

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JANET RENÉE MANNING,
Grievant,

v.

Docket No. 2018-0028-RaIED

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent,

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 July 13, 2017, and the grievance statement provides; "I have an ECCAT and so does Rhonda Maynor but I have seniority. It is in violation of 18A-4A-8b and 18A-4A-8g." The relief sought states, "I should have received the job at Lester Elementary. I would like to have that job, any back pay differential and benefits." The parties agreed to waive the grievance to level three of the grievance procedure.¹

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 Federation of Teachers-WV, AFL-CIO. Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl LLP. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on

¹ 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.

or about October 16, 2017. Both parties submitted fact/law proposals.

Synopsis

Grievant filed a complaint over her non-selection for a vacancy in the position of Aide/Early Childhood Classroom Assistant Teacher (ECCAT) at Lester 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 more senior applicant of the two.

It is ECCAT certification, seniority and employment status that tends to distinctly influence personnel decisions, for ECCAT positions. Grievant's seniority is greater as to ECCAT certification and aid classification. The successful applicant held an ECCAT job at the time Respondent appointed her to the position in dispute. The parties disagree on the practical application of the selection process, relevant law and priorities in the circumstance of this grievance. Respondent established pertinent rationale for its action. 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.

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

Findings of Fact

1. Janet Renee Manning, Grievant, is regularly employed by Respondent as a special education aide.
2. Raleigh County Board of Education, Respondent, is created by statute for the management and control of the public schools of Raleigh County, West Virginia.
3. On June 19, 2017, Respondent posted a vacancy for a Preschool Aide/ECCAT (Early Childhood Classroom Assistant Teacher) at Lester Elementary School. The posting required an ECCAT certification from the West Virginia Department of Education in order to be qualified for the position. Respondent posted the Pre-K aide/ECCAT position for the 2017-2018 school year at Lester Elementary School from June 19, 2017 through June 27, 2017.
4. Grievant applied for the Lester Elementary ECCAT position. At the time of the posting, Grievant was employed as a special education Aide and did not at that time hold a ECCAT job classification duty, although she did have ECCAT certificate.
5. Grievant had previously been employed in an Aide/ECCAT position from August 14, 2014, through October 27, 2015.
6. Grievant bid into an Aide position in October of 2015 that was a special education position, not an ECCAT position. Grievant has served as a regular employee in the aide classification category since September 26, 2011. G Ex 5
7. Grievant holds permanent certification as an Early Childhood Classroom Assistant Teacher, effective October 4, 2015. G Ex 1
8. At the time of the posting, Rhonda Maynor, the successful applicant, was

employed by Respondent and working as an Aide/ECCAT, a multiclassified employee holding both job titles.

9. Ms. Maynor holds certification as an Early Childhood Classroom Assistant Teacher, effective January 3, 2017. She has served as a regular employee in the aide classification category since August 24, 2016. G Ex 5

10. Grievant and Ms. Maynor applied for the Pre-K aide/ECCAT position at Lester Elementary School for the 2017-2018 school year. The performance evaluations of both Grievant and Ms. Maynor are acceptable. G Ex 4

11. Respondent selected and employed Ms. Maynor for the Pre-K aide/ECCAT position for Lester Elementary School for the 2017-2018 school year.

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

Discussion

As this grievance does not involve a disciplinary issue, 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). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

It is Respondent’s position that Ms. Maynor, as a multiclassified Aide/ECCAT at the time of the posting, had priority over Grievant, who did not hold the applicable multiclassification at that time. 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(s). **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 a qualified candidate with superior seniority.** Grievant has more seniority in the aide classification category and as an Early Childhood Classroom Assistant Teacher than Ms. Maynor, the successful applicant.

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. 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 a reasonably similar situation as 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.* The distinction in this case seems to be that the instant Grievant has ECCAT certification seniority greater than the successful applicant. (Grievant has one year and 75 days as an Early Childhood Classroom Assistant Teacher as compared to Ms. Maynor’s 175 days as an Early Childhood Classroom Assistant Teacher.) Thus, the question of Respondent’s ability to select an individual currently working as an ECCAT over an individual with more seniority employed as an aide. Grievant’s seniority is greater as to ECCAT certification and aide classification. These factors are recognized by the undersigned as notable distinction(s) from the facts of *Wagner v. Raleigh County Board of Education*.

Grievant was not working in an ECCAT job classification at the time of application, but Grievant was licensed as an ECCAT. Respondent maintains that as a multiclassified Aide/ECCAT at the time of the posting, Maynor, the successful applicant, had priority over

Grievant, who did not hold the applicable multiclassification at that time.² Grievant maintains Respondent reliance upon *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RaLED is misplaced, in that in the current case Grievant has established more seniority than the selected applicant and Respondent has erroneously acted upon “the proposition that a board of education could grant ***in classification category preference*** to an applicant holding all the classification titles of a multiclassification position over an applicant who only held portion of the classification titles contained within the multiclassification position.” See Grievant’s fact/law proposals

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

² 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.”

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.*

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.

For ECCAT positions, it is clear that ECCAT certification, seniority, and employment status readily influence the personnel decision. Respondent 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. Respondent maintains that following the interpreting in *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RaLED (July 20, 2017), it was appropriate for Respondent to hire a currently employed Aide/ECCAT over Grievant, who at the time only held the aide classification. Respondent argues its decision to award the successful applicant the position in discussion is valid because as a multiclassified Aide/ECCAT at the time of the posting, Ms. Maynor had priority over Grievant, who did not hold the applicable multiclassification at that time. Grievant vehemently disagrees.

As set forth above, West Virginia Code § 18A-4-8b requires that employees currently holding the applicable classification be given first opportunity to fill the position. As stated in that statute, applicants are to be considered in a specific order:

- (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
- (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

W. Va. Code § 18A-4-8b(b). Pursuant to this provision, the successful applicant, Ms. Maynor, would be in category (1) by virtue of currently “holding” or being employed in the multiclassification title of Aide/ECCAT, and Grievant would be considered as a “regularly employed service personnel who do not hold” the classification title of the vacancy, in category (3). Accordingly, Respondent was required to consider and assess the qualifications and seniority of all applicants in the first category before proceeding to the others. Since there were qualified applicants in category (1) -- regular employees holding the classification titles (Aide/ECCAT) of the vacancy -- the most senior applicant in that category was entitled to placement in the position. *Cook v. Lincoln County Board of Education*, Docket No. 2012-0106-LinED (Dec. 4, 2012) clearly provides “it 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.”

This ALJ believes 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 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 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. In the instant case, both the successful candidate and Grievant 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. Respondent established reasonable rationale for its action.

As the most senior, multiclassified Aide/ECCAT applicant, Ms. Maynor 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 his 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); *Wagner v. Raleigh County Board of Education*, Docket No. 2017-0809-RalED (July 20, 2017).

6. 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

Landon R. Brown
Administrative Law Judge