

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**APRIL PAUGH,
Grievant,**

v.

Docket No. 2015-1574-BarED

**BARBOUR COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, April Paugh, is employed by the Barbour County Board of Education as an Aide at Belington Middle School and Philippi Elementary School. On June 18, 2015, Grievant filed this action against her employer alleging the following:

Respondent filled an ECCAT/Aide position at Belington Elementary School with an applicant possessing less seniority than Grievant in the Aide classification category. Grievant alleges a violation of West Virginia Code § 18A-4-8b & 18A-4-8g.

As relief, Grievant seeks the following:

Instatement into the ECCAT/Aide position at Belington Elementary School with all benefits (pecuniary and non-pecuniary) and compensation for lost wages.

By agreement of the parties, a Level One hearing was held at Respondent's offices in Philippi on August 31, 2015. In the Level One decision issued on September 28, 2015, Superintendent Jeffrey Woofter denied the grievance. Grievant appealed to Level Two on or about October 8, 2015. A mediation session was conducted on January 28, 2016. Grievant perfected her appeal to Level Three on February 12, 2016. An evidentiary hearing was conducted before the undersigned on June 13, 2016, at the Randolph County

Development Authority, Elkins, West Virginia. Grievant appeared in person and by her counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Howard E. Seufer, Jr., Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on July 25, 2016.

Synopsis

Grievant was employed by Respondent as an Aide when she filed this grievance. She bid on a posted Aide/Early Childhood Classroom Assistant Teacher position, which required Early Childhood Classroom Assistant Teacher certification. Although Grievant was the most senior applicant in the Aide classification, she did not at any time hold Early Childhood Classroom Assistant Teacher certification, nor had she held an Early Childhood Classroom Assistant Teacher position. In addition, Grievant did not possess an Early Childhood Classroom Assistant Teacher Temporary Certification, nor had she completed any of the requirements necessary to obtain such a certification. Grievant did not demonstrate she was entitled to placement in the posted position.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed as an Aide at Belington Middle School and Philippi Elementary School at the time she filed this grievance.
2. For the period of May 19-26, 2015, Respondent posted notice of vacancy for the 2015-2016 school year in the 200-day position of Early Childhood Classroom Assistant Teacher/Kindergarten Aide/Supervisory Aide/Transportation Aide at Belington Elementary

School.

3. Ten people applied for the posted job, including Grievant and another regular Respondent employee, Kathy Halstead. Grievant did not already hold an Early Childhood Classroom Assistant Teacher position or an Early Childhood Classroom Assistant Teacher credential from the West Virginia Department of Education. Kathy Halstead did. Grievant had more Aide seniority than Kathy Halstead. However, Kathy Halstead held an Early Childhood Classroom Assistant Teacher/Aide job during the 2014-2015 school year. Grievant had never held an Early Childhood Classroom Assistant class title.

4. At its meeting on June 8, 2015, Respondent appointed Kathy Halstead to fill the posted vacancy. A month later, Kathy Halstead resigned from the position. Respondent accepted her resignation on July 13, 2015, retroactive to July 7, 2015.

5. For the period of July 14-21, Respondent again posted notice of vacancy for the 2015-2016 school year in the 200-day position of Early Childhood Classroom Assistant Teacher/Kindergarten Aide/Supervisory Aide/Transportation Aide at Belington Elementary School.

6. Five people applied for the posted job, including Grievant and regular Respondent employee Sherry Jones. Grievant still did not hold an Early Childhood Classroom Assistant Teacher position or an Early Childhood Classroom Assistant Teacher credential from the West Virginia Department of Education. Sherry Jones did. Grievant had more Aide seniority than Sherry Jones. However, Sherry Jones held an Early Childhood Classroom Assistant Teacher/Aide job during the 2014-2015 school year. Grievant had never held an Early Childhood Classroom Assistant class title.

7. At its meeting on July 27, 2015, Respondent appointed Sherry Jones to fill the posted vacancy.

8. Grievant contends that based upon her greater seniority as an Aide, she, rather than the successful applicants should have been appointed by Respondent to fill the 200-day position of Early Childhood Classroom Assistant Teacher/Kindergarten Aide/Supervisory Aide/Transportation Aide at Belington Elementary School for the 2015-2016 school year.

9. Grievant acknowledges that both times the position was filled under the postings, she did not hold an Early Childhood Classroom Assistant Teacher position, nor did she hold an Early Childhood Classroom Assistant Teacher credential from the West Virginia Department of Education. Grievant contends that Respondent should not have held this against her, since if she had been appointed to the job, she could have then applied for and obtained from the State Department of Education an Early Chidhood Classroom Assistant Teacher Temporary Authorization.

10. According to Rhonda Fisher, Coordinator of the West Virginia Department of Education's Office of Early Learning, an Aide who is awarded an Early Childhood Classroom Assistant Teacher Temporary Authorization by virtue of having been awarded a Pre-Kindergarten or Kindergarten Aide position is required to commit to then successfully complete three required courses during the initial one-year term of the temporary authorization and up to two renewal years. Not every person who is awarded the temporary authorization takes all three required courses, in which case the temporary authorization expires.

11. Grievant began the 2015-2016 school year in the position of Aide. She then successfully applied for a pre-Kindergarten Aide position, was issued an Early Childhood Classroom Assistant Teacher Temporary Authorization by the West Virginia Department of Education, and entered into the duties of her new position in October 2015. At the time of the Level Three hearing, she had completed one of the three courses required by the temporary authorization. As school year 2016-2017 begins, Grievant will hold the Early Childhood Assistant Teacher/Aide position that is at issue in this appeal.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). In other words, "[t]he 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).

WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article.

WEST VIRGINIA CODE § 18A-4-8 lists service personnel classification titles and provides definitions for each title. This CODE § at (i)(36), (37), and (38) defines the class titles Early Childhood Classroom Assistant Teacher I, Early Childhood Classroom Assistant Teacher II, and Early Childhood Classroom Assistant Teacher III. These class titles replaced the class titles Early Childhood Classroom Assistant Teacher - Temporary Authorization, Early Childhood Classroom Assistant Teacher - Permanent Authorization, and Early Childhood Classroom Assistant Teacher - Paraprofessional Certificate, effective March 9, 2015, prior to the date the position at issue was posted. Early Childhood Classroom Assistant Teacher I is defined as "a person who does not possess minimum requirements for the permanent authorization requirements, but is enrolled in and pursuing requirements." Early Childhood Classroom Assistant Teacher II is defined as, "a person who has completed the minimum requirements for a state-awarded certificate for early childhood classroom assistant teachers as determined by the State Board." Early Childhood Classroom Assistant Teacher III is defined as, "a person who has completed permanent authorization requirements, as well as additional requirements comparable to current paraprofessional certificate." WEST VIRGINIA CODE § 18A-3-2a states that a paraprofessional certificate may be issued by the State Board of Education to persons who

have met the two stated conditions, those being completion of 36 semester hours “in subjects directly related to performance of the job,” and demonstration of “the proficiencies to perform duties as required of a paraprofessional.” WEST VIRGINIA CODE § 18A-4-8(u) states that an aide “who becomes employed as an Early Childhood Classroom Assistant Teacher shall hold a multiclassification status that includes aide and/or paraprofessional titles.”

WEST VIRGINIA CODE § 18A-4-8b(d)(2)(C) states:

Paraprofessional, autism mentor, early classroom childhood assistant teacher and braille or sign support specialist class titles are included in the same classification category as aides[.]

Finally, at § (d)(3) it states:

The assignment of an aide to a particular position within a school is based on seniority within the aide classification category if the aide is qualified for the position.

As Respondent has indicated in its proposals, the issue which will decide this case is whether Grievant was qualified for the position. WEST VIRGINIA CODE § 18A-4-8(g)(j) provides that “[s]ervice personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.” The question here is whether Respondent was required to place Grievant in the posted position when she did not hold the certification required by the posting, and Respondent had no reason to believe that Grievant would receive any type of Early Childhood Classroom Assistant Teacher certification by the time she began working in the position. The State Board of Education regulations make clear that in order for an employee to obtain any type of Early Childhood Classroom Assistant Teacher certification from the State Board of Education, the employee

must either be employed in Early Childhood Classroom Assistant Teacher position, or present “verification of at least one year of pre-kindergarten or kindergarten teaching experience.” 126 C.S.R. 136 §§ 12.1.c.7 and 12.1.d.8.

Both Kathy Halstead and Sherry Jones had already qualified as Early Childhood Classroom Assistant Teachers when Respondent appointed them to fill the posted vacancies. Because Grievant had never held the Early Childhood Classroom Assistant Teacher classification and lacked a credential from the West Virginia Department of Education to serve in that classification, she was not qualified for the posted positions.

Finally, Respondent asserts that in considering applicants for service personnel vacancies, WEST VIRGINIA CODE § 18A-4-8g(d) requires a county board to treat candidates' seniority as accumulating within classification categories as referred to in WEST VIRGINIA CODE § 18A-4-8e. The latter statute does not place Aide class titles in the same classification category as Early Childhood Classroom Assistant Teacher. By contrast, Grievant argues that by placing the three Early Childhood Classroom Assistant Teacher classification titles into the Aide classification category as set out in WEST VIRGINIA CODE § 18A-4-8b(d)(2), the Legislature had a profound effect upon the filling of Early Childhood Classroom Assistant Teacher positions. In essence, all employees within the Aide classification category should be given first priority in filling Early Childhood Classroom Assistant Teacher position rather than all employees holding the Early Childhood Classroom Assistant Teacher classification title. The undersigned acknowledges the confusing statutory provisions; however, this interpretation appears to be contrary to past

application of the Code, and the record of this case supports a finding that it was permissible for Respondent to prefer the successful applicants at issue in this grievance.¹

Accordingly, even though Grievant possessed more Aide seniority than the successful applicants when the positions were filled, her Aide seniority did not count as Early Childhood Classroom Assistant Teacher seniority. In contrast to Grievant, both Kathy Halstead and Sherry Jones had held Aide/Early Childhood Classroom Assistant Teacher jobs, and possessed seniority in both classifications of the posted vacancies.

The undersigned concludes from the statutory provisions cited above, and the State Board of Education regulations, that Grievant was not properly certified for the posted position, nor did she demonstrate that she completed any of the requirements for obtaining certification. Grievant did not demonstrate that she was entitled to be awarded the position at issue.

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. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a

¹See *Cosner v. Gilmer County Bd. of Educ.*, Docket No. 2015-1520-GilEd (July 27, 2016).

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-4-8b provides with regard to selection for service personnel positions that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

3. "A board of education is permitted to fill a vacant position with an applicant who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results. *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997)." *Harvey v. Mineral County Bd. of Educ.*, Docket No. 00-28-117 (Aug. 7, 2000).

4. Grievant did not demonstrate that she held the required certification for the position at issue, or that she had completed all the requirements necessary for obtaining the required certification.

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: August 26, 2016

**Ronald L. Reece
Administrative Law Judge**