

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SARAH PHELPS,**

**Grievant,**

**v.**

**Docket No. 2020-0866-RaIED**

**RALEIGH COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Sarah Phelps, filed this expedited level three grievance against her employer, Raleigh County Board of Education, dated January 30, 2020, stating as follows:

Grievant was suspended without pay and her contract of employment as an ECCAT/Aide at Ghent Elementary School was terminated for incompetency due to her failure to acquire certification as an ECCAT.

- Grievant asserts that she made a good faith effort to acquire certification but misunderstood the procedure.
- Grievant asserts that after notification of rejection of her application for certification and the Respondent's intent to terminate her employment, she undertook remedial measures to obtain certification. Those efforts have not succeeded, at least in part, on the basis of the refusal of the administration to approve her application.
- Grievant asserts that her misconduct, i.e., failure to obtain ECCAT certification constituted correctable conduct. Accordingly, she should have received an evaluation, a plan of improvement, and provided with an opportunity to remedy her deficiencies, i.e., obtain the required certification.
- Grievant asserts that she was competent as an aide. Accordingly, she should have retained employment as an aide and the ECCAT portion of her contract be removed rather than her contract of employment being terminated completely.

Grievant alleges:

- The suspension without pay and termination of the contract of employment of Grievant, Respondent violated West Virginia Code §§ 18A-2-8(a), (b), and 18A-4-8g(l).
- The suspension without pay and termination of the contract of employment of Grievant was arbitrary and capricious.

As relief, Grievant seeks,

- Reinstatement with back pay with interest and all benefits, pecuniary and nonpecuniary.
- Respondent be directed to cooperate fully with Grievant's efforts to secure certification as an ECCAT or in the alternative, assign Grievant to a regular aide position.

The parties submitted a "Joint Motion to Submit Grievance on Record Developed Below" on October 28, 2020, asking this ALJ to decide this grievance at level three based upon the record developed at the school-level disciplinary hearing before the Raleigh County Board of Education conducted on January 23, 2020. This ALJ granted the parties' joint motion and set a date for the parties' submission of proposed Findings of Fact and Conclusions of Law. This matter became mature for consideration on December 18, 2020, upon the receipt of the last of the parties' proposals. Grievant appeared by her representative, John Everett Roush, Esq., AFT-WV/AFL-CIO. Respondent appeared by its counsel, George "Trey" B. Morrone, III, Esq., Bowles Rice, LLP.

### **Synopsis**

Grievant was employed by Respondent as an Aide IV/Early Childhood Classroom Assistant Teacher-I (ECCAT-I) and had been so employed since on or about February 12, 2019. Respondent first suspended, then terminated Grievant's employment citing her

lack of an ECCAT certification rendering her incompetent to hold her position. Grievant does not dispute that she lacked her ECCAT certification. However, Grievant argues that her failure to properly obtain her ECCAT certification was correctable conduct, and, as such, would be entitled to notice of the deficiency and an opportunity to improve before her employment was terminated. Grievant also argues that as she was multiclassified as an ECCAT/Aide, she was entitled to retention as in an Aide capacity. Respondent met its burden of proving that it properly suspended and subsequently dismissed Grievant from employment because she was incompetent to hold her position. Grievant failed to prove her 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 an Aide IV/ECCAT-I at Ghent Elementary School. Before this position, Grievant was employed by Respondent as a substitute teacher's aide from the 2015-2016 school year through the 2018-2019 school year.

2. Grievant bid on and received the position of Aide IV/ECCAT-I on or about February 12, 2019. At that time, Grievant was aware that she would be required to obtain ECCAT certification for this position. This was the first time Grievant had been required to obtain ECCAT certification.

3. Angela Meadows, Certification Coordinator, attempted to contact Grievant in July 2019 to have her come into the office to complete the necessary paperwork to

obtain the credentials she needed from the West Virginia Department of Education for the new ECCAT position. However, Grievant did not return Ms. Meadows' calls.

4. Grievant had been on a leave of absence from her employment from January 3, 2019 through May 9, 2019.

5. On August 7, 2019, Grievant came to the central office to speak with Tammy Lynch for a reason unrelated to Ms. Meadows' calls. At that time, Ms. Lynch informed Grievant that she needed to see Ms. Meadows to complete paperwork needed to obtain her ECCAT certification for her new position.

6. On August 7, 2019, after speaking with Ms. Lynch, Grievant met with Ms. Meadows. Ms. Meadows then helped Grievant complete Form 7—Application Consent/Release of Background Information and Form 41—Early Childhood Classroom Assistant Teacher Authorization. Grievant needed to complete these forms to obtain the ECCAT credentials from the West Virginia Department of Education.

7. Forms 7 and 41 required Grievant to pay a non-refundable application fee, that Grievant submit a narrative to any background disclosure questions to which she answered "yes," and that Grievant have her fingerprints processed. Grievant told Ms. Meadows that she wanted to type her narrative responses for her background disclosure questions and that she would return the same to Ms. Meadows.

8. Grievant began working in her position of Pre-school Special Needs Aide IV/ECCAT-I position at Ghent Elementary School on August 8, 2019.

9. As of August 20, 2019, Grievant had not submitted her typed narrative responses to Ms. Meadows. Ms. Meadows contacted Grievant that date and told her the information was needed and that she could submit it directly to the Department of

Education if she wished and provided Grievant the email address where she could send it. Ms. Meadows also told Grievant that she was going to submit Form 41 to the Department of Education at that time.

10. Superintendent David C. Price signed Grievant's Form 41 on August 20, 2019, and it was submitted to the Department of Education that day.

11. Near the beginning of the 2019-2020 school year, Grievant registered for the online classes related to obtaining her ECCAT certification for the spring of 2020. The classes for the fall of 2019 were already full.

12. In September and October 2019, Department of Education employees emailed Grievant to inform her of actions she needed to take to complete her ECCAT credential application. She was informed that she needed to pay the \$35.00 fee for her Form 41 application and provided her the information for paying it online. She was also informed that she needed to complete her fingerprint background check.

13. Grievant did not take the necessary actions to properly complete her application for her ECCAT credentials. She had not submitted her narrative answers for her background check and she had not paid the required fee.

14. By email dated November 9, 2019, Robert Hagerman from the Department of Education informed Grievant, as well as Randy Adkins, Assistant Superintendent for Raleigh County School, that Grievant's ECCAT application had been denied as it had "pended too long—information requested was not received by final deadline."

15. Ms. Meadows contacted Grievant on November 12, 2019, and told her that her application for her ECCAT certification had been denied and encouraged her to submit the missing items to the Department of Education by November 22, 2019. Ms.

Meadows was aware that there was a 90-day grace period allowing an employee to remain in a position while an application for certification is pending with the Department of Education before the application is denied and the employee can no longer serve in the position. Ms. Meadows thought that Grievant had a few more days because her application was submitted on August 20, 2019.

16. On December 5, 2019, Ms. Meadows confirmed with the Department of Education that Grievant had not submitted any of the missing information from her application.

17. On December 5, 2019, Mr. Adkins and Rebecca Hendrick, Principal at Ghent Elementary School, met with Grievant about her failure to obtain the required ECCAT certification and informed her that such rendered her unable to stay in the Aide IV/ECCAT-I position.

18. By letter dated December 6, 2019, the Superintendent notified Grievant that she was suspended without pay, effective that day, and that he would recommend to the Board that her employment be terminated because she was considered incompetent to hold the Aide IV/ECCAT-I position without the required certification.

19. Grievant does not deny that she failed to provide the necessary information to the Department of Education for her application for ECCAT certification despite being reminded by Ms. Meadows. Grievant admits to receiving the emails from the Department of Education about information lacking from her application; however, she believed them to be a phishing scam.

20. Grievant paid the fee and completed the fingerprint background investigation after she was informed that her application was denied and after Mr. Adkins informed her that her lack of certification rendered her incompetent to hold the position.

21. As of January 16, 2020, Grievant's Form 41 for ECCAT Authorization remained denied since November 8, 2019. As of January 23, 2020, Grievant had not submitted her narrative responses for her background investigation.

22. After the hearing conducted before the Raleigh County Board of Education on January 23, 2020, the Board voted to ratify Grievant's unpaid suspension and to terminate her employment contract. By letter dated January 24, 2020, Grievant was notified of her Board's decision.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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 employer has not met its burden. *Id.*

Grievant concedes that, "technically, [her] lack of ECCAT certification rendered her incompetent to hold the position of ECCAT."<sup>1</sup> However, Grievant argues that her conduct was "correctable" and that she was entitled to the opportunity to improve before her employment was terminated. Grievant also asserts that instead of being dismissed from

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<sup>1</sup> See, Grievant's proposed Findings of Fact and Conclusions of Law, pg. 9.

employment, she was entitled to be retained as an Aide as she was certainly competent to hold that position. Respondent denies Grievant's claims, asserting that it properly terminated Grievant's employment because she lacked the required certifications to hold the position of ECCAT, thereby rendering her incompetent to hold her position.

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.

(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. Va. 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 (4<sup>th</sup> 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 an ECCAT certification. As such certification is required for her to hold the position of Aide IV/ECCAT-I, Grievant is incompetent to hold the position. Grievant knew of the requirements of holding an ECCAT position. She was informed of the same and she was reminded numerous times of what she needed to do to complete her application. She failed to do so, regardless of the reasons. Grievant's argument that she did not understand the importance of completing her application is not supported by the evidence. She was informed not only by Ms. Meadows, but also by the Department of Education. The reminders and the emails should have, at least, prompted her to ask questions about the information they were telling her needed to be submitted. Grievant's unfamiliarity with the process and ignorance are no excuses, especially as she was reminded a number of times.

Grievant's argument that she is entitled to an opportunity to improve before her employment was terminated because her conduct was correctable also fails. Grievant was dismissed under West Virginia Code § 18A-2-8(a) for being legally incompetent to hold her position. She was not dismissed for her job performance, pursuant to West Virginia Code § 18A-2-8(b). Correctable conduct would only be relevant if her job performance were the reason for the termination of her employment contract. The simple fact that she lacked the required certifications to hold an ECCAT position is what renders her 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.

Further, Grievant was not entitled to be retained and employed by Respondent as an Aide pursuant to West Virginia Code § 18a-4-8g(l) as she argues. The law Grievant

cites as authority for this argument does not apply to the matter at issue because West Virginia Code § 18A-4-8g(l) pertains to a reduction in force. This was not a situation where Grievant lost her job due to a reduction in force. Grievant's contract was terminated for incompetency as she lacked the required certification to hold her position. Therefore, Grievant's argument on this issue also fails. Grievant could certainly apply for any vacant positions for which she is qualified, but Grievant was not automatically entitled to retention in employment as an aide.

Accordingly, for the reasons set forth herein, 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 to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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 employer has not met its burden. *Id.*

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. Va. 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 (4<sup>th</sup> 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. Respondent has proved by a preponderance of the evidence that Grievant was incompetent to hold her position, and that its actions in terminating Grievant's employment were justified as Grievant lacked the certifications required to hold her position as an Aide IV/ECCAT-I.

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, 2018).

**DATE: February 5, 2021.**

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