

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERESA CHAPMAN-DAVIDSON,

Grievant,

v.

Docket No. 2016-1712-BooED

BOONE COUNTY BOARD OF EDUCATION,

Respondent,

and

WILLIA ROBIN ANTILL,

Intervenor.

DECISION

Grievant, Teresa Chapman-Davidson, filed this grievance against her employer, Boone County Board of Education, dated May 27, 2016, stating as follows: “[h]ire another Teacher-Aide with less seniority in a position I bidded for.” No relief sought was listed in the original statement of grievance. At level two, Grievant amended her statement of grievance to state as follows: “Grievant, a teacher’s aide, applied for a vacant ECCAT/Bus Aide position as (sic) Ashford-Rumble Elementary School. This position was awarded to Willia Robin Antill, who is less senior than Grievant. Grievant alleges a violation of WV Code 18A-4-8b and 18A-4-8g.” As relief sought, “Grievant seeks instatement into the ECCAT/Bus Aide position, retroactive wages, benefits, and seniority. Grievant also requests interest on all monetary sums.”

A level one conference was held on August 3, 2016, and denied by decision issued August 24, 2016. Grievant appealed to level two on September 6, 2016. A level two mediation was conducted on November 10, 2016. Grievant perfected her level three

appeal on November 21, 2016. Willia Robin Antill was granted Intervenor status by Order entered January 19, 2017. A level three hearing was conducted on February 8, 2017, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by her representative, John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Denise M. Spatafore., Esquire, Dinsmore & Shohl LLP. Intervenor appeared in person, *pro se*. This matter became mature for decision on March 15, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law. It is noted that Intervenor did not submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an aide. Grievant applied for an Instructional Aide II/III/IV/Early Childhood Classroom Assistant Teacher ("ECCAT")/Bus Aide position. While Grievant was the most senior applicant in the aide classification, she did not hold an ECCAT credential from the West Virginia Department of Education, nor had she ever held an ECCAT position. Another applicant, Intervenor, who was already employed in an ECCAT position, and held an ECCAT credential, was selected for the position. Grievant asserts that she is entitled to the position as she had the most seniority in the aide classification. Respondent argues that its selection of the other applicant for the ECCAT position was proper pursuant to statute. Grievant failed to prove her claim 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. At all times relevant herein, Grievant was regularly employed by Respondent as an aide at Madison Elementary School.

2. On April 20, 2016, Respondent posted a position for an Instructional Aide II/III/IV/ECCAT/Bus Aide at Ashford-Rumble Elementary School for the 2016-2017 school year.¹

3. At the times relevant herein, Intervenor was regularly employed by Respondent in an ECCAT/Instructional Aide position. Intervenor worked as an ECCAT/Instructional Aide during the 2015-2016 school year, and received her ECCAT temporary authorization effective January 11, 2016. Intervenor's ECCAT temporary authorization states that it expires June 30, 2017.²

4. Grievant applied for the Instructional Aide II/III/IV/ECCAT/Bus Aide position at Ashford-Rumble Elementary School, along with fourteen other people.³

5. Grievant was the fourth most senior aide out of the fifteen applicants for the Instructional Aide II/III/IV/ECCAT/Bus Aide position. However, Grievant did not hold an ECCAT job or any ECCAT credential.⁴

6. Five of the fifteen applicants for the Instructional Aide II/III/IV/ECCAT/Bus Aide position held an ECCAT position or an ECCAT credential at the time of application. Only three of the applicants holding ECCAT positions or ECCAT credentials had more

¹ See, Grievant's Exhibit 1, posting dated April 20, 2016.

² See, Respondent's Exhibit 1, January 6, 2016, employment letter to Intervenor; Respondent's Exhibit 2, 2015-2016 Seniority List; Grievant's Exhibit 3, Intervenor ECCAT Temporary Authorization.

³ See, Grievant's Exhibit 2, Service Personnel Spreadsheet.

⁴ See, Grievant's Exhibit 2; testimony of Grievant

aide seniority than Grievant. They were Clara Workman, Lora Ann Price, and Denise Thurmond.⁵

7. Respondent offered the Instructional Aide II/III/IV/ECCAT/Bus Aide position to Clara Workman, Lora Ann Price, and Denise Thurmond. However, they each chose to accept other positions.⁶

8. Intervenor was selected to fill the Instructional Aide II/III/IV/ECCAT/Bus Aide position at Ashford-Rumble Elementary School as she was most senior ECCAT certified applicant for the position, after Clara Workman, Lora Ann Price, and Denise Thurmond chose to take other positions, and she was currently working in an ECCAT position at the time of her application.

9. Grievant's aide seniority date is January 26, 2009. Intervenor's aide seniority date is March 3, 2014. Therefore, Grievant holds a classification title within the classification category of aide, and has more seniority within that classification than the successful applicant for the position at issue. However, at the time Grievant applied for the Instructional Aide II/III/IV/ECCAT/Bus Aide position, Grievant did not hold an ECCAT position, and she did not hold any kind of ECCAT credential from the West Virginia Department of Education.

10. Grievant was not among the Respondent's aides who, by reason of holding pre-school or kindergarten aide jobs on July 1, 2014, and being eligible for full retirement benefits before July 1, 2020, were entitled to ECCAT-Permanent Authorizations under the "grandfather clause" of West Virginia Code § 18-5-18(b).

⁵ See, Grievant's Exhibit 2.

⁶ See, testimony of Jeffrey Huffman, Superintendent.

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 (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). "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).

Grievant argues that because she had more seniority in the aide classification category, she should have been selected to fill the Instructional Aide II/III/IV/ECCAT/Bus Aide position at Ashford-Rumble Elementary School instead of Intervenor. Respondent argues that it was correct in selecting Intervenor to fill the position because she was the most senior ECCAT certified applicant, and she was working in an ECCAT position at that time.

West Virginia Code § 18A-4-8b states, in part, as follows:

(a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) 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. . . .

W. Va. Code § 18A-4-8b. West Virginia Code § 18A-4-8 lists service personnel classification on titles and provides definitions for each title. The class titles Early Childhood Classroom Assistant Teacher I, Early Childhood Classroom Assistant Teacher II, and Early Childhood Classroom Assistant Teacher III are defined in West Virginia Code § 18A-4-8(i)(36), (37), and (38), respectively. 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.” W. Va. Code § 18A-4-8(i)(36). 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.” W. Va. Code § 18A-4-8(i)(37). 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 titles.” W. Va. Code § 18A-4-8(i)(38). West Virginia Code § 18A-3-2a states, in part, as follows:

[a] paraprofessional certificate may be issued to a person how meets the following conditions: (1) [h]as completed thirty-six

semester hours of post-secondary education or its equivalent in subjects directly related to performance of the job, all approved by the State Board; and (2) [d]emonstrates the proficiencies to perform duties as required of a paraprofessional as defined in section eight [§ 18A-4-8], article four of this chapter.

W. Va. Code § 18A-3-2a(d). “A person who has held or holds an aide title and becomes employed as an Early Childhood Classroom Assistant Teacher shall hold a multiclassification status that includes aide and/or paraprofessional titles in accordance with section eight-b of this article.” W. Va. Code § 18A-4-8(u).

While there are three ECCAT class titles, West Virginia Code § 18A-4-8b(d)(2) states as follows: “[e]ach class title listed in section eight of this article is considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which are considered a single classification of employment. . . .” As such, the three ECCAT class titles would be considered a single classification of employment. This Code section further states that “[p]araprofessional, autism mentor, early classroom assistant teacher and braille or sign support specialist class titles are included in the same classification category as aides. . . .” W. Va. Code § 18A-4-8b(d)(2)(C). “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.” W. Va. Code § 18A-4-8b(d)(3). Additionally, there are State Board of Education regulations regarding the requirements for ECCAT certification. These regulations make clear that in order for an employee to obtain any type of ECCAT certification from the State Board of Education, the employee must either be employed in an ECCAT 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.

The issue in this case is whether Respondent was required to place Grievant in the posted Instructional Aide II/III/IV/ECCAT/Bus Aide position at Ashford-Rumble Elementary instead of Intervenor. The Grievance Board has addressed this type of issue a number of times. Grievant was not employed as an ECCAT at the time she applied for the position at Ashford-Rumble Elementary, and she did not hold any type of ECCAT credential from the West Virginia Department of Education. Intervenor not only held an ECCAT credential, but she was employed as an ECCAT at another school at the time she applied. West Virginia Code § 18A-4-8(g)(j) states as follows: “[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.” As Grievant never held the ECCAT classification, and lacked the ECCAT credential from the West Virginia Department of Education, she was not qualified for the posted position. See *Workman v. Raleigh County Bd. of Educ.*, Docket No. 2016-0830-RalED (Nov. 22, 2016); *Cosner v. Gilmer County Bd. of Educ. and Skinner*, Docket No. 2015-1520-GilED (July 27, 2016); *Paugh v. Barbour County Bd. of Educ.*, Docket No. 2015-1574-BarED (Aug. 26, 2016); *Mayle v. Barbour County Bd. of Educ.*, Docket No. 2016-0113-BarED (Aug. 26, 2016); *Adkins v. Fayette County Bd. of Educ.*, Docket No. 2015-1620-FayED (Oct. 19, 2016).

Grievant argues that as the ECCAT classification titles are placed into the aide classification category as set forth in West Virginia Code § 18A-4-8b(d)(2), all employees within the aide classification should be given first priority in filling ECCAT positions rather than all employees holding the ECCAT classification title. A similar argument was made in the case of *Adkins v. Fayette County Bd. of Educ.*, Docket No. 2015-1620-FayED (Oct.

19, 2016). In that case, the administrative law judge stated as follows:

[t]he Legislature has carved out several positions which require certain training and expertise to properly serve particular student populations. The Legislature placed these class titles[:] paraprofessionals, autism mentors, early classroom teacher assistants, and Braille or sign specialists, into the Aide classification. W. Va. Code § 18A-4-8b(d)(2)(C). However, that does not mean that all aides are qualified to hold these special class titles. It was noted in *Riffle v. Webster County Board of Education*, Docket No. 04-51-122 (July 30, 2004), that while “an autism mentor is an aide, an aide is not necessarily an autism mentor.” In that case, it was held that it was appropriate for a board of education to award an aide/autism mentor position to an applicant who had more seniority as an autism mentor, even though the grievant had far more regular seniority in the aide classification. See also *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005). This reasoning has been generally followed by the Grievance Board in cases regarding ECCAT positions. See *Cosner v. Gilmer County Bd. of Educ. and Skinner*, Docket No. 2015-1520-GilED (July 27, 2016); *Paugh v. Barbour County Bd. of Educ.*, Docket No. 2015-1574-BarED (Aug. 26, 2016); and *Mayle v. Barbour County Bd. of Educ.*, Docket No. 2016-0113-BarED (Aug. 26, 2016).

This interpretation may seem at odds with the inclusion of these specialty aide positions in the general aide classification. However, to interpret the statute otherwise would result in more senior aide applicants, with no specialized training or certification, being selected over less senior applicants who do hold certification as ECCATs, autism mentors, or Braille specialists. This surely was not [why] the Legislature required that employees in these specialized positions receive additional training and certification to qualify. In such situations the West Virginia Supreme Court of Appeals has instructed that, “The plain meaning of a statute is normally controlling, except in the rare case in which literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. In such cases, it is the legislative intent, rather than the strict language, that controls.” *West Virginia Human Rights Comm’n v. Garrettson*, 196 W. Va. 118, 128, 468 S.E.2d 733, 743 (1996).

Id. The same applies in this case. Therefore, Grievant did not prove by a preponderance

of the evidence that holding greater seniority in the aide classification entitled her to be selected for the posted ECCAT position over an applicant who was employed as an ECCAT and held an ECCAT credential. Accordingly, 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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. West Virginia Code § 18A-4-8b is to be followed in filling vacancies for newly created service personnel positions, and states, in part, as follows:

(a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) 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. . . .

3. 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.

4. Grievant did not prove by a preponderance of the evidence that holding greater seniority in the aide classification entitled her to be selected for the posted ECCAT

position over an applicant who held an ECCAT credential and was employed in an ECCAT position.

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: May 17, 2017.

Carrie H. LeFevre
Administrative Law Judge