

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**AMY GERRARD, et al.,**

**Grievants,**

**v.**

**DOCKET NO. 2016-1393-CONS**

**BROOKE COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

On March 4, 2016, Amy Gerrard, Magdalene Sacker, Pam Simpson, and Wendy Willis filed the following grievance at Level One of the grievance procedure, against their employer, the Brooke County Board of Education (“Respondent” or “BCBE”):

Grievants have been placed on the transfer list without termination of less senior ECCAT/Aides in order to provide ECCAT/Aide positions into which they could transfer. Grievants allege a violation of W. Va. Code 18A-2-6, 18A-4-8b and 18A-4-8g.

For their relief sought, Grievants asked for “reinstatement into ECCAT/Aide positions without loss of seniority or compensation for the 2016-2017 school year.”

Following a Level One hearing on May 24, 2016, the chief administrator’s designee, Danny Kaser, denied the grievance in a written decision issued on June 21, 2016. Thereafter, Grievants Pam Simpson and Magdalene Sacker asked to be dismissed from this grievance, and were subsequently dismissed as parties to this grievance in Orders issued on July 21, 2016. This matter proceeded through a mediation session at Level Two on August 12, 2016, and the remaining Grievants thereafter timely appealed to Level Three. A Level Three hearing was conducted in the Grievance Board’s office in Westover, West Virginia, on December 13, 2016. Grievants

were represented by John Roush, Esquire, with the West Virginia School Service Personnel Association. Respondent was represented by Kimberly S. Croyle, Esquire, with Bowles Rice, LLP. At the beginning of the Level Three hearing, counsel for Grievants verbally withdrew the grievance of Wendy Willis, indicating that she no longer wished to pursue her grievance. Accordingly, Wendy Willis will be dismissed and severed from this grievance, leaving Amy Gerrard as the sole remaining Grievant in this matter.

This matter became mature for decision on January 13, 2017, upon receipt of the last of the parties' post-hearing proposals.

### **Synopsis**

Grievant was transferred from an ECCAT<sup>1</sup> Kindergarten position to an Aide position in another school, although she held more seniority as an ECCAT than at least one other service employee in an ECCAT position, who was allowed to maintain her ECCAT position. Although ECCATs are Aides who are qualified to fill other Aide positions, a more senior Aide who lacks ECCAT certification is not permitted to fill an ECCAT position. In addition, ECCATs are in a higher pay grade than Aides. Thus, Grievant suffered a loss in pay as a result of being transferred to an Aide position.

The school board failed to comply with W. Va. Code § 18A-4-8g(d) which, when read *in Pari materia* with W. Va. Code § 18A-4-8e, 18A-4-8 and 18A-4-8a, requires a board needing to reduce the number of ECCATs by reduction in force, to eliminate the ECCAT with the least seniority. Instead, Grievant was required to displace a less senior Aide. In addition, the school board failed to follow W. Va. Code § 18A-2-6 when it

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<sup>1</sup> "ECCAT" is an acronym for "Early Childhood Classroom Assistant Teacher." See W. Va. Code § 18-5-

omitted any reference to that statute, or the proposed termination of Grievant's contract as an ECCAT, when it notified Grievant that she was being proposed for transfer in accordance with W. Va. Code § 18A-2-7. Therefore, this grievance must be granted.

The following Findings of Fact are made based upon the record developed at Level One and continuing through the Level Three hearing.

### **Findings of Fact**

1. During the 2015-2016 school year, Grievant was employed by Respondent Brooke County Board of Education as a Kindergarten Aide with ECCAT certification at Colliers Primary School.

2. As a result of obtaining ECCAT certification, Grievant was paid a higher rate of pay than a regular Aide with the same experience and seniority. See W. Va. Code § 18A-4-8a(a)(2).

3. Due to declining enrollment, BCBE found it necessary to reduce the number of ECCAT positions, including that held by Grievant.

4. Respondent timely notified Grievant that she was being proposed for transfer during the 2016-2017 school year. The correspondence from BCBE Superintendent Toni A. Paesano Shute stated the following:

In accordance with Chapter 18A, Article 2, Section 7 of the West Virginia Code, as amended, you are hereby notified that I am considering you for transfer or to be transferred for the 2016-2017 school year. You are being considered for transfer because:

- of declining enrollment your position of Kindergarten aide at Colliers Primary is being terminated.

If you desire a hearing, the Brooke County Board of Education will conduct one, but only if you deliver a written request for a hearing to Toni

A. Shute, Superintendent, within **ten days** after the day on which you receive this notice, no later than Noon on February 11, 2016. You will be notified of the time of your hearing.

R Ex 1 at Level III (emphasis in original).

5. Grievant requested a hearing on her proposed transfer for the 2016-2017 school year. See R Ex 1 at Level III. Respondent conducted the hearing on February 9, 2016. Thereafter, Respondent approved the placement of Grievant on the transfer list.

6. Grievant was transferred to a regular Aide position not requiring ECCAT certification for the 2016-2017 school year. As a result of this transfer, Grievant's rate of pay was decreased.

7. When Grievant was transferred, there was at least one ECCAT employed by BCBE with less seniority as an ECCAT (Debbie Murdock). See G Ex 3 at Level III.

8. The position to which Grievant was transferred was determined based upon the seniority of all employees serving as an Aide, and Grievant's ECCAT seniority was not a consideration in this determination.

### **Discussion**

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997). "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).

Generally, “[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). On the other hand, “[s]chool personnel regulations and laws are to be construed strictly in favor of the employee.” Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). See *Trimboli v. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

W. Va. Code § 18-5-18(b), which became effective on March 9, 2015, provides, in pertinent part, as follows:

Beginning July 1, 2014, any person previously employed as an aide in a kindergarten program and who is employed in the same capacity on and after that date and any new person employed in that capacity in a kindergarten program on and after that date shall hold the position of aide and either Early Childhood Classroom Assistant Teacher I, Early Childhood Classroom Assistant Teacher II or Early Childhood Classroom Assistant Teacher III. Any person employed as an aide in a kindergarten program that is eligible for full retirement benefits before July 1, 2020, may remain employed as an aide in that position and shall be granted an Early Childhood Classroom Assistant Teacher permanent authorization by the state superintendent pursuant to section two-a, article three, chapter eighteen-a [18A-3-2a] of this code.

Classification titles for school service personnel are also set forth in W. Va. Code § 18A-4-8, as pertains to this grievance:

(3) “Class title” means the name of the position or job held by a service person;

\* \* \*

(8) "Aide I" means a person selected and trained for a teacher-aide classification such as monitor aide, clerical aide, classroom aide or general aide;

(9) "Aide II" means a service person referred to in the "Aide I" classification who has completed a training program approved by the state board, or who holds a high school diploma or has received a general educational development certificate. Only a person classified in an Aide II class title may be employed as an aide in any special education program

(10) "Aide III" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate; and

(A) Has completed six semester hours of college credit at an institution of higher education; or

(B) Is employed as an aide in a special education program and has one year's experience as an aide in special education;

(11) "Aide IV" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate; and

(A) Has completed eighteen hours of State Board-approved college credit at a regionally accredited institution of higher education, or

(B) Has completed fifteen hours of State Board-approved college credit at a regionally accredited institution of higher education; and has successfully completed an in-service training program determined by the state Board to be the equivalent of three hours of college credit;

\* \* \*

(36) "Early Childhood Classroom Assistant Teacher I" means a person who does not possess minimum requirements for the permanent authorization requirements, but is enrolled in and pursuing requirements;

(37) "Early Childhood Classroom Assistant Teacher II" means 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;

(38) “Early Childhood Classroom Assistant Teacher III” means a person who has completed permanent authorization requirements, as well as additional requirements comparable to current paraprofessional certificate;

W. Va. Code § 18A-4-8b contains additional provisions pertinent to this grievance:

(d) A promotion means any change in employment that the service person considers to improve his or her working circumstance within the classification category of employment.

\* \* \*

(2) Each 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:

\* \* \*

(C) Paraprofessional, autism mentor, early classroom assistant teacher and braille or sign support specialist class titles are included in the same classification category as aides;

\* \* \*

(3) 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.

An additional statutory provision pertinent to this grievance is W. Va. Code § 18A-4-8g(d), which provides: “For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e of this article.” W. Va. Code § 18A-4-8e, as referenced in 8g(d), provides, in pertinent part, as follows:

(a) The state board shall develop and make available competency tests for all of the classification titles defined in section eight of this article and

listed in section eight-a of this article for service personnel. The board shall review and, if needed, update the competency tests at least every five years. Each classification title defined and listed is considered a separate classification category of employment for service personnel and has a separate competency test, except for those class titles having Roman numeral designations, which are considered a single classification of employment and have a single competency test.

(1) The cafeteria manager class title is included in the same classification category as cooks and has the same competency test.

(2) The executive secretary class title is included in the same classification category as secretaries and has the same competency test.

(3) The classification titles of chief mechanic, mechanic and assistant mechanic are included in one classification title and have the same competency test.

“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in Pari materia* to assure recognition and implementation of the legislative intent.” Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). This Grievance Board has previously applied the language contained in these statutes to conclude that not all school service employees who hold the class title of Aide are qualified to fill a position that is required to have certain training and expertise in order to serve a particular student population, such as an ECCAT. *Adkins v. Fayette County Bd. of Educ.*, Docket No. 2015-1620-FayED (Oct. 19, 2016). Thus, the person holding the Aide position who Grievant was assigned to displace could not have displaced Grievant as an ECCAT, even if she had more seniority as an Aide, because she is not qualified to serve as an ECCAT. For this reason, it has been observed that while an Autism Mentor is an Aide, an Aide is not necessarily an Autism Mentor. *Riffle v. Webster County Bd. of Educ.*, Docket No. 04-51-122 (July 30, 2004).



Consequently, this Grievance Board has concluded that a board of education needing to reduce the number of aides is not required to reduce an Aide with less seniority who is working as an Autism Mentor in order to keep an Aide with more seniority. *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005), *aff'd*, Cir. Ct. of Kanawha County No. 05-AA-178 (Mar. 22, 2006). Indeed, the *Taylor* decision appears to have presaged the current grievance by stating, “if there is a reduced need for autism mentors, then it would be appropriate for a board of education to RIF the aide/autism mentor with the least seniority.” *Id.*

To paraphrase *Taylor*, if there is a reduced need for ECCATs, then it would be appropriate for BCBE to RIF the Aide/ECCAT with the least seniority. Although there have been some changes in the statute relating to ECCAT Aides since *Taylor* was decided in 2005, the requirement to read these related statutes *in Pari materia* has not changed. W. Va. Code § 18A-4-8g(d) states: “For all purposes **including** the filling of vacancies and **reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e of this article.**” W. Va. Code § 18A-4-8g (emphasis added). W. Va. Code § 18A-4-8e refers to these classification categories of employment in the following terms: “Each classification title defined [in W. Va. Code § 18A-4-8] and listed [in W. Va. Code § 18A-4-8a] is considered a separate classification of employment for service personnel . . . except for those classification titles having Roman numeral designations, which are considered a single classification of employment . . . .” W. Va. Code § 18A-4-8 defines ECCAT I, II and III separately from

Aide I, II III and IV. See W. Va. Code § 18A-4-8(i)(8), (9), (10), (11), (36), (37) & 38. Likewise, W. Va. Code § 18A-4-8a lists ECCAT I & II in Pay Grade E, ECCAT III in Pay Grade F, and Aide I, II, III & IV in Pay Grades A through D, respectively.

Accordingly, the specific language in W. Va. Code § 18A-4-8g compels a board of education conducting a reduction in force to follow the classification categories referred to in W. Va. Code § 18A-4-8e, which further references W. Va. Code § 18A-4-8 and 18A-4-8a, each of which lists ECCAT I, II and III separately from Aide I, II, III and IV. W. Va. Code § 18-5-18(b), relied upon by Respondent, is more focused on how to staff a Kindergarten program than how to reduce service personnel positions in a reduction in force. In reading these related provisions *in Pari materia*, 18-5-18(b) is an obvious outlier. Thus, although W. Va. Code § 18-5-18(b) may appear to consolidate Aides and ECCATs for certain purposes, it is not the controlling Code provision when conducting a reduction in force.

In accordance with the forgoing analysis, BCBE failed to follow the requirements of W. Va. Code § 18A-4-8g(d) when conducting the reduction in force at issue in this grievance, and improperly transferred Grievant to a regular Aide position, instead of placing her in another ECCAT position for which she held greater seniority as an ECCAT.

Grievant also asserts that the action taken by BCBE was procedurally defective because she was not simply transferred to a different position, but had her compensation reduced. Because her pay was reduced, Grievant argues that BCBE was required to terminate her contract under W. Va. Code § 18A-2-6, rather than W.

Va. Code § 18A-2-7, citing *Board of Education v. Hunley*, 169 W. Va. 489, 288 S.E.2d 524 (1982). BCBE gave Grievant timely notice that she was being transferred based upon the authority in W. Va. Code § 18A-2-7, without any reference to W. Va. Code § 18A-2-6.

“When a county school board seeks to reduce the working hours of a service employee by one half, the board must comply with procedures set out in W. Va. Code § 18A-2-6.” Syl., *Hunley, supra*. This Grievance Board has recognized that following the *Hunley* precedent and W. Va. Code § 18A-2-6 provides proper authority for a county board of education to reduce the compensation of a school service employee based upon their terms of employment. *Cowger v. Webster County Bd. of Educ.*, Docket No. 92-51-230 (Mar. 29, 1993), *aff’d*, Cir. Ct. of Kanawha County No. 93-AA-101 (Sept. 9, 1994). See *Roach v. Mason County Bd. of Educ.*, Docket No. 26-87-070 (Nov. 30, 1987). On the other hand, BCBE cites no persuasive authority for the proposition that notifying an employee of a transfer under W. Va. Code § 18A-2-7 is sufficient to terminate an employee’s contract in a position at one pay grade in order to place that employee in a position at a lower pay grade, without any reference to W. Va. Code § 18A-2-6. Accordingly, in addition to Grievant’s transfer to an Aide position being improper on its merits, the reduction in pay Grievant suffered was also procedurally defective per *Hunley, supra*.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. In a non-disciplinary matter, the Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ.*, Docket No. 93-29-481 (Apr. 4, 1994).

2. “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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. “Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in Pari materia* to assure recognition and implementation of the legislative intent.” Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

4. “School personnel regulations and laws are to be strictly construed in favor of the employee.” Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

5. W. Va. Code § 18A-4-8g compels a board of education conducting a reduction in force to follow the classification categories referred to in W. Va. Code § 18A-4-8e, which further references W. Va. Code § 18A-4-8 and 18A-4-8a, each of which lists ECCAT I, II and III separately from Aide I, II, III and IV.

6. BCBE failed to follow the requirements of W. Va. Code § 18A-4-8g(d) when conducting the reduction in force at issue in this grievance, and improperly transferred Grievant to a regular Aide position, instead of placing her in another ECCAT position for which she held greater seniority as an ECCAT. *See Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005), *aff'd*, Cir. Ct. of Kanawha County No. 05-AA-178 (Mar. 22, 2006).

7. “When a county school board seeks to reduce the working hours of a service employee by one half, the board must comply with procedures set out in W. Va. Code § 18A-2-6.” Syl., *Bd. of Educ. v. Hunley*, 169 W. Va. 489, 288 S.E.2d 524 (1982).

8. BCBE failed to properly notify Grievant that her contract as an ECCAT was being terminated in accordance with W. Va. Code § 18A-2-6, resulting in a decrease in her rate of pay when she was transferred to an Aide position at another school. *Hunley, supra*. *See Cowger v. Webster County Bd. of Educ.*, Docket No. 92-51-230 (Mar. 29, 1993), *aff'd*, Cir. Ct. of Kanawha County No. 93-AA-101 (Sept. 9, 1994).

Accordingly, this grievance is hereby **GRANTED**. The Brooke County Board of Education is **ORDERED** to reinstate Grievant to another ECCAT position, if she is not currently serving as an ECCAT, to pay back pay to Grievant for the difference between

what she was paid as an Aide and what she would have received had she remained in an ECCAT position, to pay prejudgment simple interest on this back pay at the statutory rate currently set in W. Va. Code § 56-6-31, and to restore all benefits and seniority to which Grievant would have been entitled had she not been improperly transferred.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**Date: February 2, 2017**

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**LEWIS G. BREWER**  
**Administrative Law Judge**