

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANE CARPENTER, et al.,¹
Grievants,

v.

Docket No. 2018-1027-CONS

WEBSTER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, Diane Carpenter, Donnis Davis, Aubrey Flanagan, Karen Lawson and Samantha McCourt, filed a level one grievance form dated February 28, 2018, alleging:

We were required to establish Seniority by lot when there was no requirement to change the seniority list, in violation 18a-8-8g and 18a-4-8b.

As relief these Grievants seek, "To revert to the seniority list as it existed prior to the determination of seniority by lot."

Grievants, Kerry Y. Holcomb, Donnis Davis, Aubrey Flanagan, and Samantha McCourt,² filed a second level one grievance form dated March 7, 2018, alleging:

WV § 18A-4-8; WV § 18A-4-8b Early Childhood Assistant Teachers were asked to complete a Seniority drawing for "ECAT Seniority" when no such thing exists. ECAT are considered in the part of the Aide Classification and their seniority is gained in the Aide classification.³

As relief these Grievants seek, "County use of Aide seniority in determining placement for ECAT."

¹ Grievants are; Diane Carpenter, Donnis Davis, Aubrey Flanagan, Karen Lawson, Kerry Holcomb, and Samantha McCourt.

² Davis, Flanagan, and McCourt signed the previous grievance form as well.

³ The Statements of Grievance from both forms appear herein as they appear on the form with no corrections.

All Grievants are employed by Respondent, Webster County Board of Education (“Board”) in the Aide Classification and certified as Early Childhood Classroom Assistant Teachers routinely referred to as ECCATs. The grievances were consolidated at level one for consideration and decision. A level one hearing was conducted on April 26, 2018, and a decision denying the grievances was issued on June 18, 2018.⁴ Grievants filed level two appeals dated June 20 and 27, 2018, and a mediation was conducted on September 27, 2018. Grievants appealed to level three on September 28, 2018 and October 8, 2018.

A Level Three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on January 4, 2019. Grievants personally appeared and were represented by Brad Hamilton, ODS, WVEA, and George B. Morrone III, Esquire, WVSSPA.⁵ Respondent appeared through Personnel Director, Brenda Knight, and was represented by Richard S. Boothby, Esquire, Bowles Rice, LLP. This matter became mature for decision on February 25, 2019, with receipt of the last Proposed Findings of Fact and Conclusions of law submitted by the parties.

Synopsis

Grievants are employed by Respondent as Aides holding ECCAT certification. In the past Respondent ranked them for seniority purposes based upon their Aide seniority for Aide and ECCAT purposes. In early 2018 Respondent determined that even though Grievants have different start dates as Aides they all entered into their ECCAT duties on

⁴ At level one Grievants were represented by Brad Hamilton, ODS, WVEA and Joe Spradling, Esq. WVSSPA.

⁵ Some Grievants signed both grievance forms and no representations were made regarding which individuals were represented by which advocate, nor was that necessary for the purpose of this decision.

the same date. Respondent determined that Grievants were tied for ECCAT seniority and required Grievants to participate in a random selection process to determine their ECCAT seniority ranking.

Grievants argue that their ECCAT seniority should be calculated the same as their Aide seniority. Additionally, they aver that the process for determining the seniority ranking for employees was held years after the statutory time limit for that procedure.

Respondent proved that the ECCAT seniority is not the same as Aide seniority and that it was proper to hold the random selection process outside the statutory time limit when it was necessary to correct a prior mistake in seniority calculation.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievants are employed by Respondent, Webster County Board of Education, in the Aide classification. They are all certified to serve as Early Childhood Classroom Assistant Teachers (ECCAT).

2. Pursuant to WEST VIRGINIA CODE § 18-5-18 (2013), all Aides working in pre-school and Kindergarten classrooms in public schools were required to hold one of the following ECCAT credentials: ECCAT - Temporary Authorization (now ECCAT I); ECCAT – Permanent Authorization (now ECCAT II); or ECCAT Certification (now ECCAT III).⁶

3. Each Grievant obtained some form of the necessary ECCAT credentials from the State Department of Education by July 1, 2014, and all Grievants started the

⁶ The titles were changed when the statute was amended in 2017.

2014-2015, in an ECCAT position.⁷ August 18, 2014, was the first day that all Grievants commenced employment in an ECCAT position although they had been employed in the Aide classification in prior years.

4. “Paraprofessional, 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).

5. Grievants, and three aides who did not grieve, held the following seniority dates reflecting when each commenced work in the Aide classification for the Board:

| | |
|----------------------------|--------------------------------|
| a) Audrey Flannigan | February 30, 1985. |
| b) Donnis Davis | December 15, 1992. |
| c) Karen Lawson | February 24, 1996. |
| d) Marie (Diane) Carpenter | August 10, 2001. |
| e) # - Susan Wilkins | March 5, 2005. |
| f) # - Sandy Ayres | November 28, 2005. |
| g) Samantha McCourt | January 23, 2006. |
| h) Karen Holcomb | October 19, 2007. ⁸ |
| i) # - Cheri Wolford | January 6, 2011. ⁹ |

6. Near the beginning of 2018, there was concern by the Webster County Schools Administrators that there may be a need to reduce the number of ECCATs employed in the school system. Consequently, Personnel Director, Brenda Knight examined the seniority list to determine seniority ranking for reduction in force.

7. All the ECCAT were employed by the Board at that time, including Grievants, commenced work as an ECCAT on the same date: August 18, 2014. Based

⁷ Starting with the 2014-2015 school year all Aide positions in pre-school and Kindergarten class were referred to as Early Childhood Classroom Teacher Assistants, ECCATs.

⁸ Grievants Exhibit 1. Service Personnel Seniority Lists compiled twice a year by Respondent.

⁹ “#” designates a non-grievant in FOF 5 and in FOF 10, p.5.

upon that fact, Director Knight determined that all the ECCATs were tied in seniority and a random selection method would need to be used to establish a seniority ranking for these employees in ECCAT positions.¹⁰

8. Director Knight prepared a random selection process and invited the ECCAT certified employees to draw to create a seniority ranking on February 21, 2018.

9. Prior to the drawing, Grievants offered to enter into an agreement to waive any related claims if the Board would use Aide seniority to determine seniority for all ECCATs. Respondent's agents did not feel they could properly agree to that proposition.

10. Following the random drawing the ECCATs' seniority was listed separately from their Aide seniority. Each employee held a different ranking for Aide seniority and ECCAT seniority as represented by the following:

| | | | | |
|-------------------|-----------|-----|------------|-------------------------------|
| Audrey Flannigan | Aide Rank | 1st | ECCAT Rank | 4 th |
| Donnis Davis | Aide Rank | 2nd | ECCAT Rank | 6 th |
| Karen Lawson | Aide Rank | 3rd | ECCAT Rank | 7 th |
| Diane Carpenter | Aide Rank | 4th | ECCAT Rank | 9 th |
| # - Susan Wilkins | Aide Rank | 5th | ECCAT Rank | 1 st |
| # - Sandy Ayres | Aide Rank | 6th | ECCAT Rank | 2 nd |
| Samantha McCourt | Aide Rank | 7th | ECCAT Rank | 8 th |
| Karen Holcomb | Aide Rank | 8th | ECCAT Rank | 5 th |
| # - Cheri Wolford | Aide Rank | 9th | ECCAT Rank | 3 rd ¹¹ |

¹⁰ See W. VA. CODE § 18A-4-8g(i).

¹¹ See footnote 9 *supra*.

11. Grievants Audrey Flanigan and Donnis Davis are also certified as Autism Mentors. Their seniority dates for Autism Mentor reflect the date each of them started working in that classification resulting in them having different Aide seniority dates from their Autism Mentor Seniority dates.

12. Karen Lawson is certified to be a Paraprofessional. Her seniority date in that classification reflects the date she started working in that classification resulting in her having a different Aide seniority date from her Paraprofessional seniority date. Grievants Exhibit 2.

13. WEST VIRGINIA CODE § 18A-4-8g requires that, "A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date."¹² Because the start date for all ECCATs in their employment is August 18, 2014, Respondent conducted the drawing over three years after Grievants established an identical ECCAT seniority date.

14. No ECCAT position was eliminated at the end of the 2017 – 2018 school year.

15. No one objected to the specific procedure utilized for random selection to establish an ECCAT seniority ranking, nor the way it was conducted.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard

¹² *Webster County Board of Education Policy 4370* contains an identical provision. Grievants Exhibit 3.

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 party bearing the burden has not met its burden. *Id.*

Grievants' main position is that when all parties have ECCAT certification, their seniority ranking should be based upon their Aide seniority not a separate ECCAT seniority. Their Aide seniority is based upon when each one of them first commenced work as an Aide. ECCAT seniority is based upon when each employee commences work as an ECCAT. Grievants base this position upon WEST VIRGINIA CODE § 18A-4-8b(d)(2)(C) which states:

Paraprofessional, autism mentor, **early classroom childhood assistant teacher** and braille or sign support specialist class titles are included in the same classification category as aides[.]

The theory is that all these areas requiring certification are within the Aide classification, Aide seniority should control. Grievants also point out that even though all Grievants commenced their ECCAT employment at the start of the 2014-15 school year, the semi-annual service personnel seniority lists issued by Respondents did not include a separate seniority for ECCAT certification.

The West Virginia Supreme Court of Appeals has had an opportunity to address ECCAT seniority vis a vis 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.*

Grievants try to distinguish this case from *Mayle* by noting that Ms. Mayle did not hold an ECCAT certification and was trying to use Aide seniority to be hired ahead of someone who was properly certified. Whereas, in this matter all Grievants have ECCAT certification. The Court’s ruling was based upon the Aides and ECCATs being different classifications. Consequently, seniority is gained in each classification separately. It should also be noted that WEST VIRGINIA CODE § 18A-4-8b(d)(2)(C) places Paraprofessionals and Autism Mentors classifications in the Aide classification. The Board has consistently set a separate seniority date for those classifications apart from the seniority date for the Aide classifications.¹³ It is only logical that all these special certification areas within the Aide classification be treated the same. Grievants did not prove that ECCAT seniority should be determined by the time Grievants were employed as Aides.

Next, Grievants point to provision of WEST VIRGINIA CODE § 18A-4-8g requires, “A board shall conduct the random selection within thirty days of the time the service

¹³ See Grievants Exhibit 2. The seniority lists all demonstrate that the three Grievants holding these certifications gain seniority in those areas separately from their seniority dates as Aides.

personnel establish an identical seniority date.” The same requirement is found in Board Policy 4370.¹⁴ Grievants correctly point out that Respondent failed to hold a random selection to set the seniority ranking for Grievants within thirty days of them all starting to work as ECCATs in August 2014. Grievants seems to argue that Respondent is now stuck with computing the ECCAT seniority based upon Aide seniority because it did not hold the tie-breaker within the statutory time line.

The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). In this matter, Director Knight discovered that Grievants all held the same ECCAT start date when she was preparing for a possible reduction in force in that classification. Shortly after making that discovery, Director Knight and the Superintendent organized and held a random tie-breaker session to set the seniority rankings for the tied ECCATs.

A Board cannot continue to calculate seniority in a manner inconsistent with the law simply because they failed to timely hold a tie-breaker. No employment decisions were made using the EECAT certification in the intervening time and Grievants were not harmed by Respondent’s error. “[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment.” *Miller v. Bd. of Educ. of Boone Cty.*, 190 W.Va. 153, 159, 437 S.E.2d 591, 597 (1993); *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision). Finally, Respondent’s failure to hold the tie-breaker until February 2018 is

¹⁴ See Grievants Exhibit 3.

understandable because the issue of separate ECCAT certification was not settled until the Supreme Court addressed the issue in *Mayle* which was issued in on January 18, 2018.

Grievants failed to prove that Respondent was required to use Aide seniority for ECCAT employment decisions because it did not meet the statutory time limit holding a tie-breaker to set the ECCAT seniority ranking for employees who held identical ECCAT seniority. Accordingly, the consolidated grievance is DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 party bearing the burden has not met its burden. *Id.*

2. 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).

3. Grievants did not prove by a preponderance of the evidence that ECCAT seniority should be determined by the time Grievants were employed as Aides.

4. WEST VIRGINIA CODE § 18A-4-8g requires, "A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date." The same requirement is found in Board *Policy 4370*.

5. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

6. “[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment.” *Miller v. Bd. of Educ. of Boone Cty.*, 190 W.Va. 153, 159, 437 S.E.2d 591, 597 (1993); *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision).

7. Grievants did not prove by a preponderance of the evidence that Respondent was required to use Aide seniority for ECCAT employment decisions because it did not meet the statutory time limit holding a tie-breaker to set the ECCAT seniority ranking for employees who held identical ECCAT seniority.

Accordingly, the consolidated 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: March 27, 2019.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**