THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM GUY REDMAN,

Grievant,

v. **Docket No. 2013-0326-JacED**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, William Guy Redman, filed this expedited Level Three grievance against his employer, Jackson County Board of Education, dated September 10, 2012, stating as follows: "Respondent has suspended the Grievant without pay for 7 1/2 days for failure to complete the certification process for the 2012-2013 school year on a 'timely basis.' Grievant was not released to return to work to operate a bus at the beginning of the 2012-2013 school year and has, of this date, still not returned to work. Grievant contends that his suspension was in violation of W. Va. Code 18A-2-7 & 18A-2-8 and was arbitrary and capricious." As relief sought, "Grievant seeks compensation for wages with [sic] and benefits of any kind lost as a result of his suspension. Grievant also seeks interest of any sums to which he is entitled and removal of all references to his suspension from any file maintained by Respondent or its agents."

The Level Three grievance hearing was held on December 14, 2012, at the Grievance Board's office in Charleston, West Virginia, before the undersigned administrative law judge. Grievant appeared in person and by counsel, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent, Jackson County Board of Education, appeared by counsel, Howard S.

Seufer, Jr., Esquire, of Bowles Rice, LLP. This matter became mature for consideration on January 28, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, while on personal leave due to a medical condition, allowed his bus operator certification to expire. At the beginning of his contract year, Grievant, still lacking his required certification, reported to work for inservice days, then returned to personal leave before having to start making his bus runs. During that time, Grievant was again reminded that his certification was needed. However, Grievant did not take action to renew his certification. In response, Respondent suspended Grievant without pay for incompetency as he lacked the certification required to be employed as a bus driver. Upon being suspended, Grievant took action to obtain his certification. Grievant was suspended without pay for a total of 7.5 days. Grievant asserts that his suspension violated West Virginia Code § 18A-2-8. Respondent denies Grievant's claims arguing that the suspension was proper because Grievant lacked certification, and was, therefore, incompetent. Respondent has proved its 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. William Guy Redman is employed by Respondent, Jackson County Board of Education, as a bus operator.

2. Except for two days in August 2012, Grievant has been off work on sick

leave since February 2012. Grievant has not been released by his doctor to return to work.

3. As a bus operator, Grievant is required to be certified to perform his job. A bus operator's certification expires at the end of each school year, and he or she must renew the same by satisfying six requirements, two of which are passing an online exam and proving that he or she is First Aid CPR-certified.

4. In July 2012, Assistant Superintendent Jay Carnell learned that Grievant had not renewed his certification, and that Grievant had not taken the online exam or obtained a new First Aid CPR certificate. In response, Mr. Carnell telephoned Grievant to remind him to do these things. When no one answered the call, Mr. Carnell left a voice mail message with the information.

5. Grievant did not respond to Mr. Carnell's voice mail message.

6. On July 31, 2012, Mr. Carnell sent Grievant a letter stressing the necessity of renewing his certification. Mr. Carnell sent this letter to the address he had for Grievant. However, Grievant's address had changed due to 911 mapping. Despite the change, Grievant receives at least some mail sent to his previous address.

7. Grievant does not recall receiving Mr. Carnell's voice mail message or his letter. Grievant explained that someone else in his household could have received both and not informed him of the same.

8. Mr. Carnell was not required to telephone or write to Grievant about renewing his certification. He did so only as a courtesy.

9. Grievant reported to work on August 13, 2012, the first day of his contract year. At that time, Grievant had not renewed his certification. Assistant Superintendent

David Moore and Mr. Carnell spoke with Grievant that day and reminded him of what he needed to do to obtain his bus operator certificate.

10. Grievant worked three consecutive days, two of which were continuing education days followed by one day when the bus operators worked on their buses and drove their routes without students. Grievant did not drive a bus during this time.

11. During those three days, Grievant was paid and did not use sick, or personal, leave. When it was time to start transporting students, Grievant resumed taking sick leave.

12. On August 23, 2012, Superintendent Blaine C. Hess met with Grievant about his lack of certification. Superintendent Hess explained to Grievant that certification was a requirement of his employment as a bus operator, and that because he was not yet certified, despite ample time to do so and the reminders that he had been given, he was suspended without pay. Mr. Hess informed Grievant that he would have a set amount of time to obtain his certification, or else he would risk termination of his contract for incompetence.

13. By letter dated August 24, 2012, Superintendent Hess reiterated what was discussed at the August 23 conference, and set September 6, 2012, as the deadline for Grievant to obtain his certification.

14. Because he was suspended without pay during that time, Grievant could not receive compensation for accrued sick, or personal, leave on days he was absent from work and not certified to operate a bus.

15. On August 30, 2012, Grievant received his First Aid CPR certification. On August 31, 2012, Grievant contacted Assistant Superintendent Moore to arrange to take

the online exam.[1] Grievant took the exam that afternoon at Ripley High School and received a passing score.

16. The State Superintendent of Schools issued Grievant's new bus operator's certificate on September 4, 2012. Information regarding the issuance of the certificate was faxed to the Board's office that same day. The actual certificate arrived on September 6, 2012.

17. At the September 6, 2012, Board meeting, Superintendent Hess asked the Board to ratify Grievant's unpaid 7.5-day suspension. Mr. Hess arrived at 7.5 days by treating the suspension as ending on September 4, and subtracted a half-day to reflect the time Grievant came to Ripley High School to take the online exam. Mr. Hess did not ask the Board to terminate Grievant's contract.

18. Before acting on Superintendent Hess's recommendation, the Board conducted a hearing as requested by Grievant. At the conclusion of the hearing, the Board voted to ratify the 7.5-day suspension.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

[1] Grievant apparently took the online exam at home on or about August 14, 2012, in the presence of an acquaintance who works in law enforcement. However, this manner of test taking does not meet the requirements for certification. Grievant was never told that such was permissible, or that it met the requirements for certification. He did this on his own.

"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 and 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*.

Respondent asserts that when Grievant's contract year began and he lacked his bus operator certification, he was incompetent to hold his job; therefore, it was proper to suspend him until such time as he became certified. Grievant argues that his failure to have his certification does not constitute incompetency because he was under a doctor's care, unable to drive a school bus, and was so for the foreseeable future. Grievant asserts that Respondent was aware of his condition and aware that he would not be able to drive the bus. Essentially, Grievant is arguing that because he was unable to work, his lack of certification was insignificant. Grievant further argues that because he had not exhausted his personal leave, he was entitled to continue receiving his pay until he exhausted his personal leave.

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote, or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-7(a). "The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the

superintendent with the board of education and the period of the suspension may not exceed thirty days unless extended by order of the board." W. VA. CODE § 18A-2-7(c). Further, 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. . . .

W. VA. CODE § 18A-2-8(a).

"The authority of a county board of education to discipline an employee 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).

"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." *Trimboli v. Dept. of Health & Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

State Board Policy 4336 requires that "[a]ll school bus operators' certification shall be renewed on an annual basis at the request of their current or intended employer for the upcoming year." 126 C.S.R. 92. "A bus operator is required to operate a bus. Lack of the prerequisite legal certification or licensure required to perform one's job duties constitutes incompetency within the meaning of WEST VIRGINIA CODE § 18A-2-8 in this particular scenario. *Rogers v. Kanawha County Board of Education,* Docket No. 93-20-447 (Mar. 23, 1994); *Posey v. Lewis County Bd. of Educ.,* Docket No. 2008-0328-LewED (July 25, 2008). ''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) (emphasis added). *See Durst v. Mason County Bd. of Educ.,* Docket No. 06-26-028R (May 30, 2008); *Posey, supra.* The Grievant's lack of certification for her position constitutes 'incompetency.'" *Jones v. Fayette County Bd. of Educ.,* Docket No. 2009-1075-FayED (Aug. 5, 2009). *See also, Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010).

Grievant's lack of certification constitutes incompetency as contemplated by WEST VIRGINIA CODE § 18A-2-8. To be eligible to be employed as a bus operator, one has to be certified. At the beginning of his contract year, Grievant was not certified. In fact, he had taken no steps to obtain his certification before returning to work on August 13, 2012. Therefore, he was not eligible to be employed as a bus driver on August 13, 2012. Upon learning that Grievant reported for work on August 13, 2012, school administrators reminded him of the need to renew his certification. Grievant was paid for the days he reported to work at the beginning of his contract year. He was not suspended until August 24, 2012. Only after he was suspended did Grievant begin to

take the steps required to obtain his certification. Getting certified took Grievant 7.5 days, not counting the time he reported to Ripley High School to take his exam. Respondent could have terminated Grievant's employment, but it did not. Suspending Grievant for 7.5 days until he received his certification was certainly not unreasonable, arbitrary, or capricious.

The undersigned is not persuaded by Grievant's argument that his suspension was improper because he was entitled to receive his pay until he exhausted his personal leave as he was unable to return to work due to a physical condition. To be qualified to be employed as a bus operator, one must be certified. Grievant was not qualified to be a bus driver during the time in question. The use of personal leave does not somehow excuse Grievant's lack of certification. Further, there appears to be no exception to the rules for those on personal leave. Clearly, Grievant knew of his need to be certified and took no action to renew the same until he was suspended. Once suspended, he quickly obtained his certification, and was promptly placed back on paid personal leave. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public

school employee may be 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.

3. "The authority of a county board of education to discipline an employee 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. "A bus operator certification is required to operate a bus. Lack of the prerequisite legal certification or licensure required to perform one's job duties constitutes incompetency within the meaning of WEST VIRGINIA CODE § 18A-2-8 in this particular scenario. *Rogers v. Kanawha County Board of Education,* Docket No. 93-20-447 (Mar. 23, 1994); *Posey v. Lewis County Bd. of Educ.,* Docket No. 2008-0328-LewED (July 25, 2008). ''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) (emphasis added). *See Durst v. Mason County Bd. of Educ.,* Docket No. 06-26-028R (May 30, 2008); *Posey, supra.* The Grievant's lack of certification for her position constitutes 'incompetency.'" *Jones v. Fayette County Bd. of Educ.,* Docket No. 2009-1075-FayED (Aug. 5, 2009). *See also, Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010).

5. Respondent has proved by a preponderance of the evidence that

Grievant's lack of certification constituted incompetency pursuant to West Virginia Code § 18A-2-8, and that Grievant's 7.5-day suspension was not arbitrary or capricious.

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

DATE: April 29, 2013.

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Carrie H. LeFevre
Administrative Law Judge