

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JERIANNE BRYANT,**

**Grievant,**

**v.**

**Docket No. 2018-1124-McDED**

**MCDOWELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Jerianne Bryant, filed a level three grievance against her employer, Respondent, McDowell County Board of Education, on April 25, 2018, which stated as follows: “[a]ccording to W. Va. Code 6C-2-4(a)(4): I feel that I have been unjustly reclassified resulting in a loss of compensation or benefits. I was given a letter of transfer due to me leaving my classroom early to do my high school bus run. . . .” Grievant seeks the following relief: “1) Rescind my transfer letter and leave me on the bus. 2) Find someone else to do the high school run of the evenings (if there is a 2018-2019 high school run). 3) Remove all special needs aide[s] that leave classroom early to do a bus run.” On April 30, 2018, Grievant filed an amended statement of grievance which stated as follows: “Grievant, an ECCAT/Aide, was approved for transfer for the 2018-2019 school in order to eliminate the bus duties that were attached to her position. This will result in a significant loss of compensation to Grievant. The reason given for the action, Grievant’s bus duties interfere with performance of her classroom duties, applies equally to the aide to whom the duties will be assigned and to many other aides in the county school system. Grievant contends that this reason was a pretext and the true motivating factor was in retaliation for Grievant declining to attend a training session outside the

county. Grievant alleges a violation of West Virginia Code §§ 18A-4-8(m); 18A-4-5b (uniformity); and 6C-2-(d) & (f) (discrimination and favoritism).” As relief, “Grievant seeks reinstatement of her bus duties and compensation for lost overtime wages resulting from the removal of her bus duties. Grievant also seeks interest on all sums to which she is entitled.”

On May 1, 2018, the parties agreed to waive levels one and two of the grievance process and proceed to the level three hearing. The level three grievance hearing was conducted on July 24, 2018, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge. Grievant appeared in person and by counsel, John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent, McDowell County Board of Education, appeared by counsel, Howard E. Seufer, Jr., Esquire, Bowles Rice LLP.

At the commencement of the hearing, Grievant, by counsel, advised that since the filing of this grievance circumstances have changed in that Grievant bid on and accepted a new Aide position that includes bus duties. However, she has lost the ECCAT classification title and is now at a lower pay grade. Counsel clarified that Grievant is still seeking reinstatement to the ECCAT position at Kimball Elementary School with the bus run, and is also grieving her loss in pay as she went from an ECCAT position to a regular aide position. Respondent had no objection to the addition of the claim for loss in pay or proceeding with the level three hearing on that day. It is further noted that Grievant, by counsel, stated during the level three hearing that Grievant was abandoning her discrimination claim. As such, the same is deemed abandoned and will not be further discussed herein.

This matter became mature for consideration on August 22, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed by Respondent as a pre-kindergarten ("Pre-K") classroom Aide/ECCAT with regular Bus Aide duties. Respondent reconfigured Grievant's Pre-K Aide/ECCAT position to remove the bus duties because such required her to leave the classroom over an hour before the last of the students were dismissed from school each day. A Head Start employee had been available to cover for Grievant each afternoon. For financial reasons, Head Start could not commit to a position for the upcoming school year. Respondent reconfigured the Pre-K classroom Aide/ECCAT duties to ensure Pre-K classroom coverage. Grievant was placed on transfer, and Respondent posted the reconfigured Pre-K Aide/ECCAT position and a second regular classroom Aide position that included bus duties. Grievant did not receive the Pre-K classroom Aide/ECCAT position because a more senior employee applied. Grievant bid on and received the regular classroom Aide/Bus Aide position which caused Grievant a loss of compensation. Grievant argues that Respondent's actions were arbitrary and capricious and in violation of W. Va. Code § 18A-4-8(m). Respondent denies Grievant's claims, and asserts that its actions were reasonable and proper. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. At the times relevant herein, Grievant was employed by Respondent as an

Aide/ECCAT<sup>1</sup> in a Pre-K program at Kimball Elementary School and as a bus aide. Grievant was employed at Kimball for about four years. Grievant began there as a Special Education Aide, but soon bid on and was awarded the Pre-K classroom Aide/ECCAT position. This Aide position was posted as having both the Pre-K classroom Aide duties and bus Aide duties.

2. As part of her regular Pre-K classroom Aide/ECCAT duties, Grievant worked as a bus aide every morning from 6:00 a.m. until 8:15 a.m. After her morning bus run, Grievant reported to Kimball Elementary School where she worked as a Pre-K classroom Aide. At 2:20 or 2:30 p.m. each day, Grievant would leave the Pre-K classroom to serve as a bus aide on the same high school bus run until the end of her work day, which was about 4:45 p.m.

3. Given the duties required of her position, Grievant worked more hours each day than is typical for a regular Aide position. Grievant received additional compensation for these extra work hours.

4. The Pre-K students did not have class on Fridays. On Fridays, the Pre-K staff engaged in planning, training, and other like-activities. Therefore, on Fridays, when Grievant would leave the Pre-K in the afternoon to do her bus duties, she would miss a portion of the trainings and other activities.

5. Performing her bus duties required Grievant to leave the Pre-K classroom while a portion of the students were still there. During the 2017-2018 school year, when Grievant left the classroom, a Head Start employee would come to the classroom to provide the second of two adult supervisors required by State Board Policy 2525.

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<sup>1</sup> Early Childhood Classroom Assistant Teacher.

6. Grievant had held this Pre-K classroom Aide/ECCAT position for about four years. During the entire time she held this position, Grievant performed both the Pre-K classroom Aide duties and her daily bus duties which required her to leave the classroom early each day. Respondent had raised no issue about her leaving the Pre-K classroom before the end of the school day until the spring of 2018.

7. In the spring of 2018, Respondent was informed that because of financial issues, Head Start was unable to commit an employee in the 2018-2019 school year to help supervise Grievant's Pre-K classroom each day from 2:20 p.m. or 2:30 p.m. until the students were dismissed at 3:45 p.m. In response, Respondent decided to place Grievant on transfer, and reconfigure the Pre-K classroom Aide/ECCAT position she held by removing the bus duties. By doing this, the Pre-K classroom Aide/ECCAT would be able to stay in the Pre-K classroom with the teacher until all of the students were dismissed.

8. Grievant was notified by Respondent in the spring of 2018 that she would be recommended for transfer for the 2018-2019 school year. Grievant requested a hearing before the Respondent and the same was conducted on or about April 11, 2018. Thereafter, Grievant was approved for transfer.

9. Respondent posted the new Pre-K classroom Aide/ECCAT position without the bus duties, and Grievant was considered an applicant. However, someone else who had more seniority applied for the position and was awarded the same.

10. Respondent posted a regular classroom Aide position at Kimball Elementary School for the 2018-2019 school year that would have the bus duties that Grievant had previously performed. This aide position was assigned to the fourth grade. There is no requirement that there be two adults in fourth grade classrooms at all times.

Therefore, no one would have to take the Aide's place when the Aide left to perform the bus duties in the afternoons. Grievant bid on and was awarded this position. However, in doing so, Grievant had to accept a lower paygrade because this position was not classified as an ECCAT.

11. During the fall of the 2017-2018 school year, a two-day training was scheduled to be held at Glade Springs. Amanda Lester informed Grievant about this training, and Grievant informed her that she did not wish to attend the same because it would be out of the county for two days. Grievant did not attend this training. However, Grievant attended all other trainings held that school year. Grievant was not disciplined for not attending the Glade Springs training.

12. Grievant has not alleged that Respondent failed to follow the procedural steps necessary to remove her from her prior assignment as a Pre-K classroom Aide/ECCAT. Grievant has not alleged any procedural error in the process by which she was awarded the fourth grade regular classroom Aide/Bus Aide position for the 2018-2019 school year.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues that Respondent improperly changed the duties of the Aide/ECCAT position she held for four years resulting in her losing the position and suffering a reduction in pay in retaliation for her not attending the two-day training at Glade Springs in the fall of 2017. Grievant also argues that Respondent's actions violated West Virginia Code § 18A-4-8(m).<sup>2</sup> Respondent denies Grievant's claims, and asserts it properly placed Grievant on transfer and reconfigured her former position to remove the bus aide duties in order to ensure compliance with State Board of Education Policy 2525. Grievant is not alleging any procedural errors in her transfer or the filling of the position by a more senior applicant.

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or

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<sup>2</sup> It is noted that Grievant did not address her claim of favoritism in her proposed Findings of Fact and Conclusions of Law. Accordingly, this claim is deemed abandoned and will not be discussed further herein.

reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant first argues that Respondent’s decision to reconfigure the Aide/ECCAT position to remove the bus duties was arbitrary and capricious and done to retaliate against her for missing the two-day training. Grievant asserts that her position as Aide/ECCAT was posted with both duties and she had performed them for years without Respondent seeing any need to change it, and that Respondent only reconfigured the position’s duties after Grievant declined to attend an out-of-county training. Respondent



argues that it decided to reconfigure the position in the spring of 2018 in response to learning that Head Start could not commit an employee for the 2018-2019 school year to fill in for Grievant when she left the Pre-K classroom to perform the afternoon bus duties.

The parties do not dispute that two adults are required by State Board of Education Policy 2525 to be in the Pre-K class at all times. It is also undisputed that Grievant had to leave the classroom each day more than one hour before the last of the Pre-K students were dismissed for the day. If there were no Head Start employee to fill in for Grievant, the classroom teacher would be left alone with the children for more than an hour each day and such violates State Board Policy 2525. While Respondent made the decision to reconfigure the position before it was known for sure whether Head Start would actually have an employee available at Kimball to fill in for the Pre-K Aide/ECCAT each day, Respondent knew that if Head Start did not have an employee to cover the Pre-K classroom a policy violation would result. Despite the arrangement existing for years without a perceived need to change it, it was not unreasonable for Respondent to eliminate the ever-present potential of Head Start lacking an employee to cover for the Pre-K Aide/ECCAT in the afternoon. Based upon the evidence presented, it appears that at any time Head Start could move an employee position and this lack of coverage could result. While this change was made only after Grievant missed the training, the change is reasonable given that there would always be a chance of violating State Board of Education Policy 2525. Further, Grievant presented no evidence other than her own testimony in support of her claim of retaliation. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W.*

*Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

Accordingly, the undersigned cannot conclude that Respondent's decision to reconfigure the Pre-K classroom Aide/ECCAT position in the spring of 2018 was arbitrary and capricious, or otherwise improper.

Grievant next argues that Respondent violated the non-relegation provision of West Virginia Code § 18A-4-8(m) in that its "reconfiguration of aide and ECCAT duties at Kimball Elementary School subjected Grievant to a condition of employment that resulted in reduction in her compensation. She could not retain both her ECCAT pay grade and the overtime compensation provided by the bus duties."<sup>3</sup> West Virginia Code § 18A-4-8(m) states as follows:

Without his or her written consent, a service person may not be: . . . Relegated to any condition of employment which would result in a reduction of his or her salary, rate or pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

*Id.* Respondent made the decision to reconfigure the duties of the Pre-K Aide/ECCAT to remove the bus duties that had been part of that position in order to ensure compliance with State Board of Education Policy 2525. Therefore, Grievant was properly placed on transfer at the end of the 2017-2018 school year. A Pre-K Aide/ECCAT position without the bus duties was posted as a new position. Also, Respondent posted another new classroom Aide position assigned to the fourth grade that included the high school bus duties Grievant had previously worked. This second new classroom Aide was not classified as an ECCAT. Essentially, Respondent split the Pre-K Aide/ECCAT position

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<sup>3</sup> See, Grievant's Proposed Findings of Fact and Conclusions of Law.

duties that Grievant previously held between two positions. Neither party disputes that there is no rule requiring two adults be present in the classroom at all times for the fourth grade.

Grievant bid on the Pre-K Aide/ECCAT position, but was not selected because a more senior employee applied. Grievant also bid on the regular Aide position which included the bus duties. Grievant was awarded the regular classroom Aide position for the 2018-2019 school year. As a result, Grievant lost compensation because she went down one paygrade by moving from an ECCAT classification to a regular Aide classification. Grievant still earns comparable overtime for performing the high school bus duties.

Based upon the evidence presented, Respondent did not violate W. Va. Code § 18A-4-8(m). Grievant's conditions of employment were not changed during a fiscal year. Grievant's old position was eliminated at the end of the 2017-2018 school year and she was placed on transfer. Respondent posted two new Aide positions for the 2018-2019 school year, one a Pre-K classroom Aide/ECCAT, and the other, a regular classroom Aide for the fourth grade with the high school bus duties. Grievant applied for both, and was ultimately selected for the fourth grade regular classroom Aide/Bus Aide for the 2018-2019 school year. Grievant began in an entirely different position in the 2018-2019 school year, the subsequent school year. She is not entitled to the ECCAT classification title or pay. Grievant is not serving as an ECCAT. Grievant has failed to prove by a preponderance of the evidence that Respondent violated West Virginia Code § 18A-4-8(m).

It is noted that Grievant did not address the claim of reprisal pursuant to West

Virginia Code § 6C-2-3(h) in her proposed Findings of Fact and Conclusions of Law. Accordingly, any such claim, if raised, is deemed abandoned and will not be addressed further herein.

For the reasons set forth herein, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

3. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v.*

*Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-

359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant failed to prove her claim that Respondent's actions in reconfiguring the Pre-K classroom Aide/ECCAT position was in retaliation for her failing to attend an out-of-county training.

7. "Without his or her written consent, a service person may not be: . . . Relegated to any condition of employment which would result in a reduction of his or her salary, rate or pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years." W. VA. CODE § 18A-4-8(m).

8. Grievant failed to prove by a preponderance of the evidence that Respondent's actions in reconfiguring her Pre-K-Aide/ECCAT position and creating the regular classroom Aide position for the fourth grade that included the high school bus duties was arbitrary and capricious, or otherwise improper. Grievant also failed to prove her claims that Respondent violated West Virginia Code § 18A-4-8(m) as she lost compensation by moving from an ECCAT position to a regular Aide position.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 civil action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: October 17, 2018.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**