

7. By written memorandum dated May 10, 1993, Ms. Chris Courtney, Certification Analyst for KCBE, advised school officials,with a copy sent to Grievant, of Grievant's failure to obtain certification within the maximum time period allowed. KCS Ex 3.

8. By letter dated July 23, 1993, Mr. William G. Milam, Director of Personnel for KCBE, advised Grievant that his employment would be terminated if he did not obtain the necessary certifications by August 27, 1993. KCS Ex 2.

9. By letter dated August 31, 1993, Ms. Jorea Marple, Superintendent of Schools for KCBE, notified Grievant of his proposed termination for failure to obtain appropriate certification as required by W. Va. Code §18A-3-2, and that a hearing would be conducted on September 8, 1993. KCS Ex 1.

10. Based upon the evidence adduced at the termination hearing, KCBE terminated Grievant's employment, effective October 21, 1993.

DISCUSSION

Grievant alleges his termination was flawed in that he was not afforded either the proper notice or accommodation required by statute. During his termination hearing, Grievant argued that he should be allowed to transfer to a social studies position for which he holds the requisite certification, displacing a less senior teacher in accordance with W. Va. Code §18A-4-7a. (See footnote 2) This contention was properly rejected by KCBE, given that the statute only provides such "bumping" rights in the event of a reduction inforce. As will be discussed hereinafter, this termination is governed by W. Va. Code §18A-2-8.

Grievant's primary contention is that he was not provided written notice that his contract of employment was subject to termination prior to April 1, 1993, as required under W. Va. Code §18A-2-2. The notice of termination which was provided to Grievant on August 31, 1993, reads as follows:

> I am advised that you are not now certified to serve as a resource room teacher at East Bank High School. West Virginia Code 18A-3-2 requires that all teachers hold a valid teaching certificate licensing them to teach in the specializations and grade levels shown on the certificate. You have not completed all requirements of the West Virginia Department of Education for certification as a resource room teacher, specifically, you have not received a passing score on the required Multi-subjects, Behavioral Disorders and Specific Learning Disability tests. The original five year period for obtaining certification expired June 30, 1992. An out of field authorization was obtained for you but expired June 30, 1993.
>
> You are hereby suspended without pay effective August 27, 1993. A hearing will be held on September 8, 1993 at 1:30 p.m. in Room 205 at the Board's central office on the question of whether termination of employment should be recommended to the Board of Education. You may be present with counsel or other representative. Testimony will be taken under oath and recorded by mechanical means. You may cross examine witnesses called against you, present evidence and call witnesses. (KCS Ex 1.)

Although KCBE did not make reference to W. Va. Code §§18A-2-7 and 18A-2-8 as the basis for Grievant's suspension and termination in the foregoing correspondence, the contested action appears to comprise a termination for "incompetency" within the contemplation of W. Va. Code §18A-2-8. "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). (See footnote 3) By citing to W. Va. Code §18A-3-2, KCBE clearly notified Grievant that he lacked the qualifications required by law to continue serving in his current teaching position.

Treating Grievant's termination as a de facto disciplinary action under §18A-2-8 is more appropriate than applying §18A-2-2 to these circumstances. In one sense, providing notice under §18A-2-2 would seem redundant, given that Grievant had been on notice for nearly six years that his employment was contingent upon obtaining the requisite certifications. On the other hand, issuing notice of possible termination under §18A-2-2 would have been premature as of the April 1, 1993 statutory deadline in that Grievant still had until June 30, 1993, to obtain the necessary certification. (See footnote 4)

Although KCBE did not cite §18A-2-8 in its notice of termination, that notice provided Grievant adequate details of the reasons for the action being proposed to respond to the charges. The overall procedure followed by KCBE provided sufficient due process to Grievant. Waite v. Civil Service Comm'n, 241 S.E.2d 164 (W. Va. 1977). See Queen v. W. Va. Univ. Hosp., 365 S.E.2d 375, 386 (W.

Va. 1987); Major v. DeFrench, 286 S.E.2d 688, 698 (W. Va. 1982). Grievant's only response was to allege failure to comply with §18A-2-2 and to solicit accommodation by reassignment to aposition for which he held certification to teach. Since Grievant had not obtained the certification required by law, KCBE properly approved his termination.

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

CONCLUSIONS OF LAW

1. Grievant, who failed to obtain requisite certification for teaching position for which he had been hired six years previously, was not entitled to notice under W. Va. Code §18A-2-2 prior to April 1, 1993, that he would be terminated for failure to obtain the required certification not later than June 30, 1993.

2. KCBE's termination procedure, which included written notice advising Grievant that he was being terminated for failure to obtain the teaching certificate required for his position under W. Va. Code §18A-3-2, and a hearing affording Grievant the right to call and confront witnesses and to be represented by counsel or other representative, provided sufficient due process, given Grievant's property interest in continued employment. Waite v. Civil Service Comm'n, 241 S.E.2d 164 (W. Va. 1977).

3. Grievant's failure to obtain required certification for teaching position in accordance with W. Va. Code §18A-3-2, following six years of employment while working under permit and out of field authorization, rendered grievant subject to termination for incompetency under W. Va. Code §18A-2-8.

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: March 23, 1994

CERTIFICATE OF SERVICE

I, **Lewis G. Brewer**, Administrative Law Judge for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this day of , served true copies of the foregoing **DECISION** upon the following by Certified United States Mail in properly addressed and stamped envelopes to their addresses as follows:

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LEWIS G. BREWER

Administrative Law Judge

Footnote: 1Upon receipt of written submissions from the parties, this case became mature for decision on December 23, 1993.

Footnote: 2This argument was not renewed in Grievant's written submission at Level IV. However, since it was not explicitly withdrawn, this issue will be addressed in this decision.

Footnote: 3Under this approach, Grievant is not deemed incompetent in the sense that he lacks the ability to teach; rather, he is legally incompetent in that he does not possess the minimum qualifications required by W. Va. Code §18A-3-2.

Footnote: 4KCBE further extended this deadline until August 27, 1993, the beginning of the 1993-94 school year.