

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA HILL and JOANN THOMAS,

Grievants,

v.

Docket No. 2017-2509-CONS

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Lisa Hill and Joann Thomas, filed separate level one grievances against their employer, Respondent, Boone County Board of Education, challenging a hiring selection on or about May 22, 2017. Grievant Hill's statement of grievance was dated May 22, 2017, and stated as follows: "Grievant was not awarded kindergarten-Aide position at New Haven Elementary for the 2017-2018 school year that she applied for and is most senior applicant for, in violation of School Law 18A-4-8b paragraph (b) sections (1) & (2).[.] [T]he position was given to a less senior RIF'd Aide." As relief sought, "Grievant seeks to be awarded the position of kindergarten-aide at New Haven Elementary School for the 2017-2018 school year. Job 210-363-C[.]" This grievance was originally assigned Docket No. 2017-2194-MasED. Grievant Thomas's statement of grievance was dated May 22, 2017, and stated as follows: "Grievant was passed over for 3 different Kindergarten-Aide positions she applied for and is most senior applicant in violation of WV School Law 18A-4-8b paragraph (b), sections (1) & (2). Positions were awarded at Mason county BOE meeting on May 9, 2017 to less senior RIF'd personnel. Job217-461-C, Job210-363-C, Job001-048." As relief sought, "Grievant seeks to be awarded one of the positions listed above. Her preference is Job #217-461-C at Point

Pleasant Primary School for the 2017-2018 school year.” These grievances were consolidated into Docket No. 2017-2509-CONS at level three of the grievance process, by Order entered March 23, 2018.

Level one conferences for both grievances were conducted. However, the dates of which are unknown; the dates are not listed in the level one decisions. Both grievances were denied by decisions issued on September 11, 2017. Grievants appealed to level two on September 19, 2017. Level two mediations in the two separate grievances were conducted on December 11, 2017. Grievants appealed their separate grievances to level three on December 18, 2017. On January 9, 2018, the two grievances were scheduled for level three hearings to be conducted on March 26, 2018, and March 28, 2018. After consolidating the grievances, the consolidated grievance was scheduled to be conducted on March 28, 2018. On that date, Respondent, by counsel, Leslie Tyree, Esquire, and Tonya Martin, Mason County Schools, Grievant Thomas, and counsel for Grievants, Joe Spradling, Esquire, West Virginia School Service Personnel Association (WVSSPA), appeared for the level three hearing. Counsel for Grievants advised that Grievant Hill was unable to attend due to illness, and orally moved for a continuance. Respondent had no objection to the continuance and the same was granted. By Order entered March 29, 2018, this matter was rescheduled for hearing on May 3, 2018.

On April 23, 2018, counsel for Respondent requested a continuance of the May 3, 2018, due to unavailability, and Grievants did not object. By Order entered April 24, 2018, the May 3, 2018, hearing was continued. On June 6, 2018, the level three hearing was rescheduled to be held on June 22, 2018, based upon agreed upon dates submitted by the parties. On June 18, 2018, the parties submitted a Joint Motion to Continue asserting

that there was a scheduling conflict for both parties, the parties agreed that no prejudice would result from such a continuance, and that the parties would submit mutually agreeable dates by June 26, 2018. By Order entered June 19, 2018, the hearing was continued.

In July 2018, George B. Morrone, III, Esquire, General Counsel, WVSSPA, was substituted as counsel for Grievants. On August 3, 2018, the level three hearing was next scheduled to be held on August 16, 2018. On August 9, 2018, counsel for Grievants moved for a continuance as he was new to the case and needed additional time to prepare. There was no objection from Respondent, and the parties submitted agreed upon dates. By Order entered August 13, 2018, the continuance was granted and the hearing was rescheduled to October 4, 2018.

A level three hearing was conducted on October 4, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievants appeared in person and by counsel, George B. Morrone, III, Esquire, General Counsel, WVSSPA. Respondent appeared by its counsel, Leslie Tyree, Esquire. This matter became mature for decision on January 15, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent as Aides. Grievants applied for two positions that required Early Childhood Classroom Assistant Teacher (ECCAT) certification. While Grievants were the more senior applicants in the aide classification than those awarded the positions, Grievants did not at that time hold ECCAT certifications from the West Virginia Department of Education, nor had they ever held an ECCAT

position. The successful applicants held ECCAT certifications. Grievants assert that they were entitled to placement in the positions over those selected. Respondent argues that its selection of the other applicants for the ECCAT positions was proper. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

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

Findings of Fact

1. At all times relevant herein, Grievant Hill was regularly employed by Respondent as an Aide III. She has been employed in the aide classification category since October 27, 2008. Grievant Hill is currently assigned to an aide position at New Haven Elementary School. At the times relevant herein, Grievant Hill did not hold an ECCAT certification. However, Grievant Hill thought she was enrolled for a course required for the ECCAT certification in early 2017, but she later learned that she had been enrolled in the wrong course.

2. At all times relevant herein, Grievant Thomas was regularly employed by Respondent as an Aide III. She has been employed in the aide classification category since January 18, 2005. Grievant Thomas is currently assigned to an aide position at Point Pleasant Primary School. At the times relevant herein, Grievant Thomas did not hold an ECCAT certification. However, Grievant Thomas was enrolled in courses for ECCAT certification as of February 2016.

3. On April 12, 2017, Respondent posted a list of service personnel vacancies which included position "210-363-C Aide, Kindergarten New Haven Elementary School

2017-2018,” and position “217-461-C Aide, Kindergarten Point Pleasant Primary School 2017-2018,” and “001-048-I Aide, Central Office Itinerant 2017-2018.”¹

4. The “Position Announcement” for Job 210-363-C incorrectly identified the position as a preschool aide, but correctly stated it was a position at New Haven Elementary. The minimum qualifications were listed as being a “high school diploma or its equivalent and classified as an aide or successful completion of all State required testing. Early Childhood Classroom Assistant Teacher Certification.”²

5. The “Position Announcement” for Job 210-363-C incorrectly identified the position as a preschool aide, but correctly stated that it was a position at Point Pleasant Primary School. The minimum qualifications were listed as being a “high school diploma or its equivalent and classified as an aide or successful completion of all State required testing. Early Childhood Classroom Assistant Teacher Certification.”³

6. Grievant Hill applied for the vacant kindergarten aide position at New Haven Elementary School (Job # 210-363-C). It is unknown how many people applied for this position.

7. Nicole Blessing also applied for the vacant kindergarten aide position at New Haven Elementary School (Job # 210-363-C). On May 9, 2017, Respondent rescinded its reduction-in-force (RIF) of Nicole Blessing, and awarded her that position.

8. Ms. Blessing had been employed in the aide classification category since March 24, 2016. She received her ECCAT temporary authorization on February 29, 2016.

¹ See, Grievant’s Exhibit 6, Job Postings, April 12, 2017.

² See, Grievant’s Exhibit 7, Position Announcement Job 210-363-C.

³ See, Grievant’s Exhibit 7, Position Announcement Job 210-363-C.

9. Grievant Hill had more seniority in the aide classification category than Ms. Blessing, but Grievant Hill did not hold an ECCAT job or any ECCAT credentials.

10. Grievant Thomas applied for the vacant kindergarten aide position at Point Pleasant Primary School (Job # 217-461-C). It is unknown how many applicants applied for this position.

11. Virginia Hughes also applied for the vacant kindergarten position at Point Pleasant Primary School. On May 9, 2017, Respondent rescinded its RIF of Ms. Hughes and awarded her this position.

12. Ms. Hughes had been employed in the aide classification category since August 17, 2015. Ms. Hughes received her permanent ECCAT authorization on March 1, 2015.

13. Grievant Thomas had more seniority in the aide classification category than Ms. Hughes, but Grievant Thomas did not hold an ECCAT job or any ECCAT credentials.

14. Grievants hold no ECCAT seniority. It is unknown what, if any, ECCAT seniority Ms. Blessing and Ms. Hughes held. It is also unknown whether Ms. Hughes and Ms. Blessing held ECCAT positions at the time they were RIF'd.

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 they should have been selected for the two posted positions because they met the minimum qualifications for the positions, they were more senior than those selected, and they were regularly employed when the two selected had been RIF'd. Respondent argues that it was correct in selecting Ms. Blessing and Ms. Hughes to fill the positions at issue because the Grievants did not meet the minimum qualifications of the positions, and Ms. Blessing and Ms. Hughes already held ECCAT certifications.

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. . . Qualified applicants shall be considered in the following 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. . . .

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 Early Childhood Classroom Assistant Teacher III are defined in West Virginia Code § 18A-4-8(i)(36), (37), and (38), respectively. These class titles replaced the class titles Early Childhood Classroom Assistant Teacher-Temporary Authorization, Early Childhood Classroom Assistant Teacher-Permanent Authorization, and Early Childhood Classroom Assistant Teacher-Paraprofessional Certificate, effective March 9, 2015, prior to the date the positions at issue were posted. Early Childhood Classroom Assistant Teacher I is defined as “a person who does not possess minimum requirements for the permanent authorization requirements, but is enrolled in and pursuing requirements.” W. Va. Code § 18A-4-8(i)(36). Early Childhood Classroom Assistant Teacher II is defined as “a person who has completed the minimum requirements for a state-awarded certificate for early childhood classroom assistant teachers as determined by the State Board.” W. Va. Code § 18A-4-8(i)(37). Early Childhood Classroom Assistant Teacher III is defined as “a person who has completed permanent authorization requirements, as well as additional requirements comparable to current paraprofessional titles.” W. Va. Code § 18A-4-8(i)(38). “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).

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). “The assignment of an aide to a particular position within a school is based on seniority within the aide classification category if the aide is qualified for the position.” W. Va. Code § 18A-4-8b(d)(3). Additionally, there are State Board of Education regulations regarding the requirements for ECCAT certification. These regulations make clear that in order for an employee to obtain any type of ECCAT certification from the State Board of Education, the employee must either be employed in an ECCAT position, or present “verification of at least one year of pre-kindergarten or kindergarten teaching experience.” 126 C.S.R. 136 §§ 12.1.c.7 and 12.1.d.8.

Grievants argue that they meet the minimum qualifications for the positions at issue because, while they did not hold the ECCAT credentials, they were qualified to hold the credentials as they were enrolled in the courses, and that such meets the minimum qualifications stated in Respondent’s ECCAT job description.⁴ Grievants appear to suggest that they meet the definition of ECCAT I as stated in this ECCAT job description. Thus, they argue that as they were qualified and they had more aide seniority, they should have been selected for the positions. Grievants had no ECCAT seniority. It is unknown if Ms. Hughes or Ms. Blessing had been employed as ECCATs and whether they had any ECCAT seniority.

By definition, at the time at issue, Grievants may have been qualified to hold the

⁴ See, Grievant’s Exhibit 11, Mason County Schools ECCAT Job Description.

class title ECCAT I. However, the issue is whether Respondent was required to place Grievants in the positions at issue when they did not hold the certifications required by the posting, and Respondent had no reason to believe that Grievants would receive ECCAT certification by the time they began working in the positions. Both Ms. Hughes and Ms. Blessing held ECCAT credentials at the time they applied for and were awarded the positions. “A board of education is permitted to fill a vacant position with an applicant who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results. *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997).’ *Harvey v. Mineral County Bd. of Educ.*, Docket No. 00-28-117 (Aug. 7, 2000).” *Cosner v. Gilmer County Bd. of Educ. and Skinner*, Docket No. 2015-1520-GilED (July 27, 2016). Accordingly, Respondent was not required to place Grievants in the positions at issue. See *Workman v. Raleigh County Bd. of Educ.*, Docket No. 2016-0830-RalED (Nov. 22, 2016); *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).

Lastly, in the case of *Adkins v. Fayette County Bd. of Educ.*, Docket No. 2015-1620-FayED (Oct. 19, 2016), the administrative law judge stated as follows:

[t]he Legislature has carved out several positions which require certain training and expertise to properly serve particular student populations. The Legislature placed these class titles[:] paraprofessionals, autism mentors, early classroom teacher assistants, and Braille or sign specialists, into the Aide classification. W. Va. Code § 18A-4-8b(d)(2)(C). However, that does not mean that all aides are qualified to hold these special class titles. It was noted in *Riffle v. Webster*

County Board of Education, Docket No. 04-51-122 (July 30, 2004), that while “an autism mentor is an aide, an aide is not necessarily an autism mentor.” In that case, it was held that it was appropriate for a board of education to award an aide/autism mentor position to an applicant who had more seniority as an autism mentor, even though the grievant had far more regular seniority in the aide classification. See also *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005). This reasoning has been generally followed by the Grievance Board in cases regarding ECCAT positions. 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); and *Mayle v. Barbour County Bd. of Educ.*, Docket No. 2016-0113-BarED (Aug. 26, 2016).

This interpretation may seem at odds with the inclusion of these specialty aide positions in the general aide classification. However, to 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. In such situations the West Virginia Supreme Court of Appeals has instructed that, “The plain meaning of a statute is normally controlling, except in the rare case in which literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. In such cases, it is the legislative intent, rather than the strict language, that controls.” *West Virginia Human Rights Comm’n v. Garrettson*, 196 W. Va. 118, 128, 468 S.E.2d 733, 743 (1996).

Id. The same applies in this case. For the reasons set forth herein, Grievants failed to prove that they were entitled to be awarded the positions at issue. Accordingly, this 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. 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. “A board of education is permitted to fill a vacant position with an applicant who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results. *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997).’ *Harvey v. Mineral County Bd. of Educ.*, Docket No. 00-28-117 (Aug. 7, 2000).” *Cosner v. Gilmer County Bd. of Educ. and Skinner*, Docket No. 2015-1520-GilED (July 27, 2016).

4. Grievants did not prove by a preponderance of the evidence that they held the required certifications for the positions at issue, or that they had completed all the requirements necessary for obtaining the certification. Grievants failed to demonstrate that they were entitled to placement into the positions at issue.

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 (eff. July 7, 2018).

DATE: March 15, 2019.

Carrie H. LeFevre
Administrative Law Judge