

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KAREN SHAFER**

**Grievant,**

**v.**

**Docket No. 2019-0083-LewED**

**LEWIS COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **DECISION**

Grievant, Karen Shafer, is employed by Respondent, Lewis County Board of Education. On July 16, 2018, Grievant filed this grievance against Respondent, alleging, "Grievant was denied the opportunity to bid in house on a job because she was not on the seniority list. Grievant has been ECCAT certified since 2006 according to Dept. of Education Certification Department, yet no seniority has been established for her. This is a violation on (sic) WV Code 18A-4-8b (b) (3), (4). And WV Code 18-4-8b (e). Grievant is also questioning Lewis County BOE policy that covers in-house moves, as discriminatory and would request that the policy be reviewed." As relief, Grievant seeks, "Establish seniority for grievant and to be added to the seniority list".

A level one conference was conducted on August 29, 2018, and a decision denying the grievance was issued on September 12, 2018. Grievant appealed to level two on September 24, 2018, and a mediation session was held on October 25, 2018. Grievant appealed to level three of the grievance process on November 8, 2018. A level three hearing was held on May 30, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by representative Brad Hamilton, ODS, WVEA. Respondent appeared by Melissa Riley and counsel, Denise M.

Spatafore, Dinsmore Shohl, LLP. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on July 15, 2019.

### **Synopsis**

Grievant has been employed by Respondent in the Aide classification since 2002. Grievant has never held an ECCAT position and was certified as an ECCAT only in 2018. Grievant contends that Respondent acted improperly and discriminatorily in not crediting her with ECCAT seniority using her Aide seniority after allowing its first group of ECCATs in 2014, to use their Aide seniority as an ECCAT seniority tie-breaker. Respondent argues that it is well-settled law that ECCATs and Aides are separate classifications, and that seniority in one cannot be attributed to the other. Grievant did not prove Respondent acted improperly or discriminatorily in failing to credit her with ECCAT seniority using her Aide seniority.

The following facts have been proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant has been employed by Respondent, Lewis County Board of Education, in the Aide classification since 2002.
2. In 2006, Grievant completed an apprenticeship program as a Child Development Specialist administered by the U.S. Department of Labor, a training program offered to employees working in early childhood classrooms. This was not a certification from the State of West Virginia, nor did it alter Grievant's job title at the time of classroom Aide.

3. In 2009, Grievant bid on a special education bus/classroom Aide position and was hired for the position.

4. Grievant has not been assigned to a preschool or kindergarten classroom since 2009.

5. That same year, Grievant bid on two Classroom Aide positions, but lost out to an applicant with more seniority.

6. In 2013, the West Virginia legislature enacted a new law which established job titles for Early Childhood Classroom Assistant Teacher (ECCAT), along with requiring specific training, qualifications, and certification from the West Virginia Department of Education (DOE) for individuals working in those classifications. The ECCAT classifications are confined to service personnel who work as aides in preschool and kindergarten classrooms.

7. Pursuant to the specifics of the initial legislation enacted by the legislature in 2013, all Aides serving at that time in kindergarten and preschool classrooms were reclassified to include the ECCAT job classification in their titles, effective with the commencement of the 2014-15 school year.

8. Grievant has never worked for Respondent in the ECCAT classification since its creation in 2013, and has been classified as a special education Aide, working in the same Aide position since 2009.

9. Grievant received an ECCAT certification from the DOE, effective January 24, 2018.

10. In 2014, the first year that the ECCAT classification existed, a seniority tie-breaker had been agreed on between Respondent and the original

preschool/kindergarten Aides as they were being reclassified as ECCATs. These new ECCATs agreed to use their Aide seniority dates to determine their seniority order as ECCATs, since all of them had the same August 2014, ECCAT seniority date. Respondent did not include Grievant in the seniority tie-breaker agreement because she was not working in the preschool/kindergarten Aide positions reclassified as ECCATs in August 2014, had no ECCAT seniority, and was not in need of a tie-breaker for ECCAT seniority.

### **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 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant contends that Respondent caused her to miss out on ECCAT job openings when it failed to place her on the ECCAT seniority list starting in 2014, and when it failed to calculate her ECCAT seniority using her Aide seniority. Grievant asserts that she was ECCAT qualified based on her 2006 ECCAT certificate. Grievant requests that she be added to Respondent’s ECCAT seniority list using her Aide seniority. Grievant contends that Respondent’s policy covering in-house moves is discriminatory, since Respondent allowed some employees in 2014, to use their Aide seniority as an ECCAT seniority tie-breaker.

Respondent suggests that Grievant's claims emanating from its failure to place Grievant on an ECCAT seniority list during its implementation of the ECCAT classification in 2014, are untimely. "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. Va. Code § 6C-2-3(c)(1). There is no evidence that Respondent preserved a timeliness defense at or before level two of the grievance process. Therefore, this argument is untimely.

Respondent also requests that the matter be dismissed due to Grievant's failure to state a claim on which relief can be granted. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11 (2018). "An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party. ..." W. VA. CODE ST. R. § 156-1-6.6 (2018). Respondent timely filed before the level three hearing its motion to dismiss for failure to state a claim on which relief can be granted.

In asserting that Grievant fails to state a claim on which relief can be granted, Respondent argues that the only claims and relief requested by Grievant are to "[e]stablish seniority for grievant and to be added to the seniority list" based on Grievant becoming ECCAT certified in 2006. This, however, is not the totality of Grievant's claim. Grievant also claims that Respondent's in-house moves were discriminatory. If Respondent's policies are in fact discriminatory, the undersigned can take remedial action

against Respondent. Therefore, Respondent's motion to dismiss for failure to state a claim on which relief can be granted is denied.

On the merits of Grievant's arguments, Respondent counters that it is well established that ECCATS and Aides are different classifications, that each accrue seniority separately from one another, and that Grievant is not eligible for ECCAT seniority (even though she became ECCAT certified in 2018) because she has never worked as an ECCAT. Respondent contends that its one-time ECCAT seniority tie-breaker agreement from 2014, has no relevance to Grievant because she was never an ECCAT.

Grievant's primary argument is premised on the theory that, because ECCAT positions are within the Aide classification, Aide seniority should control. Grievant bases this contention on the mandate found in West Virginia Code § 18A-4-8b(b) requiring Respondent to fill service personnel vacancies on the basis of seniority, qualifications, and past service. Grievant cites to the definition of "qualifications" therein as "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. ...". Grievant points out that West Virginia Code § 18A-4-8b(d)(2)(C) considers an Aide and an ECCAT to be within the same classification category in its stating 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; ..." and implies that she should be considered qualified for seniority purposes when she became ECCAT certified in 2006.

The West Virginia Supreme Court of Appeals has addressed the interplay between ECCAT seniority and Aide seniority. In *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision) the Court wrote:

We also find that the circuit court was not clearly wrong in concluding that ECCAT seniority accrues independently of aide seniority. West Virginia Code § 18A-4-8g, titled “[d]etermination of seniority for service personnel,” sets forth that “[f]or 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 [West Virginia Code § 18A-4-8e].” West Virginia Code § 18A-4-8e does not place aides and ECCATs into the same classification category. To the contrary, the statute provides that “[e]ach classification title defined and listed is considered a separate classification category of employment[.]” As set forth above, aides and ECCATs are defined separately. Accordingly, we find that the circuit court’s conclusion that “the Board was not permitted to count [p]etitioner’s [a]ide seniority as ECCAT seniority” was not clearly wrong. *Id.*

Grievant implies that her situation is different from *Mayle* because she held an ECCAT certification in 2006 and that, if Respondent had used Aide seniority, she would have been on the ECCAT seniority list. The *Mayle* ruling, however, is pertinent to this case in holding that Aides and ECCATs are different classifications and that seniority is gained in each classification separately. It is well-settled law that Aide seniority does not count as ECCAT seniority, as ECCATs are Aides, but Aides are not ECCATs. ECCATs are a special kind of Aide. *Mayle v. Barbour County Board of Education*, Docket No. 2016-0113-BarEd (Aug. 26, 2016) *aff’d*, W.Va. Sup. Ct. App. Docket No. 17-0204 (January 8, 2018).

West Virginia Code § 18A-4-8b prioritizes the hiring of service personnel based on seniority, qualifications, and past services, but, as aptly pointed out by Grievant, gives

priority to qualified applicants. Grievant is not qualified as an ECCAT, having never held an ECCAT position. Grievant argues that ECCATs and Aides are considered to be in the same classification category and that Respondent should have included her on the ECCAT seniority list using her 2002 Aide start date for seniority because her 2006 ECCAT certification qualified her as an ECCAT. In so arguing, Grievant fails to distinguish her case from *Mayle* and the many other Board decisions holding that Aides and ECCATs are different classifications, that seniority is gained in each classification separately, and that, because the ECCAT classification was only created by the legislature in 2013, Grievant could not have been ECCAT certified in 2006.

Grievant also uses the 2014 tie-breaker agreement to argue that Respondent is obligated to use her Aide seniority to calculate her ECCAT seniority. In 2014, when the initial ECCATs who were already working in preschool and kindergarten classrooms were required to receive the new classification, Grievant was not eligible for that reclassification because she was not working in an ECCAT position. Further, Grievant has never held an ECCAT position and has no ECCAT seniority that could possibly necessitate a tie-breaker. Grievant agrees that she was not working as a preschool or kindergarten Aide in 2014. Therefore, Grievant's contention that she should have been included in the initial ECCAT reclassification is meritless, as she was not certified as an ECCAT nor working in a position that would qualify her as an ECCAT.

Grievant argues that Respondent discriminated against her in not allowing her to use her Aide seniority to determine ECCAT seniority, in spite of allowing employees in 2014, to do so as an ECCAT tie-breaker. Discrimination for purposes of the grievance process has a very specific definition. "Discrimination' means any differences in the



treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005). The fact of the matter is that the group of employees who were tied for ECCAT seniority in 2014, were Respondent’s first set of ECCAT eligible employees. Grievant did not prove that she had at least the same amount of ECCAT seniority as these original ECCAT employees at the time they were attributed their Aide seniority as an ECCAT tie breaker.<sup>1</sup> Grievant therefore failed to show that she was treated differently than a similarly-situated employee.

Grievant has not proven that Respondent acted improperly in refusing to calculate her ECCAT seniority using her Aide seniority or that its failure to do so was discriminatory. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

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<sup>1</sup>While the 2014 tie-breaker agreement appears to have violated the requirement of a random tie-breaking selection system set forth in W. Va. Code § 18A-4-8g(i), Grievant did not prove that this worked to her detriment or that a second random selection should have been held for her as a result of subsequently acquiring seniority identical to that of the initial ECCAT employees.

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 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11 (2018).

3. Respondent did not prove that Grievant failed to state a claim on which relief could be granted.

4. In *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision) the Court held:

We also find that the circuit court was not clearly wrong in concluding that ECCAT seniority accrues independently of aide seniority. West Virginia Code § 18A-4-8g, titled “[d]etermination of seniority for service personnel,” sets forth that “[f]or 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 [West Virginia Code § 18A-4-8e].” West Virginia Code § 18A-4-8e does not place aides and ECCATs into the same classification category. To the contrary, the statute provides that “[e]ach classification title defined and listed is considered a separate classification category of employment[.]” As set forth above, aides and ECCATs are defined separately. Accordingly, we find that the circuit court’s conclusion that “the Board was not permitted to count [p]etitioner’s [a]ide seniority as ECCAT seniority” was not clearly wrong. *Id.*

5. ECCAT seniority accrues independently of aide seniority. *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision).

6. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

7. Grievant did not prove by a preponderance of the evidence that Respondent acted improperly or discriminatorily in not using the date Grievant was employed as an Aide to determine her ECCAT seniority.

Accordingly, the 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 (2018).

**DATE: August 26, 2019.**

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**JOSHUA S. FRAENKEL**  
**ADMINISTRATIVE LAW JUDGE**