

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

**PAMELA CURTIS**

**Grievant,**

**v.**

**Docket No. 2018-1223-LewED**

**LEWIS COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **DECISION**

Grievant, Pamela Curtis, is employed by Respondent, Lewis County Board of Education. On May 18, 2018, Grievant filed this grievance against Respondent, challenging various aspects of her employment as an ECCAT ("Early Childhood Classroom Assistant Teacher") and alleging, "I was wrongfully transferred from a job at Jane Lew elementary school as an ECCAT, which I was awarded but which I had not actually worked pursuant to WV Code 18a-2-7(b), in violation of 18a-2-7(b), 18a-4-8b, 18a-2-7." As relief, Grievant seeks, "To have my transfer from my previous (sic) awarded job at Jane Lew, rescinded so I can work at my previously awarded job at Jane Lew and my seniority corrected."

A level one conference was conducted on June 27, 2018, and a decision denying the grievance was issued on July 17, 2018. Grievant appealed to level two on July 30, 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 began working and accruing seniority as an ECCAT on November 15, 2017. Respondent placed Grievant at the bottom of its ECCAT seniority list. After determining that fewer ECCAT positions would be needed for the 2018-19 school year, Respondent reduced Grievant from her ECCAT position and transferred her to an Aide position. Grievant contends that if Respondent had properly used her Aide seniority to determine her ECCAT seniority, she would have ranked higher in seniority and kept her ECCAT position. Grievant did not prove that Respondent should have calculated her 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. During the early years of her employment, Grievant was assigned to preschool and/or kindergarten classrooms. As a result, she participated in an apprenticeship program offered to Aides by the U.S. Department of Labor in cooperation with the West Virginia Department of Education (DOE), receiving a certificate for completion of Child Development Specialist training. This was not a certification from the DOE and did not change Grievant's job title of classroom Aide.

3. At the beginning of the 2013-14 school year, Grievant was the successful applicant for a special education classroom Aide position at Lewis County High School. She remained in that position until she bid into a special education Aide position at Jane Lew Elementary School in August 2017.

4. In 2013, the West Virginia legislature enacted new law which established job titles for Early Childhood Classroom Assistant Teacher (ECCAT), along with requiring specific training, qualifications, and certification from the DOE for individuals working in those classifications. The ECCAT classifications are confined to service personnel who work as Aides in preschool and kindergarten classrooms. Previously, Aides working in these classrooms held the same job title as all other Aides.

5. Pursuant to 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.

6. Because she was working as a special education Aide at Lewis County High School, not as a preschool or kindergarten Aide, Grievant was not reclassified as an ECCAT in 2014.

7. Grievant bid on an ECCAT position at Jane Lew Elementary School in September 2017, but subsequently withdrew her application. That position was awarded to an employee who was working as an ECCAT at the time, with an ECCAT seniority date of November 9, 2016. At the time this position was posted, Grievant was working as a special education Aide and did not have an ECCAT certificate.

8. In November of 2017, another ECCAT position at Jane Lew Elementary School became available, and Grievant expressed interest in the job. Although she was not ECCAT certified at that time, Grievant was placed in the ECCAT position and permitted to apply for certification from the DOE. The position was offered to Grievant as an Aide already working in the building.

9. Pursuant to an application filed in November of 2017, Grievant received an ECCAT certification effective July 13, 2017.<sup>1</sup> She began working in the ECCAT classification and accruing seniority as an ECCAT on November 15, 2017.

10. In the spring of 2018, the administration determined that fewer ECCAT positions would be needed for the upcoming school year, resulting in a reduction in force in the ECCAT classification.

11. Respondent selected Grievant for reduction in force and for transfer to an Aide position, since she was the least senior ECCAT.

12. Respondent notified Grievant of the proposed reduction in force and transfer and provided her the opportunity for a hearing, but Grievant did not request a hearing. (Level one decision)

13. The Board of Education approved Grievant's reduction and transfer on March 15, 2018.

14. Grievant was removed from the ECCAT classification and placed on transfer as an Aide, ultimately displacing a less senior Aide.

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<sup>1</sup>The DOE has a practice of back-dating all certificates to the beginning of the school year, regardless of when an employee actually applies for a particular certification.

15. In 2014, the first year that the ECCAT classification existed, a seniority tie-breaker had been agreed upon between Respondent and the original preschool/kindergarten Aides classified as ECCATs. The 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. Grievant was not included in the seniority tie-breaker agreement because she was not working in an ECCAT position in August 2014, and had no 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.*

Respondent contends that this grievance was untimely filed and requests the issuance of a dismissal order. “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). “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). Respondent raised this defense at level one and renewed the motion at level three in its submission of proposed findings of fact

and conclusions of law. Asserting a timeliness defense at level one preserved Respondent's right to raise the defense at level three but did not relieve Respondent of the requirement to timely raise that defense at level three. As demonstrated by the level one record, Respondent knew well before the level three hearing that it had grounds to file a motion to dismiss based on untimeliness, yet made its level three motion to dismiss in its proposed findings of fact and conclusions of law. Respondent's motion to dismiss is therefore untimely.

As for the merits of this grievance, Grievant contends that Respondent should have calculated her ECCAT seniority using her Aide seniority, and that in not doing so Respondent improperly ranked her as the employee with the least ECCAT seniority. This resulted in Grievant being reduced in force from her ECCAT position and transferred to an Aide position. Grievant asserts that her current predicament stems from an agreement in 2014, between Respondent and a group of employees classified as ECCATs on the same day, whereby Respondent would use their Aide seniority as the tie-breaker for ECCAT seniority. Grievant implies that Respondent should have determined her ECCAT seniority using her Aide seniority as it did for this group of ECCAT employees in 2014. Grievant advances this assertion using West Virginia Code § 18A-4-8b, which requires Respondent to use seniority, qualifications, and past service in filling service personnel vacancies and states that Aides and ECCATs are in the same classification category.

Respondent counters that ECCATS and Aides are separate classifications, that each accrue seniority separate from one another, and that Grievant's ECCAT seniority was properly calculated using the November 15, 2017, date she began working as an ECCAT. Respondent contends that its one-time tie-breaker agreement from 2014, has

no relevance to Grievant because she was not then an ECCAT and is not tied for ECCAT seniority.

Grievant's primary argument is premised on the theory that because ECCATs 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 that she should be considered qualified for seniority purposes much earlier than her November 15, 2017, ECCAT start date.

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 credited her with Aide seniority, she would have avoided ranking at the bottom of the ECCAT seniority list and the resulting reduction in force and transfer. 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 noted by Grievant, gives priority to qualified applicants. There is no dispute that Grievant was qualified as an ECCAT when she was reduced in force from her ECCAT position on March 15, 2018. Grievant argues that because ECCATs and Aides are considered to be in the same classification category, Respondent acted improperly in ranking her seniority based on her November 15, 2017, ECCAT start date rather than her 2002 Aide start date, which resulted in her improper reduction in force over other ECCATs who had less overall Aide seniority. 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 and that seniority is gained in each classification separately.

Grievant also uses the 2014 tie-breaker agreement to argue that Respondent is obligated to use her Aide seniority when calculating her ECCAT seniority. It is undisputed that from 2013 through 2017, Grievant was assigned to Lewis County High School as a special education Aide. Thus, when the initial ECCATs who were already working in preschool and kindergarten classrooms received the new classification back in 2014, Grievant was not eligible for that reclassification. Further, Grievant could not be part of the 2014 tie-breaker agreement, because, unlike the participants who all had ECCAT seniority, she had no ECCAT seniority in 2014. Grievant did not prove that this tie-breaker agreement impacted her or obligated Respondent to utilize her Aide seniority to determine her ECCAT seniority.<sup>2</sup> Respondent was not obliged to include Grievant in the initial ECCAT reclassification in 2014, because Grievant was not certified as an ECCAT nor working in a position (such as a preschool or kindergarten Aide) that would qualify her as an ECCAT. Grievant began working in her first ECCAT position on November 15, 2017, which is her seniority date for the ECCAT job title.

Pursuant to West Virginia Code § 18A-4-8g, seniority is calculated from the time an employee begins performing “regular employment duties” in a specific position and is accumulated “within particular classification categories of employment”. Grievant is therefore not in the same situation as the original Lewis County ECCAT/Aides who

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<sup>2</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.

received a seniority date of August 2014. Moreover, it is not possible for Grievant to receive ECCAT seniority for her previous work in preschool or kindergarten classrooms prior to the creation of the ECCAT job classification by the legislature in 2013. Grievant's completion of the Child Development Specialist apprenticeship program did not provide her with ECCAT certification because there was no ECCAT job title or license in existence at that time. Regardless, certification does not equate to the accrual of seniority. Only when one has obtained employment in an ECCAT position can one begin to accrue ECCAT seniority. ECCAT positions were not available until 2014. As Grievant did not assume an ECCAT position until November 15, 2017, she could not accrue ECCAT seniority until after that date.

Grievant has not proven that Respondent was required to use Aide seniority for ECCAT employment decisions. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

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. "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).

3. 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.*

4. Grievant did not prove by a preponderance of the evidence that Respondent acted improperly in not using the date Grievant was employed as an Aide, and in only using the November 15, 2017, date she assumed an ECCAT position, 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**