

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MYRRL GIBSON, et al.,¹

Grievants,

v.

Docket No. 2019-0783-CONS

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants filed this grievance against their employer, Respondent, Fayette County Board of Education, dated January 18, 2019, stating as follows: “[w]e were required to establish seniority by lot when there was no requirement to change the seniority list in violation of W. Va. Code §§ 18A-4-8g and 18A-4-8b.” As relief sought, Grievants seek “[t]o revert to the seniority list as it existed prior to the determination of seniority by lot.”

On or about January 30, 2019, the parties agreed in writing to waive this matter to level three of the grievance process pursuant to W. Va. Code § 6C-2-4(a)(4). There was no level one proceeding. A level three grievance hearing was conducted on June 24, 2019, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievants appeared in person, and by counsel, George B. Morrone, III, Esq., General Counsel, West Virginia School Service Personnel Association. Also, appearing as Grievant Kathy Roberts’ union representative was Anthony Ramsey. Mr. Morrone was Grievant Roberts’ counsel in this matter and represented her interests at this hearing. There were no objections to Mr. Ramsey attending the level three hearing. Respondent appeared by counsel, Jason S. Long, Esq.,

¹ Grievants are Myrrl Gibson, Neva Martin, and Kathy Roberts.

Dinsmore & Shohl, LLP, and was represented in person by Margaret Pennington, Associate Superintendent for Fayette County Schools. This matter became mature for decision on August 19, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.²

Synopsis

Grievants are employed by Respondent as Aides holding ECCAT certification, multiclassified as Aide/ECCATs. Grievants all shared the seniority date of August 8, 2014, along with other Aide/ECCAT employees. In November 2018, the Associate Superintendent determined that seniority tie-breaker drawings had to be conducted because employment decisions were going to have to be made because of county school consolidations, or mergers. The Associate Superintendent organized and conducted the tie-breaker drawings in December 2018. As a result of the drawings, Aide/ECCAT employees who shared the same seniority date for their ECCAT classification were assigned seniority rankings. Grievants argue that the drawings conducted in December 2018 were invalid and that their overall Aide seniority should control for employment decisions. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

² At the end of the level three hearing, the date set for submission was August 9, 2019. However, on August 7, 2019, counsel for Grievant asked for an extension of the submission date to August 16, 2019. There being no objection from opposing counsel, this ALJ granted the same.

Findings of Fact

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

2. Grievants were employed by Respondent in the Aide classification category prior to 2014.

3. Grievants each hold the title of Aide/ECCAT, which is a multiclassified position.

4. Grievants obtained the necessary credentials and began working as ECCATs on August 8, 2014, which was the first day of the 2014-2015 school year. Therefore, they shared the ECCAT seniority date of August 8, 2014. At the times relevant herein, including Grievants, there were eleven Aide/ECCATs who held this same seniority date. The other eight Aide/ECCATs are not parties to this action.

5. 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).³

6. Even though the Grievants began working in the ECCAT classification category on August 8, 2014, they all had been employed in the Aide classification in prior years.

³ The titles were changed when the statute was amended in 2017.

7. “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).

8. Grievants held the following Aide seniority dates and rankings reflecting when each commenced work for Respondent in the Aide classification:

a) Myrri Gibson	June 2, 1999	4 th
b) Neva Martin	October 14, 2006	11 th
c) Kathy Roberts	March 6, 2007	13 th

9. From August 8, 2014, to December 20, 2018, Respondent used the ECCAT seniority dates to make employment decisions for the multiclassified Aide/ECCAT position. However, there had been no situation in which two Aide/ECCATs with the same seniority date had ever applied for the same job.

10. Because of school closures and/or mergers in the county, Associate Superintendent Margaret Pennington determined during the 2018-2019 school year that random tie-breaker drawings were necessary given the various personnel moves that were subject to a statutory priority preference vote, pursuant to W. Va. Code § 18A-4-8f, that had been approved by the service personnel.⁴

11. Associate Superintendent Pennington prepared a random selection process and by letters dated on or about November 15, 2018, invited those employed as Aide/ECCATs who had identical seniority dates to drawings to be held on December 20, 2018, to create a seniority ranking.⁵ One drawing was to create rankings for those that

⁴ It is not known when this vote took place.

⁵ See, Joint Exhibits 14, 15, and 16, November 15, 2018, letters to Grievants.

shared August 8, 2014, as their seniority date, and for those who shared August 10, 2015. None of the parties to this grievance held the ECCAT seniority date of August 10, 2015.

12. The drawings were held as scheduled. Following the random drawing, the ECCATs' seniority was listed separately from their Aide seniority. Therefore, each Grievant now held a different ranking for Aide seniority and ECCAT seniority, as represented by the following:

a) Myrri Gibson	Aide Rank	4 th	ECCAT Rank	7 th
b) Kathy Roberts	Aide Rank	11 th	ECCAT Rank	8 th
c) Neva Martin	Aide Rank	13 th	ECCAT Rank	10 th

13. As a result of the random drawings, two Grievants moved up in the ECCAT seniority rankings, and one went down in the rankings. All Grievants want the overall Aide seniority to control personnel decisions for Aide/ECCAT positions.

14. Respondent conducted the drawings over four years after Grievants first established identical ECCAT seniority dates.

15. Respondent was aware since at least 2014 that many of the Aide/ECCATs shared identical seniority dates.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants argue that the December 20, 2018, drawings are invalid “. . . because state code mandates that the procedure [is] to be utilized within thirty (30) days of the identical seniority dates being established.” Grievants assert that their seniority should be based upon their overall Aide seniority, not their ECCAT seniority. Respondent denies Grievants’ claims and asserts it was correct to conduct the random selection drawings because Grievants shared ECCAT seniority dates with other employees, even though the drawings were conducted well after the thirty-day statutory time period. Respondent argues it was correcting a mistake. Respondent further asserts that ECCAT seniority accrues separately from Aide seniority, and that ECCAT seniority controls for employment decisions for that classification category.

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.” *Id.* Respondent admits that it failed to conduct the random drawings within thirty days of Grievants being assigned August 8, 2014, as their ECCAT seniority dates. From August 8, 2014, until the December 2018 drawing, Respondent did not use Grievants’ overall Aide seniority in making ECCAT employment decisions. Instead, Respondent asserts that because no two ECCATs ever bid on the same job the issue was never raised. However, Associate Superintendent Pennington also testified that had two or more of the ECCATs bid on the same position, a tie-breaker drawing would have been conducted at that time.

The West Virginia Supreme Court of Appeals had an opportunity to address ECCAT seniority versus 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. (Emphasis added.) The Court’s ruling was based upon the Aides and ECCATs being considered separate classifications. Seniority is gained in each classification separately. All ECCATs are Aides, but not all Aides are ECCATs. 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. It is only logical that all these special certifications areas within the Aide classification be treated the same.

Recently, the issue of ECCAT seniority and tie-breaker drawings was addressed in the case of *Carpenter, et al., v. Webster County Board of Education*, Docket No. 2018-1027-CONS (Mar. 27, 2019). In that case, the grievants argued that the respondent had to use their overall Aide seniority rather than their newly-established ECCAT seniority rankings for employment decisions because respondent failed to hold the tie-breaker drawing within the thirty-day statutory timeline. The Grievance Board reasoned that,

[t]he Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors 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 the 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. . . . 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 understandable because the issue of separate ECCAT certification was not settled until the Supreme Court addressed the issue in *Mayle* which was issued in (sic) on January 18, 2018.

Carpenter, et al., v. Webster Cnty. Bd. of Educ., Docket No. 2018-1027-CONS (Mar. 27, 2019). (Emphasis added.)

The same is true in this case. Associate Superintendent Pennington organized and conducted the tie-breaker drawings on December 20, 2018. Grievants' new ECCAT seniority rankings were established that date. The actual mistake to be corrected by the December 2018 random selection drawing was Respondent's calculating seniority in a manner inconsistent with the law. The failure to have drawings in 2014 was also a mistake, but the 2018 drawings were held to correct the incorrect calculation of seniority. Respondent was aware that Grievants and other Aide/ECCAT employees shared seniority dates. However, as no Aide/ECCATs had ever applied for the same job, so this issue had not demanded attention. Also, during the four years, no employment decision

had been made based upon Aide seniority. After the consolidation and/or merger issues arose, Associate Superintendent Pennington saw the need to break the tied seniority, and organized and conducted the drawings. These drawings were certainly outside the thirty-day statutory timeline, but as in *Carpenter*, Respondent's failure to hold the tie-breaker until December 2018 does not render them invalid. Respondent was required to correct its mistake of calculating seniority in a manner inconsistent with the law.

Grievants have failed to prove that the December 2018 random selection drawings were invalid, or otherwise improper. For the reasons set forth herein, this consolidated grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. 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. 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.”

4. 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).

5. Grievants failed to prove by a preponderance of the evidence that the random selection drawings were invalid, or otherwise improper.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 26, 2019.

Carrie H. LeFevre
Administrative Law Judge