

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAVANNA HOLT,

Grievant,

v.

Docket No. 2020-0169-MerED

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Savanna Holt, filed this grievance against her employer, Respondent, Mercer County Board of Education, dated August 20, 2019, stating as follows: “WV § 18A-4-2; WV § 18A-4-1; WV § 18A-1-1; WV § 6C-2-2 Uniformity, Discrimination. Grievant is Classroom Teacher certified and hired to teach English as a second language. Students in the public schools who are not fluent in English receive services through the special education program and teachers are considered special education teachers. Students have IEP’s (sic) and the teacher spends a majority of their time instructing them. Grievant should receive the same three step bump in pay provided to [special] education teachers in the omnibus education act of 1999.” As relief sought, Grievant seeks “[s]alary adjusted to reflect three additional steps in pay and backpay plus related benefits.”

A level one conference was held on October 7, 2019. The grievance was denied at level one by decision issued October 9, 2019. Grievant appealed to level two on October 23, 2019. A level two mediation was conducted on February 7, 2020. Grievant perfected her appeal to level three on February 20, 2020. A level three grievance hearing was conducted on September 18, 2020, via Zoom video conferencing. Grievant appeared in person, and by her representative, Jessica Morgan, West Virginia Education

Association. Respondent appeared by counsel, Kermit H. Moore, Esq., Brewster Morhous, PLLC, and was represented in person by Dr. Deborah S. Akers, Superintendent, Mercer County Schools. This matter became mature for decision on October 30, 2020, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a classroom teacher and teaches English as a Second Language. Grievant asserts that she as she performs the same job as special education teachers, and she is entitled to receive a pay increase designated by statute for special education teachers. Respondent denies Grievant's claims and asserts that Grievant is not entitled to the pay increase she seeks. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, 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. Grievant, Savanna Holt, is employed by Respondent as an itinerant classroom teacher, and has been so employed since August 6, 2015.
2. Grievant holds a certification to teach English as a Second Language (ESL). Grievant was hired to teach ESL for the 2017-2018 school year, and she continues to hold this position. She is currently serving in her third year as an ESL teacher.
3. On June 10, 2019, Grievant entered into an employment contract to teach summer school identifying her as an "Extended School Year-Special Education Teacher." In this contract, the "Duties of Employee" are stated as follows: "a) Implement/provide

services as established in student's (sic) IEP; b) Monitor progress; c) Provide guidance so that students complete the program by the end of the summer school session; d) Classroom management and supervision; e) Monitor and supervise breaks within the school day; f) Report computer problems to the school administration."¹

4. In its August 30, 2019, yearly Certified List submitted to the West Virginia Department of Education through the WVEIS system, Respondent identified Grievant as a special education teacher.²

5. It is undisputed that Grievant does not hold a certification in special education. Therefore, she is not considered qualified to teach special education courses.

6. Students who are identified as having "a primary home language or native language other than English are screened to determine their English Language proficiency."³ These ESL students qualify for ESL services to help them in learning and improving their English language skills so that they can fully participate in school.

7. As an ESL teacher, Grievant is required to identify and assess ESL students' proficiency in English, create language instruction education plans (LIEP), and she prepares and manages documents such as the individualized plans for meet the students' needs, eligibility and notification documents for parents, and monitoring documents for the students' general education teachers.

¹ See, Grievant's Exhibit 2, Employment Contract for Summer School. It is noted that Grievant presented only one page of this contract, and such did not have any type of signature line. Respondent has not challenged the validity of this contract or this exhibit. Therefore, the absence of a signature page means nothing.

² See, Grievant's Exhibit 1, one-page excerpt from the Certified List.

³ See, Grievant's Exhibit 10, Initial Services Form.

8. Grievant also plans and presides over meetings with parents and teams that devise and implement direct and indirect services for the ESL students' individual needs. She also monitors students' progress in the general education settings and acts as a resource for the students' general education teachers.

9. Grievant administers tests to the ESL students and analyzes data from the tests to determine what services they will need in order to receive equitable education.

10. Grievant's job responsibilities and functions, as detailed above, are very similar to those of special education teachers. The testimony of Lynn Bayle, Director of Special Education at Mercer County Schools, at the level three hearing demonstrated that Grievant's duties and responsibilities to her ESL students mirror those of special education teachers to their students. However, while some ESL students may also be special education students because of certain conditions they may have, they are not automatically special education students because of their ESL distinction.

11. Lynn Bayle, Director of Special Education at Mercer County Schools, is not over the ESL teachers or the ESL program and services. She does not receive their data or participate in addressing the ESL needs. She has nothing to do with the ESL LIEPs unless those students have additional IEPs as special education students.

12. ESL is not defined as being a part of special education, but ESL students have special needs that must be addressed.

13. Dr. Kristal Filipek, Human Resources Director for Mercer County Schools, is responsible for preparing the Certified List that is to be submitted to the WVDE each year. She listed Grievant as a Special Education Teacher for the 2018-2019 school year. After Grievant asked her about receiving the statutory three-year experience credit pay

increase for special education teachers, Dr. Filipek told Grievant that she was not eligible for the pay increase because she was not a special education teacher. After Dr. Filipek spoke to Grievant about the pay increase, she changed Grievant to a “remedial specialist” on the Certified List. Grievant remains listed as a remedial specialist on the Certified List for the 2020-2021 school year.

14. It is assumed that there is no Code for “ESL Teacher” in the WVEIS system for the Certified List. Otherwise, Dr. Filipek would have changed Grievant’s title to the same therein. It appears that those completing the Certified List must use existing codes in the WVEIS computer system to describe an employee’s position and must find a code that most closely fits the employee’s job.

15. Neither party introduced copies of the “Frequently Asked Questions” documents issued by the WVDE that they referenced in their presentations of evidence with respect to the three-year experience pay increase grant to special education teachers in House Bill 206 and by West Virginia Code § 18A-4-2(e).

16. Both parties asked that this ALJ take notice of WVDE Policy 2419, which neither introduced as evidence at the level three hearing, as the same was represented to be public and readily accessible on the WVDE website. This ALJ granted their request and has taken notice of the same as published on the WVDE website.

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 (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.*

Grievant asserts that, given her duties and responsibilities as described herein, she does the same job as special education teachers; therefore, she should be entitled to the three-year experience credit granted to special education and math teachers pursuant to West Virginia Code § 18A-4-2(e). Grievant is not arguing that she is a certified special education teacher. Further, Grievant does not assert that she is somehow misclassified. Grievant acknowledges that the WVDE does not include ESL in special education. However, Grievant appears to argue that as ESL teachers, such as herself, do the same job as special education teachers, and to deny them the three-year experience credit pay increase is arbitrary and capricious. Respondent rejects Grievant's argument and asserts that West Virginia Code § 18A-4-2(e) is clear and that because Grievant is not a special education teacher, she is not entitled to the three-year experience credit that would increase her pay.

"School personnel' means all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise. 'School personnel' is comprised of two categories: Professional personnel and service personnel. . ." W. VA. CODE § 18A-1-1(a). "'Professional person' or 'professional personnel' means those persons or employees who meet the certification requirements of the state, licensisng requirements of the state, or both, and includes a professional education and other professional employee. . . ." W. VA. CODE § 18A-1-1(b). "'Professional educator' has the same meaning as 'teacher' as defined in section one, article one, chapter eighteen of this

code. Professional educators are classified as follows: (1) 'classroom teacher' means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity. . . ." W. VA. CODE § 18A-1-1(c)(1). West Virginia Code § 18 A-4-2(e) states as follows:

Effective July 1, 2019, each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule set forth in subsection (b) of this section: Provided, That for any classroom teacher who satisfies these requirements and whose years of experience plus the three additional years due to them exceeds the years of experience provided for on the salary schedule shall be paid the additional amount equivalent to three additional years of experience notwithstanding the maximum experience provided on the salary schedule.

W. VA. CODE § 18A-4-2(e).

It is undisputed that while Grievant is a licensed teacher, she lacks certification in special education and is not a special education teacher. According to both parties' representations during the level three hearing, the WVDE issued guidance on West Virginia Code § 18A-4-2(e), and its interpretation thereof, in the form of "Frequently Asked Questions (FAQ)." However, neither party presented the same as evidence at the level three hearing. Given that this ALJ was asked by both parties to take notice of WVDE Policy 2419, as such is public and readily accessible on the WVDE website, and she did so, this ALJ also looked to see if the referenced FAQs were also public and readily accessible on the website. They were not readily accessible on the date such was attempted. Accordingly, there is no evidence in the record regarding these FAQs other than what little testimony was presented at the level three hearing. Nonetheless, the parties appear to agree that in these FAQs, the WVDE announced that it had determined

that West Virginia Code § 18A-4-2 does not apply to ESL teachers. “‘Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.’ Syl. pt. 4, *Security National Bank & Trust Company v. First W. Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (W. Va. 1981).” *Smith v. Bd. of Educ.*, Syl. Pt. 3, 176 W. Va. 65, 66, 341 S.E.2d 685, 686 (1985). Given the evidence presented, and the plain language of West Virginia Code § 18A-4-2(e), this ALJ cannot find that the WVDE’s interpretation that ESL teachers are not entitled to the three-year experience credit resulting in a pay raise to be clearly erroneous.

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).

“‘[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 does not argue that she is a special education teacher. She argues that her job is so similar to those of special education teachers, as evidenced by the fact that Respondent had wrongly listed her a special education teacher on its Certified List and other documents more than once, she should receive the three-year experience credit, as well. West Virginia Code § 18A-4-2(e) specifically states that it applies to special education teachers. While Grievant appeared to argue *Townsend v. Barbour Cty. Bd. of Educ.*, Docket No. 2020-0238-BarED (Mar. 17, 2020), in support of her claims at the level three hearing, she did not mention, or cite, the same in her post-hearing submissions. Respondent addressed the decision in its submissions. In reviewing *Townsend*, it is easily distinguished from the instant grievance. First, the grievant in *Townsend* was a speech-language pathologist, which is recognized as being a part of special education, and the grievant held a special education certification. ESL is not a recognized as part of special education and Grievant lacks certification in special education, even though she has received some education on the subject. Given the evidence presented, this ALJ cannot conclude that the decision to deny Grievant the three-year experience credit for

special education teachers granted by West Virginia Code § 18A-4-2(e) was unreasonable or, otherwise, arbitrary and capricious.

Accordingly, for the reasons set forth herein, Grievant has failed to prove her claims by a preponderance of the evidence. Therefore, 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. “Effective July 1, 2019, each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule set forth in subsection (b) of this section: Provided, That for any classroom teacher who satisfies these requirements and whose years of experience plus the three additional years due to them exceeds the years of experience provided for on the salary schedule shall be paid the additional amount equivalent to three additional years of experience notwithstanding the maximum experience provided on the salary schedule.” W. VA. CODE § 18A-4-2(e).

3. “Interpretations of statutes by bodies charged with their administration are

given great weight unless clearly erroneous.’ Syl. pt. 4, *Security National Bank & Trust Company v. First W. Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (W. Va. 1981).” *Smith v. Bd. of Educ.*, Syl. Pt. 3, 176 W. Va. 65, 66, 341 S.E.2d 685, 686 (1985).

4. Grievant has failed to prove by a preponderance of the evidence that the WVDE’s interpretation of West Virginia Code § 18A-4-2(e), relied upon by Respondent, to exclude ESL teachers from receiving the three-year experience credit for special education teachers was clearly erroneous.

5. 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).

6. “[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).

7. Grievant has failed to prove by a preponderance of the evidence that the decision to deny her the three-year experience credit granted to special education teachers by West Virginia Code § 18A-4-2(e) was clearly wrong or arbitrary and capricious. As such, Grievant has failed to prove she is entitled to the three-year experience credit.

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: December 17, 2020.

Carrie H. LeFevre
Administrative Law Judge