STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA LOTTIE WELLMAN,

Plaintiff-Appellee,

v

BOARD OF EDUCATION OF MELVINDALE-NORTHERN ALLEN PARK PUBLIC SCHOOL DISTRICT and CORA M. KELLY,

Defendants-Appellants,

and

DEPARTMENT OF EDUCATION,

Defendant.

UNPUBLISHED
July 22, 2014

No. 318423
Wayne Circuit Court
LC No. 13-008183-CK

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendants[1] appeal by right the trial court's judgment granting declaratory relief and summary disposition in favor of plaintiff, ordering that her employment contract be reinstated, and denying defendants' cross-motion for summary disposition. We reverse.

Defendants argue that the trial court erred when it granted plaintiff's motion for summary disposition because plaintiff failed to timely renew her teacher certificate. We agree.

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), but the trial court granted the motion without citing either subrule. If a party moves for summary disposition under multiple subrules

[1] Because the Michigan Department of Education was dismissed pursuant to a stipulated order, "defendants" will refer to the Melvindale-Northern Allen Park Public School District Board of Education and Cora M. Kelly.

and the trial court rules on the motion without specifying the subrule under which it decides an issue and considers documentary evidence beyond the pleadings, this Court reviews the decision as if it were based on MCR 2.116(C)(10). *Cuddington v United Health Services, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Because the trial court considered documentary evidence in its ruling, this Court reviews the August 26, 2013, order as if it had been granted under MCR 2.116(C)(10). *Cuddington*, 298 Mich App at 270.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

"This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011). Likewise, all reasonable inferences are drawn in favor of the nonmoving party, *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010), and "an adverse inference may be drawn against a party who fails to produce evidence within its control," *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989). Appellate review is "limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc*, 285 Mich App at 476.

MCL 423.215(3)(m) provides, in part:

> For public employees whose employment is regulated by [the teacher tenure act, MCL 38.71 *et seq.*], a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and [sic] capricious standard provided under . . . MCL 38.101.

"Except as otherwise provided in [MCL 38.101a], discharge or demotion of a teacher on continuing tenure may be made only for a reason that is not arbitrary or capricious and only as provided in this act." MCL 38.101(1); see also *Cona v Avondale Sch Dist*, 303 Mich App 123, 143; 842 NW2d 277 (2013).[2] " 'Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical.' " *Cona*, 303

[2] MCL 38.101a, which concerns the discharge of school employees who have committed a listed crime, does not apply to the facts of this case.

Mich App at 143, quoting *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011). "For instance, a reason is arbitrary and capricious if it is based on prejudice, animus, or improper motives." *Cona*, 303 Mich App at 143; see also *Mich Farm Bureau*, 292 Mich App at 145.

"Except as otherwise provided by law, the board of a school district . . . shall not permit a teacher who does not hold a valid teaching certificate to teach in a grade or department of the school." MCL 380.1233(1); see also *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 250; 501 NW2d 88 (1993). "The board of a school district . . . may employ a person without a teaching certificate as a substitute teacher if the person has at least 90 semester hours of college credit from a college or university." MCL 380.1233(6). Additionally, a school district may employ a full-time or part-time noncertificated, nonendorsed teacher to teach a course in science, among other subjects, in grades 9 through 12, if the teacher meets certain requirements, MCL 380.1233b(1)-(2), but only if the school district cannot engage a "certificated, endorsed teacher," MCL 380.1233b(4).

In support of her argument that her discharge was arbitrary or capricious, plaintiff argues that defendants could have applied for a permit to allow her to teach notwithstanding the withdrawal of her certificate, which the Michigan Department of Education ("MDE") suggested in its April 10, 2013, letter informing plaintiff that she was no longer eligible to teach: "You may wish to speak with your school district to discuss the option of continuing your employment under a permit until you meet the requirements for renewing your certificate." Plaintiff points to 2012 AACS, R 390.1141, an administrative rule within the Teacher Certification Code[3] that provides:

> (1) On application, the superintendent of public instruction shall issue to a school district or nonpublic school a special permit to employ a person who has met all statutory requirements when a properly certificated teacher is not available for employment. The permit shall be a full-year, emergency, or substitute permit.
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> (2) A full-year, emergency, or substitute permit or renewal of a permit is issued to the recommending superintendent or school administrator who shall apply for such permit or renewal and who shall affirm under oath that the requirements for the requested permit or renewal have been met. The recommending superintendent or school administrator receiving the permit or renewal shall hold the permit or renewal for the person.
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> (3) An application for a permit shall be submitted within 30 days of the date the individual starts teaching.
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> (4) Permits are valid from September 1 to August 31 for the school year for which they are issued.

[3] The Teacher Certification Code, 2012 AACS, R 390.1101 *et seq.*, is authorized by MCL 388.1015.

However, Rule 390.1141 does not contemplate the temporary employment of an experienced teacher whose certification is withdrawn. Statutory-construction rules apply to administrative rules, *Danse Corp v City of Madison Heights*, 466 Mich 175, 184; 644 NW2d 721 (2002), and plain and clear language "must be enforced as written," *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). Contrary to plaintiff's characterization of the subrule in her brief on appeal, a permit application is not due "within 30 days from when the *uncertified person* starts teaching"; rather, an application is due "within 30 days of the date the individual starts teaching." Rule 390.1141(3). This distinction removes all significance from the April 10, 2013, withdrawal of plaintiff's certification; in plaintiff's view, she "could have continued to teach even without her certificate if [defendants requested] the necessary permit from [the MDE] within 30 days of April 10, 2013." But because plaintiff began teaching in 1996, a permit application submitted on her behalf would have been untimely. Further, the rule only requires the issuance of a permit "when a properly certificated teacher is not available for employment." Rule 390.1141(1).

Plaintiff has not demonstrated that her termination was arbitrary or capricious. Defendants have consistently maintained that plaintiff was discharged because MCL 380.1233(1) required it, but that statute only prohibits school districts from allowing uncertified persons to teach; it neither requires that a district take any particular action in the event a certified teacher becomes uncertified nor speaks to hiring and firing in any capacity. However, MCL 380.1231(3) provides that "[a] contract shall terminate if the certificate expires by limitation and is not renewed immediately or if it is suspended or revoked by proper legal authority." Because plaintiff's certificate was "revoked by proper legal authority," i.e., the MDE, plaintiff's contract with defendant Melvindale-Northern Allen Park Public School District Board of Education ("MNAP") immediately terminated, under MCL 380.1231(3), on April 10, 2013, regardless of defendants' words or actions thereafter.

As noted, " '[a]rbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical.' " *Cona*, 303 Mich App at 143 (citation omitted). Plaintiff's discharge occurred by operation of law rather than by any action taken by defendants, negating concern about the exercise of will. Far from being "apt to change suddenly," her discharge was entirely predictable, beginning as early as four months before the date of the MDE's letter, when the MDE sent plaintiff the first of four messages regarding its audit of her certificate, since the contract of any teacher whose certificate is duly revoked is automatically terminated under MCL 380.1231(3), and the March 21, 2013, letter warned plaintiff that if she "fail[ed] to provide all of the required documentation used to renew [her] certificate by 5:00 [p.m.] on April 4, 2013, [her] certificate [would] be withdrawn . . . ." Once terminated, plaintiff had no recognizable right to employment either as a permanent or substitute teacher.[4] Therefore, the trial court erred when it concluded that "the action of [defendant MNAP] was arbitrary and capricious."

[4] A school district "shall not permit a teacher who does not hold a valid teaching certificate to teach in a grade or department of the school." MCL 380.1233(1). A school district "*may*

Defendants also argue that the trial court erred by granting plaintiff's motion for summary disposition because there remained unresolved issues of material fact, including whether plaintiff received the MDE's e-mail messages, whether plaintiff requested a transcript from Sioux Falls University ("SFU") in March 2013, whether plaintiff "request[ed] a transcript from [SFU] at any time prior to her terminat[ion] date," and whether SFU "err[ed] (or act[ed] differently than the standard practice/procedure) when it failed to immediately provide [p]laintiff with a copy of her transcript upon completing [sic] of the continuing education course." These facts are disputed, but they are not material because they have no bearing on the question whether plaintiff was discharged for a reason that was arbitrary or capricious. The factual questions that defendants raise may inform an inquiry into whether the MDE's decision to withdraw plaintiff's certificate was justified, but the MDE's disposition, which was appealable according to the April 10, 2013, letter withdrawing plaintiff's certificate, is not before this Court.

Because there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law, MCR 2.116(C)(10), we reverse the August 26, 2013, Judgment of Declaratory Relief and remand for entry of judgment in favor of defendants. We do not retain jurisdiction. No costs pursuant to MCR 7.219, a public question having been involved.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

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employ a person without a teaching certificate as a substitute teacher if the person has at least 90 semester hours of college credit from a college or university." MCL 380.1233(6) (emphasis added). "[T]he term 'may' is 'permissive,' as opposed to the term 'shall,' which is considered 'mandatory.' " *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008).