THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JUSTIN P. ROLLYSON,

Grievant,

v. **Docket No. 2018-0296-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Justin P. Rollyson, filed this expedited level three grievance against his employer, Kanawha County Board of Education, dated August 24, 2017, stating as follows: "Mr. Rollyson seeks reversal of the Board's decision to terminate his employment. Mr. Rollyson received notice of his termination on August 21, 2017." As relief sought, "Mr. Rollyson seeks reinstatement of his employment and benefits."

A level three hearing was conducted on November 8, 2017, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, Robert P. Lorea, Esquire, Lorea Law Office, PLLC. Respondent, Kanawha County Board of Education, appeared by counsel, James W. Withrow, Esq., General Counsel. This matter became mature for consideration on February 21, 2018, following the submission of portions of the lower level record that had been omitted and an extension of time to allow parties to submit supplemental proposals as a result of the same. It is noted that both parties submitted proposed Findings of Fact and Conclusions of Law prior to the ALJ discovering that the lower level record was incomplete.

Synopsis

Grievant was employed by Respondent as a teacher in a behavioral disorder ("BD") classroom and had been so employed for several years. However, Grievant lacked an endorsement for teaching in BD classes. Grievant also lacked a permit or authorization to allow him to teach these classes. Respondent terminated Grievant from his employment citing his lack of certifications when he was off work receiving workers' compensation benefits. Respondent alleged that Grievant was terminated as he was incompetent to hold his position. Grievant disputes this, arguing Respondent dismissed him from employment in retaliation for filing a workers' compensation claim, and/or making complaints about mold in his classroom. Respondent met its burden of proving that it dismissed Grievant from employment because he was incompetent to hold his position. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the 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 a behavioral disorder ("BD") teacher at John Adams Middle School. Grievant was hired for this position on or about August 16, 2012. At that time, Grievant had a temporary teaching certificate.

2. Grievant was initially hired by Respondent as a substitute teacher in or about January 2001. Thereafter, Grievant taught as a permanent substitute in a behavior

disorder class at Elkview Middle School and held various coaching positions at that school.

3. Soon after he began working full-time at John Adams Middle School, Grievant began reporting a problem with mold growth in the classroom where his classes were held. Further, Grievant began having health issues, but he did not recognize any link between the mold and his health issues.

4. Grievant received his professional teaching certificate with an endorsement in physical education on January 11, 2014.[1] Respondent has also referred to this as a Professional Teaching Certificate.

5. Ron Pauley is the Certification Specialist for Kanawha County Schools. In his position, Mr. Pauley's primary responsibility is to make sure employees are certified for the positions they hold. In 2014, Mr. Pauley worked with Grievant in obtaining his professional teaching certificate. Mr. Pauley learned that Grievant lacked the proper BD certification at that time.[2] Mr. Pauley allowed Grievant to work on obtaining his professional teaching certificate before taking steps to obtain the appropriate BD certification.[3]

6. Even though Mr. Pauley knew that Grievant lacked the required BD certification in 2014, Grievant was allowed to continue teaching his BD class at John Adams Middle School. Further, Grievant had not received an Out of Field Authorization,

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[1] *See*, Respondent's Exhibit 1, teaching certificate.
[2] *See*, testimony of Ron Pauley, lower level transcript, pg. 15; Ron Pauley level three testimony. It is noted that the parties and witnesses have used the terms "certification," "endorsement," and "permit," almost interchangeably. Mr. Pauley attempted to clear this up, but he was not entirely successful.
[3] *See*, testimony of Ron Pauley, lower level transcript, pg. 15.

or Permit, to teach the BD class. According to Mr. Pauley, Grievant should have been on an Out of Field Authorization while teaching the BD class at John Adams.

7. Grievant continued to teach his BD class at John Adams in the 2015-2016 and 2016-2017 school years, even though he had no BD certification or Out of Field Authorization.

8. Over the course of his years at John Adams Middle School, Grievant's health issues worsened, and his concerns about the mold problem in his classroom increased. At the beginning of the 2016-2017 school year, Grievant again reported the mold issue to John Adams administration.

9. Sometime prior to September 2016, Kanawha County Schools identified Grievant as lacking the required certification to teach BD classes.

10. In or about early September 2016, Mr. Pauley initiated telephone conversations with Grievant and/or his principal, John Moyers, about Grievant's needed BD certification. At that time, Mr. Pauley informed Grievant that he could take the PRAXIS test to get his BD endorsement, and Grievant agreed to take such test. It is unclear from the evidence presented whether the Out of Field Authorization/Permit was discussed at this time.

11. Grievant's illness continued to worsen in September 2016, and Grievant did not take the PRAXIS test.

12. By letter dated September 15, 2016, Mr. Pauley informed Grievant that he lacked the proper endorsement to teach his BD class, and he had to hold the appropriate endorsement or be on a permit to continue in his current position. The letter went on to

explain how to obtain both the endorsement and the permit.[4] This letter was sent by regular U.S. Mail to an incorrect address, and Grievant did not receive the same.[5] As such, Mr. Pauley did not receive a response to his letter from Grievant. It is noted that Grievant had moved to a new address, but did not correctly update his contact information with Respondent until on or about March 13, 2017, long after his move.[6]

13. In the fall of 2016, Grievant's physicians attributed his health problems to the mold in his classroom. On or about October 17, 2016, Principal Moyers gave Grievant the results of an air quality test conducted in his classroom which showed high levels of mold. On or about that same day, Grievant applied for workers' compensation benefits for work-related illness. Sometime thereafter, Grievant was granted workers' compensation benefits and he was placed off work. October 17, 2016, was Grievant's last day in the classroom before taking leave as a result of his medical condition.[7] It is unclear from the evidence presented whether Grievant left work on an actual "medical

[4] *See*, Respondent's Exhibit 3, letter dated September 15, 2016.

[5] This letter was sent to an old address that was on file at Kanawha County Schools. Further, Mr. Pauley has stated that this letter was not returned to Kanawha County Schools as undeliverable.

[6] Grievant testified at the lower school disciplinary hearing on June 9, 2017, that he changed his address with Kanawha County Schools somewhere online to stop his paychecks from being sent to the wrong address in 2015. However, despite his paychecks being sent to the correct address since that time, the Human Resources Office at Kanawha County Schools, apparently, still had the old address on file. Grievant changed his address with that office on March 13, 2017. There is no evidence in the record to explain why correcting the mailing address for Grievant's paycheck did not change his address with the Human Resources Office.

[7] No workers' compensation documents are part of the record of this grievance. None are contained in the lower record, and none were made exhibits at level three. As such, the undersigned does not have exact dates for some events and does not know what type of workers' compensation benefits he was awarded and when. Nonetheless, the parties do not appear to dispute that Grievant was granted workers' compensation benefits for his work-related injury/medical condition in the fall of 2016.

leave of absence" on October 17, 2016, or whether after he was approved for workers' compensation such was retroactive to that date.

14. The date of Grievant's award of workers' compensation benefits is unknown, as is the type of workers' compensation benefit he was granted. No workers' compensation documents or records were presented as evidence in this matter. However, neither party appears to dispute that Grievant was approved for workers' compensation benefits as the result of his work-related injury/medical condition.

15. Kanawha County Schools was made aware that Grievant applied for and was granted workers' compensation benefits at or about the time he made application. Further, Kanawha County Schools, Grievant's employer, knew that Grievant was off work due to his work-related injury/medical condition.

16. It is unknown as to who at Kanawha County Schools is responsible for the handling of workers' compensation claims. Neither party called any witnesses or presented any documentary evidence to identify who at Kanawha County Schools had knowledge of Grievant's workers' compensation claim.[8]

17. After receiving no response to his September 2016 letter, Mr. Pauley sent Grievant a second letter dated January 6, 2017. This letter was also sent by regular U.S. Mail to the same incorrect address. The letter was not promptly returned to Respondent as undeliverable. Grievant, again, did not receive the same. Written in bold, large font

[8] In his proposed Findings of Fact and Conclusions of Law, Grievant states as a fact that, "Superintendent Ronald Duerring, Ed.D., wrote to Mr. Rollyson on October 20, 2016 and acknowledged receipt of Mr. Rollyson's Worker's Compensation Claim by KCBOE." *See*, Grievant's Proposed Findings of Fact and Conclusions of Law, pg. 3. However, no such letter was included in the lower record or presented at the level three hearing. Further, Dr. Duerring was not called as a witness by either party at the level three hearing.

at the top of the page were the words "SECOND AND FINAL WRITTEN NOTICE." The letter stated as follows:

> [a]s per prior conversations, a recent audit shows you are teaching in an area in which you are currently not endorsed—BD. You must hold the appropriate endorsement or be on a permit in the appropriate area in order to continue in your current position. For a permit, you must complete form 1 which can be obtained at the following website: www.wvde.state.us/certification/forms, be enrolled into a program to allow you to obtain the endorsement, and submit your on-line payment directly to WVDE. All forms and transcripts need to be sent to my attention here at the Board Office. The required paperwork is to be submitted prior to or by the close of business January 20, 2017 or I will have to recommend you to be processed for termination. If you have any questions, please feel free to contact me at (304) xxx-xxxx. Sincerely, Ronald Pauley Certification Specialist.[9]

18. By letter dated February 16, 2017, sent regular mail to the same incorrect address, Superintendent Dr. Ronald E. Duerring, informed Grievant that he was suspended without pay because he was not certified for the position to which he was assigned. In this letter, Dr. Duerring also informs Grievant of a hearing scheduled for March 21, 2017, to determine "if any additional disciplinary action, up to and including dismissal, should be imposed."[10] Despite this letter being sent to an incorrect address, as of March 21, 2017, it had not been returned to the Respondent as undeliverable.[11]

19. Grievant did not receive the February 16, 2017, letter from Dr. Duerring. As such, Grievant did not appear for the March 21, 2017, hearing. Respondent went forward on the disciplinary hearing before the hearing examiner.

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[9] *See*, Respondent's Exhibit 3. It is noted that the telephone number listed in the letter has been redacted herein.
[10] *See*, Respondent's Exhibit 1, lower level hearing held on March 21, 2017.
[11] *See*, pg. 5, March 21, 2017, lower level hearing transcript, statement of Ronald Pauley.

20. On or about March 13, 2017, Grievant changed his address on file with the main office at Kanawha County Schools.

21. On or about March 22, 2017, one day after the disciplinary hearing before the Board's hearing examiner, Respondent learned that the February 16, 2017, letter which notified Grievant of his hearing before the Board's hearing examiner, and the letter dated January 5, 2017, from Ron Pauley to Grievant had been returned to Respondent as undeliverable.[12]

22. By letter dated March 23, 2017, Dr. Duerring informed Grievant of the following:

> By letter dated February 16, 2017, you were advised that you were not properly certified for the position to which you are currently assigned. You were further advised that a hearing would be held on March 21, 2017, beginning at 9:00 a.m., in Room 219, at 200 Elizabeth Street, Charleston, West Virginia, to determine if disciplinary action, up to and including dismissal, should be imposed. A copy of that letter is included herein.
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> You did not appear at the hearing on March 21, 2017. Both the notice of the hearing and a letter from Ron Pauley dated January 5, 2017, were returned by the post office on March 22, 2017. I am advised that you did not change your address with Kanawha County Schools until March 13, 2017.
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> Please be advised that the hearing on the charges outlined in the letter dated February 16, 2017, will be held on April 17, 2017, beginning at 9:00 a.m., in Room 205m at 200 Elizabeth Street, Charleston, West Virginia, to determine if disciplinary

[12] It is unclear from the record whether the returned letters were actually received on March 22, 2017, or if on that date Respondent first discovered that the letters had been returned earlier. It is noted that on March 21, 2017, Mr. Pauley stated in the lower hearing that none of the letters had been returned by the post office. It was the very next day that the returned letters turned up.

> action, up to and including dismissal, should be imposed. . . .[13]

23. A hearing before the Respondent's hearing examiner was commenced on April 17, 2017. Grievant appeared at the hearing without counsel, and ultimately requested a continuance so that he could obtain representation. During this hearing, counsel for Respondent and the hearing examiner acknowledged that Grievant's regular teaching certificate needed to be renewed by the end of June 2017. Grievant's request for a continuance of the hearing was granted, and the matter was rescheduled for hearing on June 9, 2017.

24. On June 9, 2017, Grievant, Mary Pat Statler, Grievant's counsel, Respondent's counsel, and Ron Pauley appeared before the hearing office at the rescheduled hearing.

25. Grievant's professional teaching certificate expired on June 30, 2017. As of this date, Grievant has not taken any steps to reinstate his teaching certificate, and he remains without a valid teaching certificate.

26. Respondent sent Grievant a letter dated August 1, 2017, signed by Dr. Duerring, which states, in part, as follows:

> On behalf of the members of the Board of Education we wish to extend a warm greeting to you as an employee of Kanawha County Schools for the year 2017-2018. To those of you returning to the system, we are pleased that you have once again chosen to serve the students of Kanawha County. By working together we can successfully meet the challenges ahead as we continue to provide the best possible programs and services to our children.

[13] *See*, letter dated March 23, 2017, lower level record, submitted by counsel for Respondent by letter dated October 11, 2017. This letter does not appear to have been marked as an exhibit, but is referenced in the April 17, 2017, hearing transcript.

> You are employed for 200 days as CLASSROOM TEACHER-SPECIAL ED at JOHN ADAMS MIDDLE SCHOOL, beginning August 08, 2017 at an annual salary $43,420.00. Our records show that you are scheduled to receive 24 pay checks this school year. If this is not correct, complete a 'Pay Option Form" and return it to the Human Resources office. . . .[14]

27. On August 7, 2017, the Board's hearing examiner issued her Recommended Decision, sending copies to counsel for Grievant, counsel for Respondent, and Superintendent Duerring. In her decision, the hearing examiner set forth the issue to be decided as "[w]hether Employee Justin Rollyson is incompetent to hold the position to which he is assigned?" The hearing examiner concluded in her recommended decision that Grievant is incompetent to serve as a teacher as he lacks the required certifications and as his professional teaching certificate has expired. As such, the hearing examiner recommended that Grievant be removed from employment with Kanawha County Schools.

28. By letter dated August 8, 2017, Dr. Duerring informed Grievant as follows: "I concur with the findings and conclusions of the hearing examiner, and intend to recommend to the board of education that you be removed from your teaching position at John Adams Middle School . . . After the board of education acts on my recommendation, you will be advised of the board's action. Pending action by the board, you will be suspended, without pay." On this letter, it is noted that copies of the same were sent to counsel for Grievant, Mary Pat Statler, John Moyers, Carol Hamric, and Grievant's personnel file.[15]

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[14] *See*, Grievant's Exhibit 1, August 1, 2017, letter.

[15] *See*, August 8, 2017, letter to Grievant from Dr. Duerring, included in the lower level record designated by Respondent by letter dated October 11, 2017.

29. By letter dated August 18, 2017, Dr. Duerring informed Grievant that at its August 17, 2017, meeting, the Respondent Board "adopted the following motion:"

> I move the Board approve the Superintendent's prior suspension of Justin Rollyson further approve the Superintendent's recommendation for the termination of the regular teaching contract of Justin Rollyson and the contract of Justin Rollyson as a regularly employed teacher is hereby terminated effective immediately.[16]

It appears from the letter that copies of the same were sent to Grievant's counsel, Mary Pat Statler, John Moyers, Carol Hamric, and the personnel file.

30. Respondent has suggested to Grievant, including during the course of this proceeding, that when teachers are faced with this situation of lacking proper certifications, they normally resign from their permanent positions and have their names placed on the substitute teacher list.

31. At the time the decision was made to pursue the termination of Grievant's employment with Respondent in or about January 2017, Grievant was off work due to a work-related injury, and was receiving workers' compensation benefits.

32. As the certification specialist, each year Mr. Pauley discovers a number of teachers who lack the required certification for the position they hold. During the 2016-2017 school year, there were approximately twelve teachers, including Grievant, who were identified as lacking the proper certifications. It is unknown whether the employment of any of the other teachers was terminated. Apparently, when confronted with this issue, most teachers resign from their positions and have their names placed on the substitute

[16] *See*, August 18, 2017, letter to Grievant from Dr. Duerring, included in the lower level record designated by Respondent by letter dated October 11, 2017. It is noted that this is a direct quote from the letter, and it contains the grammatical errors included therein.

teacher list. Grievant is the only teacher that Mr. Pauley could think of who had ever been terminated for lack of certification while he was off work on workers' compensation.

33. The identities of those teachers, other than Grievant, identified by the audit as lacking the proper certification were not disclosed in this proceeding. Further, it is unknown what those teachers taught, whether they resigned their positions and placed their names on the substitute list, and how, if at all, their certification issues were resolved.

34. Had Grievant resigned his position and placed his name on the substitute teacher list, as Respondent had apparently expected, he could not have gone out to teach if called because he was unable to work due to his medical condition for which he was receiving workers' compensation disability benefits.

Discussion

This matter presents claims that are both disciplinary and non-disciplinary in nature. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). In non-disciplinary matters, the Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more

probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant argues that Respondent improperly terminated his employment in retaliation for his filing a workers' compensation claim. Respondent denies Grievant's claims, asserting that it properly terminated Grievant's employment because he lacked the required certifications to teach BD classes and as his professional teaching license expired on June 30, 2017, therefore, rendering him incompetent to hold his position. Respondent does not allege that Grievant had any work performance issues. Respondent bears the burden with respect to the disciplinary action taken against Grievant. Grievant bears the burden of proving his claim of retaliation based upon his filing of a workers' compensation claim.

WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
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> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

W. VA. CODE § 18A-2-8(a). "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (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).

Further, the "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. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

‘‘Incompetency’ is defined to include ‘lack of ability, legal qualification, or fitness to discharge the required duty.’ Black’s Law Dictionary 526 (Abridged Sixth Ed. 1991). *See Durst v. Mason County Bd. of Educ.,* Docket No. 06-26-028R (May 30, 2008); *Posey v. Lewis County Bd. of Educ.,* Docket No. 2008-0328-LewED (July 25, 2008). A grievant’s lack of certification for his or her position constitutes ‘incompetency.’” *See Jones v. Fayette County Bd. of Educ.,* Docket No. 2009-1075-FayED (Aug. 5, 2009); *Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010).

It is undisputed that Grievant lacked a BD endorsement on his teaching license, he had no permit to teach the BD class, and he did not have an Out of Field Authorization allowing him to teach such class. It is also undisputed that Grievant’s teaching license expired on June 30, 2017. The reason for his termination is the only matter in dispute. Grievant is alleging that he was terminated in retaliation for filing a workers’ compensation claim in violation of West Virginia Code § 23-5A-1, *et seq.*, The Workers’ Compensation Act. Respondent asserts that it terminated Grievant’s employment because he lacked the required certifications to hold his position; therefore, he was legally incompetent to hold his teaching position, and its decision to terminate Grievant’s employment had nothing to do with the workers’ compensation claim.

As Grievant lacked all the required certifications to hold his position, Grievant was legally incompetent. This finding has absolutely nothing to do with Grievant’s work

performance. The simple fact that he lacked all the required certifications is what renders him legally incompetent. Pursuant to WEST VIRGINIA CODE § 18A-2-8(a), Respondent may dismiss Grievant for incompetency. Therefore, the ALJ cannot find this Respondent's decision to dismiss Grievant was arbitrary and capricious.

"'In order to make a *prima facie* case of discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, *et seq*.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991)." *Addair v. Dep't of Health and Human Resources/Welch Community Hosp*., Docket No. 03-HHR-147 (Feb. 2, 2004). Discrimination against workers' compensation claimants is prohibited. Pursuant to WEST VIRGINIA CODE § 23-5A-1, "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." Further, "discrimination" in that context is defined by WEST VIRGINIA CODE § 23-5A-3, which states, in part, as follows:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the

> inclusion or aggregation of absence due to the injury with any other absence from work. . . .

Id. A grievance is defined as "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination. . ." W. VA. CODE § 6C-2-2(i)(1). Grievant does not seek to adjudicate his claim for the Worker's Compensation benefits over which the Grievance Board lacks jurisdiction, but, rather, seeks to block his employer's alleged wrongful employment action taken against him in retaliation for his claim. This is a grievance claim which is cognizable under the statutory grievance procedure for state employees. *See Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995).

The parties do not appear to dispute that Grievant sustained an on-the-job injury and that he initiated proceedings under the Workers Compensation Act. The parties dispute whether the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge Grievant. Grievant argues that he had taught without the BD endorsement or permit/authorization for years without any action from Respondent, and that it was only when he increased his complaints about the mold in his classroom and filed a workers' compensation claim that his certification became an issue. This certification issue resulted in his dismissal. However, Respondent claims that the West Virginia Department of Education conducted an audit of Kanawha County Schools which identified Grievant as lacking the needed BD certification to teach the class to which he has was assigned. No documentation from the West Virginia Department of Education

regarding the audit or its results was presented as evidence in this matter. It is also unclear from the evidence when this audit was alleged to have been conducted, or when the results were provided to Respondent.

In further support of his argument, Grievant asserts that he was the only teacher with certification issues who was receiving workers' compensation, and that other teachers who lacked certification were accommodated, not terminated. Grievant also alleges that in 2001 when he was first hired, Respondent requested and received a waiver from the West Virginia State Board of Education, a 5202 Permit, allowing his to teach BD classes and it was "periodically renewed by [Respondent] throughout the time [he] was employed. . ." until he complained about the mold in his class and workers' compensation claim.

The evidence presented demonstrates that Mr. Pauley initiated contact with Grievant by telephone to attempt to resolve his lack of certificate in early September 2016 before Grievant filed his workers' compensation claim. Grievant had complained about the mold before this, but there has been no evidence presented to establish that Mr. Pauley knew about it. Mr. Pauley had become aware of Grievant's lack of BD endorsement in 2014, presumably before the audit he has cited. When Mr. Pauley first spoke to Grievant about the certification issues in early September 2016, Grievant said he would take the test to obtain the required certification. There was apparently no mention of upcoming, or anticipated, medical leave or workers' compensation. Grievant testified that he tried to register for a test to get the certification, but there was a problem. He apparently registered for the wrong test, and he did not get registered for the correct one. Grievant abruptly went on medical leave on October 17, 2016. Grievant and Mr.

Pauley did not communicate again until after the March 21, 2017, disciplinary hearing. Mr. Pauley testified that he tried to contact Grievant before he initiated the termination process, but that Grievant did not return his calls. The letters Mr. Pauley sent were not initially returned by the post office. He assumed that Grievant had received the same. This is not unreasonable.

Mr. Pauley further testified that while he was trying to reach Grievant to discuss the certification issues, he called Mr. Moyers who informed him that Grievant was off on medical leave. Mr. Pauley asserted that there was nothing said about workers' compensation, and he did not inquire about the nature of Grievant's medical condition. No evidence has been presented to contradict Mr. Pauley's testimony. Neither party called Mr. Moyers as a witness. No evidence has been presented to suggest that Mr. Pauley knew anything about Grievant's workers' compensation claim or his complaints about the mold when he began discussing the certification issues with Grievant, or at any time before he initiated the termination process.

At the level three hearing, Grievant implied that Mr. Pauley should have known he was on workers' compensation, and that if he had only inquired about Grievant's medical leave of absence, he would have found out. There has been no evidence presented to suggest that Mr. Pauley has anything to do with workers' compensation claims, or that he had a duty to investigate Grievant's "medical leave of absence." Neither party presented any evidence to establish who actually handles workers' compensation claims at Kanawha County Schools, or who would have even known about the workers' compensation claim. No workers' compensation documents were introduced in this matter. As such, it is unknown exactly when Grievant applied for workers' compensation,

when he was approved for the same, the type of benefits he received, or when he received them. Also, it is unknown who, if anyone, at Kanawha County Schools was copied on the documents, or included in the correspondence.

Grievant presented no evidence other than his testimony to support his claim about the 5202 waiver. It does not appear that anyone asked Mr. Pauley about the 5202 waiver during the level three hearing. While Grievant testified that other teachers were accommodated when they lacked certification instead of being terminated, he presented no evidence to support this allegation. "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)).

It appears undisputed that Grievant was the only teacher who was off work receiving workers' compensation benefits when proceedings to terminate his employment were initiated. However, that alone does not prove a violation of the Workers' Compensation Act. West Virginia Code § 23-5A-3 allows for an employee who is receiving workers' compensation or eligible to receive worker's compensation benefits to be dismissed from employment for committing a separate dischargeable offense. In this case, Grievant could be dismissed for incompetency pursuant to WEST VIRGINIA CODE § 18A-2-8(a). It is undisputed that Grievant lacked the proper certifications to teach BD classes. Grievant also lacked his professional teaching certificate at the time he was dismissed. Despite the fact that his certification became an issue after he made complaints about mold, Grievant failed to establish by a preponderance of the evidence

that his termination was in retaliation for complaining or for filing a workers' compensation claim. Accordingly, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

2. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be dismissed or suspended and states, in part as follows:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

3. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (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).

5. ''Incompetency' is defined to include 'lack of ability, legal qualification, or fitness to discharge the required duty.' Black's Law Dictionary 526 (Abridged Sixth Ed. 1991). *See Durst v. Mason County Bd. of Educ.,* Docket No. 06-26-028R (May 30, 2008); *Posey v. Lewis County Bd. of Educ.,* Docket No. 2008-0328-LewED (July 25, 2008). A grievant's lack of certification for his or her position constitutes 'incompetency.'" *See*

Jones v. Fayette County Bd. of Educ., Docket No. 2009-1075-FayED (Aug. 5, 2009); *Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010).

6. "'In order to make a *prima facie* case of discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, *et seq.*; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991)." *Addair v. Dep't of Health and Human Resources/Welch Community Hosp*., Docket No. 03-HHR-147 (Feb. 2, 2004).

7. WEST VIRGINIA CODE § 23-5A-3 allows an employer to terminate the employment of an employee who is off work due to a compensable, work-related injury in certain circumstances as follows:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work. . . .

8. "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)).

9. Respondent has proved by a preponderance of the evidence that Grievant was incompetent to hold his position, and that its actions in terminating Grievant's employment were justified as Grievant lacked the certifications required to hold his position as a BD teacher, and now lacks a valid professional teaching certificate.

10. Grievant has failed to prove by a preponderance of the evidence that Respondent terminated his employment in retaliation for filing a workers' compensation claim in violation of West Virginia Code § 23-5A-3.

Accordingly, the 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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: April 4, 2018.

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Carrie H. LeFevre
Administrative Law Judge