

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SUSAN KAY NEAL,

Grievant,

v.

Docket No. 2019-1635-FayED

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Susan Kay Neal, filed this grievance against her employer, Respondent, Fayette County Board of Education, dated May 21, 2019, stating as follows: “Grievant is regularly employed by Respondent in the aide classification category. [Grievant] applied for a posted vacancy at Ansted Elementary School, for which she is qualified. Respondent selected a less-senior aide to fill the vacancy, in violation of W. Va. Code § 18A-4-8b. [Respondent’s] conduct is also arbitrary and capricious.” As relief sought, “Grievant seeks instatement into the aide position, plus lost pay (with interest), in any and lost benefits or seniority, if any, resulting from Respondent’s action.”

On or about May 22, 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 September 23, 2019, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, and by counsel, George B. Morrone, III, Esq., General Counsel, West Virginia School Service Personnel Association. Respondent appeared by counsel, Denise M. Spatafore, Esq., Dinsmore & Shohl, LLP, and was represented in person by Margaret Pennington, Associate

Superintendent for Fayette County Schools. This matter became mature for decision on November 4, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Early Childhood Classroom Assistant Teacher (ECCAT). Grievant applied for an ECCAT position, but another applicant with less Aide seniority, but more ECCAT seniority, was selected to fill the vacancy. Grievant argues that Respondent should have used Aide seniority, and not ECCAT seniority to determine who was to be awarded the position. Respondent argues that its use of ECCAT seniority to determine the successful applicant was proper. Grievant failed to prove her 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:

Findings of Fact

1. Grievant is employed by Respondent, Fayette County Board of Education, in the Aide classification category. Grievant's aide seniority date is February 6, 2007. Grievant received her ECCAT certification on January 3, 2017.
2. On March 14, 2019, Respondent posted a vacancy for an Itinerant Supervisory Pre-K Aide/Bus Aide/ECCAT for the 2019-2020 school year at Ansted Elementary School, with a 200-day contract, pay grade F. This position was for an ECCAT assigned to a preschool classroom, requiring ECCAT certification.

3. Respondent received ten applications for the Itinerant Supervisory Pre-K Aide/Bus Aide/ECCAT position at Ansted Elementary School. The following three applicants were classified as ECCATs, and as such, were qualified to hold the position: Amber Brumfield; Patricia Hatcher; and, Grievant.

4. Amber Brumfield's ECCAT seniority date was April 27, 2015. Patricia Hatcher's ECCAT seniority date was August 8, 2015. Grievant's ECCAT seniority date was January 3, 2017.

5. Respondent first offered the position to Amber Brumfield, but she withdrew her name from consideration. Respondent then offered the position to Patricia Hatcher, who accepted the position.

6. Grievant has more Aide seniority than Ms. Brumfield and Ms. Hatcher. However, Ms. Brumfield and Ms. Hatcher have more ECCAT seniority than Grievant.

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 asserts that Aide seniority rather than ECCAT seniority should have been used to determine which of the qualified candidates would be selected to fill the position vacancy. Grievant argues that because she had more Aide seniority than the other two

qualified candidates, she should have been awarded the position. Grievant bases her position primarily on an order of the Circuit Court of Kanawha County issued on October 11, 2019, in the matter of *Davis, et al., v. Webster County Bd. of Educ.*, Kanawha Cnty. Cir. Ct. Civil Action No. 19-AA-42 (Oct. 11, 2019), in which the Circuit Court reversed the decision of the Grievance Board issued in the matter of *Carpenter, et al., v. Webster County Bd. of Educ.*, Docket Number 2018-1027-CONS (Mar. 27, 2019).

Respondent contends that its selection of Ms. Hatcher for the position was proper because it was an ECCAT position, and she had more ECCAT seniority than Grievant, and the other candidate had withdrawn her name from consideration. Respondent argues that it would be “inconsistent” with the applicable statutes and case law “to use aide seniority to determine the most senior, qualified applicant for an ECCAT position, when choosing among current ECCAT applicants with established ECCAT seniority dates.” The parties do not dispute that Grievant and Ms. Hatcher were both qualified for the position because they both held ECCAT certifications.

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

“Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W. Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

In *Carpenter*, the Grievance Board, relying on the case of *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision), concluded that as Aide seniority and ECCAT seniority accrue separately,

ECCAT seniority was controlling for the filling of ECCAT vacancies and reductions in force, not employees' overall Aide seniority. The ALJ determined that the respondent school board was, therefore, correct in conducting a tie-breaker drawing for all those who shared the same ECCAT seniority date to establish seniority rankings to be used in such situations.

In *Mayle*, the West Virginia Supreme Court of Appeals 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 Aides and ECCATs being considered separate classification categories of employment based upon statute.

Grievant is arguing the opposite in the instant matter based upon the recent Circuit Court Order. In its Order in *Davis*, the Circuit Court distinguished the case from *Mayle*, and found West Virginia Code § 18A-4-8b(i) and § 18A-4-8b(d)(2) to be controlling on the issue of Aide versus ECCAT seniority for filling ECCAT vacancies, not West Virginia Code § 18A-4-8g or § 18A-4-8e. The Circuit Court explained its reasoning and ultimate conclusions as follows:

Respondent offers W. Va. Code § 18A-4-8g in response, which states that seniority accumulates within particular classification categories as those categories are listed in W. Va. Code § 18A-4-8e. However, section 8e does not list either aides or ECCATS as classification categories. Instead, this section governs competency testing of specific categories such as cafeteria workers, secretaries, and mechanics. If the Grievants were members of any of the classification categories listed in § 18A-4-8e, that code section would be controlling and thus dispositive in this matter. Instead, § 18A-4-8g states that seniority accumulates within the classifications listed in § 18A-4-8e, but 8e in turn provides only a very limited number of classification categories of which no Grievant is a member. It appears that W. Va. Code § 18A-4-8g determines seniority for service personnel who must perform competency testing as required by W. Va. Code § 18A-4-8e. Because the Grievants are not included in W. Va. Code § 18A-4-8e, W. Va. Code § 18A-4-8g should not be used to determine their seniority . . .

This Court **FINDS** W. Va. Code § 18A-4-8b to be controlling in this case. The *Mayle* Court considered this section, but only for the purpose of finding that the petitioner therein was not qualified for an ECCAT position. Applied here, W. Va. Code § 18A-4-8b clearly directs aide seniority to be calculated as ECCAT seniority. Subsection (i) mandates that seniority be determined by the length of time an individual spends “within a particular job classification,” then subsection (d)(2) of the same statute places ECCATs and aides in the same job classification category

This Grievance Board has addressed this issue consistently in a number of recent grievance decisions all concluding that ECCAT seniority, not Aide seniority, is to be used for filling ECCAT vacancies. The Grievance Board has based those previous decisions upon *Mayle*, the relevant statutes, and upon a line grievance cases regarding the Autism Mentor classification. The Autism Mentor cases do not appear to be addressed in the Circuit Court’s Order. Both parties have cited a number of statutes in support of their opposing positions, and such requires analysis. At the outset, this ALJ notes that many of these statutes are difficult to read, to comprehend, and even to cite. For example,

there exists a West Virginia Code § 18A-4-8b and a West Virginia Code § 18A-4-8(b). They are wholly separate statutes, but both pertain to service personnel.

West Virginia Code § 18A-4-8b, "Seniority rights for school service personnel," 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

Id. West Virginia Code § 18A-4-8b further states, in part, as follows:

(d) A promotion means any change in employment that the service person considers to improve his or her working circumstance within the classification category of employment . . .

(2) Each 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:

(A) The cafeteria manager class title is included in the same classification category as cooks;

(B) The executive secretary class title is included in the same classification category as secretaries;

(C) Paraprofessional, autism mentor, early classroom assistant teacher and braille or sign support specialist class titles are included in the same classification category as aides . . .

(3) The assignment of an aide to a particular position within a school is based on seniority within the aide classification category in the aide is qualified for the position

West Virginia Code §18A-4-8, "Employment term and class titles of service personnel; definitions," states, in part, the following:

(i) The column heads of the state minimum pay scale and class titles, set forth in section eight-a [§ 18s-4-8a] of this article, are defined as follows:

(1) "Pay grade" means the monthly salary applicable to class titles of service personnel;

(2) "Years of employment" means the number of years which an employee classified as a service person has been employed by a county board in any position prior to or subsequent to the effective date of this section and includes service in the Armed Forces of the United States, if the employee was employed at the time of his or her induction. For the purpose of section eight-a of this article, years of employment is limited to the number of years shown and allowed under the state minimum pay scale as set forth in section eight-a of this article;

(3) "Class title" means the name of the position or job held by a service person . . .

(8) "Aide I" means a person selected and trained for a teacher-aide classification such as monitor aide, clerical aide, classroom aide or general aide;

(9) "Aide II" means a service person referred to in the "Aide I" classification who has completed a training program approved by the state board, or who holds a high school diploma or has received a general educational development certificate. Only a person classified in an Aide II class title may be employed as an aide in any special education program;

(10) "Aide III" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate . . .

(11) "Aide IV" means a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate . . .

(14) "Autism mentor" means a person who works with autistic students and who meets standards and experience to be determined by the state Board. A person who has held or holds an aide title and becomes employed as an autism mentor shall hold a multiclassification status that includes both aide and autism mentor titles, in accordance with section eight-b of this article;

(15) "Braille specialist" means a person employed to provide braille assistance to students. A service person who has held or holds an aide title and becomes employed as a braille specialist shall hold a multiclassification status that includes both aide and braille specialist title, in accordance with section eight-b of this article . . .

(36) "Early Childhood Classroom Assistant Teacher I" means a person who does not possess minimum requirements for the permanent authorization requirements, but is enrolled in and pursuing requirements;

(37) "Early Childhood Classroom Assistant Teacher II" means 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;

(38) "Early Childhood Classroom Assistant Teacher III" means a person who has completed permanent authorization requirements, as well as additional requirements comparable to current paraprofessional certificate

Id. "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). "Multiclassification" means a person employed to perform tasks that involve the combination of two or more class titles in this section. In

these instances the minimum salary scale is the higher pay grade of the class titles involved W. Va. Code § 18A-4-8(i)(67).

Accordingly, all ECCATs are multiclassified, and have been placed in the Aide classification category by statute along with paraprofessionals, autism mentors, and braille specialists. However, pursuant to the statutes listed above, ECCATs require certifications that are not required for Aides, as do Autism Mentors. As such, all ECCATs and Autism Mentors are Aides, but not all Aides are ECCATs and Autism Mentors.

Grievant contends that W. Va. Code § 18A-4-8b controls and requires that Aide seniority be used, as held by the Circuit Court. However, the Circuit Court explained in its Order that West Virginia Code § 18A-4-8g and West Virginia Code §18 A-4-8e do not apply because ECCATS are not listed in W. Va. Code § 18A-4-8e. The Court stated that “[i]f the Grievants [who were ECCATS] were members of any of the classification categories listed in § 18A-4-8e, that code section [W. Va. Code § 18A-4-8g] would be controlling and thus dispositive in this matter” However, a close review of the statutes demonstrates that ECCATs are referenced in W. Va. Code § 18A-4-8e.

West Virginia Code §18A-4-8g, “Determination of seniority for service personnel,” states, in part, as follows:

(a) Seniority accumulation for a regular school service person:

(1) Begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five, article two of this chapter;

(2) Continues until the service person's employment as a regular employee is severed with the county board; and

(3) Does not cease to accumulate when the county board has authorized an absence whether without pay or due to illness or other reason over which the employee has no control . . .

(d) For 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 section eight-e of this article . . .**

(l) A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title. A multiclassified service person is subject to reduction in force in any category of employment contained within his or her multiclassification title, based upon the seniority accumulated within that category of employment. If a multiclassified service person is subject to a reduction in force in one classification category, the service person retains employment in any of the other classification categories that he or she holds within his or her multiclassification title. In that case, the county board shall delete the appropriate classification title or classification category from the contract of the multiclassified employee . . .

(m) When applying to fill a vacancy outside the classification categories held by a multiclassified service person, seniority acquired simultaneously in different classification categories is calculated as if accrued in one classification category only .

. . .

Id. (Emphasis added). Therefore, Aide seniority and ECCAT seniority accrue separately.

West Virginia Code § 18A-4-8e, entitled, “Competency testing for service personnel; and recertification testing for bus operators,” states in part as follows:

(a) The state board shall develop and make available competency tests for **all of the classification titles defined in section eight [§ 18A-4-8] of this article and listed in section eight-a [§ 18A-4-8a] of this article for service personnel Each classification title defined and listed is considered a separate classification category of employment** for service personnel and has a separate competency test, except for those class titles having Roman numeral designations, which are considered a single classification of employment and have a single competency test

Id. While ECCATs and Aides are not specifically mentioned in W. Va. Code § 18A-4-8e, and even though ECCATs are not required to take competency tests, both class titles are listed in W. Va. Code § 18A-4-8a and defined in W. Va. Code § 18A-4-8. As a result, they are incorporated by reference in W. Va. Code § 18A-4-8e. Thus, Aides and ECCATs are considered separate. Therefore, according to the Circuit Court's Order in *Davis*, W. Va. Code § 18A-4-8g is dispositive in this matter, and not W. Va. Code § 18A-4-8b as the Circuit Court had ruled.

More importantly, this Grievance Board and the West Virginia Supreme Court of Appeals have addressed this issue and clearly found that Aide seniority and ECCAT seniority accrue separately. See *Mayle*. If ECCAT seniority were not controlling in the filling of ECCAT vacancies and reductions in force, there would be no reason for such seniority to accrue at all. This Grievance Board has previously held that,

[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 where specialized training is required to qualify for those aide 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 to be 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 what 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. Garretson*, 196 W.Va. 118, 128, 468 S.E.2d 733, 743 (1996).

Adkins v. Fayette County Bd. of Educ., Docket No. 2015-1620-FayED (Oct. 19, 2016).

The same is true in this grievance. It is only logical that all these special certification areas within the Aide classification be treated the same. Accordingly, ECCAT seniority should have been used in filling the position, not the Aide seniority. Grievant did not prove that this decision was unlawful, that it was arbitrary and capricious, or otherwise improper. Therefore, Grievant has failed to prove her claims by a preponderance of the evidence. For the reasons set forth herein, 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, 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. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. 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.

W. Va. Code § 18A-4-8b(a).

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

6. “For 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 section eight-e of this article”

W. Va. Code § 18A-4-8g.

7. “The 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 where specialized training is required to

qualify for those aide 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).” *Adkins v. Fayette County Bd. of Educ.*, Docket No. 2015-1620-FayED (Oct. 19, 2016). It is only logical that all these special certifications areas within the Aide classification be treated the same.

8. Grievant failed to prove by a preponderance of the evidence that she should have been selected for the position at issue because she had more Aide seniority than the successful applicant. ECCAT seniority was correctly used in filling the vacancy. Grievant failed to prove by a preponderance of the evidence that Respondent’s decision in filling the vacancy was unlawful, arbitrary and capricious, or otherwise improper.

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

DATE: December 19, 2019.

Carrie H. LeFevre
Administrative Law Judge