

# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JANET RENEÉ MANNING,**  
Grievant,

v.

**Docket No. 2017-2171-RaIED**

**RALEIGH COUNTY BOARD OF EDUCATION,**  
Respondent, and

**TARA SANDERS,**  
Intervenor.

## **DECISION**

Janet Reneé Manning, Grievant filed this grievance against her employer the Raleigh County Board of Education ("RCBE"), Respondent. The original statement of grievance was filed on May 15, 2017, which provides "I have an ECCAT and so does Tara Sanders but I have more seniority. It is in violation of 18A-4A-8b and 18A-4A-8g." The relief sought states, "I should have received the job at Daniels Elementary. I want that job, any back pay differential and benefits." On May 20, 2017, Tara Sanders requested to intervene in the grievance. Superintendent C. David Price, granted Intervenor Sanders' request by letter dated May 31, 2017. On or about June 19, 2017, the parties agreed to waive the grievance to level three of the grievance procedure.<sup>1</sup>

A level three hearing was held before the undersigned Administrative Law Judge on September 15, 2017, at the Grievance Board's Beckley facilities. Grievant appeared in person and was represented by John Everett Roush, Legal Services, American

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

Federation of Teachers-WV, AFL-CIO. Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl LLP. Intervenor Sanders appeared *pro se*.<sup>2</sup> This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 16, 2017.

### **Synopsis**

Grievant filed a complaint over her non-selection for a vacancy in the position of Aide/Early Childhood Classroom Assistant Teacher (ECCAT) at Daniels Elementary School. 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. Respondent selected another candidate although Grievant was the most senior applicant in the Aide classification. This Board has ruled that for seniority purposes, the aide class titles are not in the same classification category as the ECCAT class titles. Very little if any of the over-all facts of this grievance matter are in disputed, the parties disagree on the application of the law, practical implications and determining the proper selection process with or without preferential application. It is ECCAT certification, seniority and employment status that tends to distinctly influence personnel decisions, for ECCAT positions. The amount of seniority in the ECCAT category which Grievant is entitled is debated. The successful applicant held an ECCAT job at the time Respondent

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<sup>2</sup> "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

appointed her to the position in dispute. The record did not establish that Grievant had more seniority in the ECCAT category than the successful applicant. Grievant did not demonstrate she was entitled to placement in the posted position.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. On April 3, 2017, Respondent posted a vacancy for a Kindergarten Aide/ECCAT (Early Childhood Classroom Assistant Teacher) at Daniels Elementary School, to begin with the 2017-2018 school year. The posting required an ECCAT certification from the West Virginia Department of Education in order to be qualified for the position.

2. At the time of the posting, Tara Sanders, Intervenor, was employed by Respondent as a multiclassified Early Childhood Classroom Assistant Teacher/Aide ("Aide/ECCAT") at Cranberry-Prosperity Elementary School. She had held that position since January of 2016 and was a fully certified ECCAT.

3. Intervenor Sanders was considered, by Respondent, an automatic applicant for all vacancies posted for her classifications for the 2017-2018 school year because she was on transfer for the upcoming school year.

4. Grievant applied for the Daniels Elementary ECCAT position. At the time of the posting, Grievant was employed as a special education Aide and did not at that

time hold an ECCAT classification position, although she had an ECCAT certificate.<sup>3</sup>

5. Grievant was previously employed in an Aide/ECCAT position from August 14, 2014, through October 27, 2015. Grievant bid into an Aide position in October of 2015 that was a special education position, not an ECCAT position.

6. When Grievant applied for the Aide/ECCAT vacancy at issue, she was working for Respondent as an Aide, not employed as a multiclassified Aide/ECCAT. Intervenor Sanders was employed as a multiclassified Aide/ECCAT. Grievant was certified as an ECCAT but not employed as an Aide/ECCAT.

7. For the ECCAT posting at Daniels Elementary School, Intervenor was the most senior applicant currently holding both the Aide and ECCAT classifications required for the multiclassified Aide/ECCAT position.

8. Grievant has two outstanding grievances both regarding ECCAT positions, one for a position at Daniels Elementary School and one for a Lester Elementary ECCAT position. Grievant prefers the Daniel Elementary position of this case.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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

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<sup>3</sup> Grievant holds permanent certification as an Early Childhood Classroom Assistant Teacher, effective October 4, 2015. G Ex 1

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The over-all facts of this grievance matter are not disputed by the parties, the parties disagree as to the relevance and weight that should be given to the instant circumstances, how relevant statutes are or should be applied to certain factual information. The parties disagree on the practical application of the selection process, relevant law and priorities in the circumstance of this grievance. Among issue(s) which will decide this case is the school service personnel seniority statute. It is more likely than not that the preferential status of one of these two candidates will be the discerning factor of this case. **The question of seniority (and priority) is where the parties disagree. The parties disagree regarding Respondent's ability to select an individual currently working as an ECCAT over an individual who is employed as an aide and certified for ECCAT duty.**

This Grievance Board has expressly held that for seniority purposes, the aide class titles are not in the same classification category as the ECCAT class titles. Accordingly, employees in the aide classification category are not entitled to priority in filling ECCAT positions over employees holding the ECCAT classification title. This concept was concluded in both *Mayle v. Barbour County Bd. of Educ.*, Docket No. 2016-0113-BarED

(Aug. 26, 2016) and *Paugh v. Barbour County Bd. of Educ.*, Docket No. 2015-1574-BarED (Aug. 26, 2016). The *Mayle* decision was affirmed by the Circuit Court of Kanawha County on January 31, 2017 (Civil Action No. 16-AA-84).

A number of grievance decisions have addressed various issues regarding ECCAT positions and the proper handling of the rights of these employees since these new job classifications were created by the West Virginia Legislature a few years ago. One of the matters that has been settled and repeatedly affirmed is that, contrary to the argument that has been made many times by grieving employees, aides who are only classified as aides are NOT entitled to ECCAT positions over employees who are actually employed and hold the ECCAT certification. 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); *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).

The recent decision of *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RalED (July 20, 2017), addressed the same issue presented by the instant case. “In the event an applicant for a multiclassified service vacancy currently holds the very same multiclassification as the posted job, then a county board may prefer that candidate over another who currently holds a job in one, but not all, of the components of the multiclassified position. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002); *Edmunds v. Kanawha County Bd. of Educ.*, Docket No. 99-20-023 (Mar. 31, 1999).” *Wagner, Id.*

Grievant was not working in an ECCAT job classification at the time of application, but Grievant was licensed as an ECCAT. Grievant is of the position, that the Early Childhood Classroom Assistant Teacher classification titles are a part of the aide classification category based upon the clear language of West Virginia Code §18A-4-8b(d)(2), and the amount of ECCAT seniority accrued while working as a general aide job classification. Grievant argues that performing duties within the aide classification while not specifically ECCAT duties/work does not toll (suspend) ECCAT seniority. Grievant asserts that ECCAT seniority accrues as Grievant works in the aide classification.

Respondent argues that applicable law and relevant case law validates that ECCAT and Aide seniority are distinct. Respondent is of the thought that ECCAT seniority does NOT necessarily accrue continuously without relevant employment status. Respondent highlights that Grievant left the ECCAT classification and accrued seniority in the Aide classification relevant for her current position. Respondent avers that Grievant's ECCAT seniority stopped on October 27, 2015, the date she ceased performing ECCAT classification duties.<sup>4</sup> Respondent maintains that as a multiclassified Aide/ECCAT at the time of the posting, Intervenor had priority over Grievant, who did not hold the applicable multiclassification at that time.<sup>5</sup>

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<sup>4</sup> Respondent argues that Special Education aide positions are different from ECCAT positions in their purpose and qualifications, so the position in which Grievant is currently employed does not entitle her to accrue ECCAT seniority.

<sup>5</sup> WEST VIRGINIA CODE § 18A-4-8g(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.” Another subsection of the service personnel seniority statute also provides that “[a] school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title.” WEST VIRGINIA CODE § 18A-4-8g(l).

By way of background, it may be helpful to examine the history of the applicable statutory provisions and their interpretation by this Grievance Board regarding the ECCAT classifications. 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 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 II are defined in West Virginia Code § 18A-4-8(i)(36), (37), and (38), respectively. 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). Also, and importantly, “[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) (emphasis added). “Because aides who take [ECCAT] positions automatically become multiclassified, while still being included in the aide classification category, they are uniquely situated . . . .” *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005). “While not all aides are [ECCATs], all [ECCATs] are automatically aides.” *Id.*

As stated above, one argument that has been repeatedly made and rejected is that, due to the statutory “inclusion” of ECCATs in the aide classification category, aides and ECCATs, along with their seniority, are interchangeable for purposes of hiring and other personnel decisions. This is simply incorrect, as first explained in *Adkins, supra*:

[T]o 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 the circumstance of this case, Respondent argues that for the instant ECCAT positions, it is ECCAT certification, employment status, and seniority that governs personnel decisions, not one’s status as an aide. Citing *Cosner, supra; Paugh, supra; Mayle, supra; Workman, supra*. Respondent maintains that while Grievant undisputedly has more aide seniority than Intervenor, the position is not an aide position, and holding greater seniority in the aide classification does not entitle her to the posted ECCAT position over an applicant who was employed as an ECCAT. See *Workman v. Raleigh*

*County Board of Education*, Docket No. 2016-0830-RalED (Nov. 22, 2016). Respondent also asserts of particular pertinence to the instant situation is West Virginia Code § 18A-4-8g, which provides that service personnel currently employed in the classification category of a posted vacancy must be given first priority in filling the position. In addition, the same statute provides that employees with multiclassified job titles are considered employees of each of the class titles in their multiclassification and accrue seniority in each of those job categories of the position.<sup>6</sup> Respondent maintains its decision to award Intervenor the position in discussion is valid because as a multiclassified Aide/ECCAT at the time of the posting, Intervenor had priority over Grievant, who did not hold the applicable multiclassification at that time.

This ALJ is of the opinion that as set forth above, West Virginia Code § 18A-4-8b applicants are to be considered in a specific order -- regular employees holding the classification titles (Aide/ECCAT) of the vacancy -- the most senior applicant in that category (Intervenor) is entitled to placement in the position. “[I]t is the classification held at the time the vacant position was posted that is controlling” and applicants currently employed in the applicable classification must be hired before other applicants are considered, in accordance with the requirement of West Virginia Code § 18A-4-8g(j) 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.” See *Cook v. Lincoln County Board of*

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<sup>6</sup> While all ECCATs are aides, not all aides are ECCATs. It is envisioned that Respondent relies on Grievance Board holdings that for seniority purposes, the aide class titles are not in the same classification category as the ECCAT class titles.

*Education*, Docket No. 2012-0106-LinED (Dec. 4, 2012). The instant grievance is akin to the recent decision of *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RalED (July 20, 2017), which addressed virtually the same issue presented herein. In the instant case, both the successful candidate and Grievant were regular aides when they applied for the aide/ECCAT vacancy, and both were qualified to serve as ECCATs. However, the successful applicant held a regular aide/ECCAT job when she applied, whereas Grievant held a job with a single class title, aide. Although Grievant had more seniority than Intervenor as an aide, it is not demonstrated that Grievant has more seniority as an ECCAT. It is debatable that employment at an aide classification position automatically increases ECCAT seniority. As the most senior, multiclassified Aide/ECCAT applicant, Intervenor was entitled to placement in the position over Grievant, who was not employed in the multiclassification title at the time of the vacancy, but instead was employed only in the Aide classification. This decision is supported by the applicable statutory provisions contained in West Virginia Code §§ 18A-4-8, 18A-4-8b, and 18A-4-8g, as interpreted and supported in numerous cases from this Grievance Board, see cites *supra*.

Accordingly, Grievant has failed to establish by a preponderance of the evidence that Respondent violated any law, rule, or policy in giving priority to the successful applicant who held an aide/ECCAT job at the time of application for the vacant position.

The following conclusions of law are appropriate in this matter:

## Conclusions of Law

1. Because the subject of 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 Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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. Service 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." West Virginia Code § 18A-4-8g(j).

4. "In the event an applicant for a multiclassified service vacancy currently holds the very same multiclassification as the posted job, then a county board may prefer

that candidate over another who currently holds a job in one, but not all, of the components of the multiclassified position. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002); *Edmunds v. Kanawha County Bd. of Educ.* Docket No. 99-20-023 (Mar. 31, 1999).” *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RalED (July 20, 2017).

5. When filling positions in the ECCAT classification, which are statutorily required to be multiclassified as Aide/ECCAT, it is rational for a board of education to consider applicants who are certified, currently employed Aide/ECCATs over employees who are only classified as aides. 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); *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); *Workman v. Raleigh County Bd. of Educ.*, Docket No. 2016-0830-RalED (Nov. 22, 2016).

6. Grievant failed to establish by a preponderance of the evidence that she possessed more seniority in the aide/ECCAT classification than the successful applicant in this case. In addition, Grievant failed to establish by a preponderance of the evidence that Respondent violated any law, rule, or policy in giving priority to the successful applicant who held an aide/ECCAT job at the time of application for the vacant 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 (2008).

**Date:** November 22, 2017

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**Landon R. Brown**  
**Administrative Law Judge**