

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CATHERINE SKAGGS, et al.,
Grievants,**

v.

Docket No. 2018-0990-CONS

**RITCHIE COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievants, Catherine Skaggs, Kimberly Oblinger, Ruthie Seese, Pauletta Lafferre, Debra Haugh, Terry Keith, Angela Riggs and Lenora Beth Robertson are employed by Respondent, Ritchie County Board of Education ("Board") and filed a level one grievance dated February 19, 2018, alleging:

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

For relief, Grievants seek, "To revert to the seniority list as it existed prior to the determination of seniority by lot." All eight Grievants hold multi-classification titles within in the Aide classification category, specifically comprised of the Aide classification title and the Early Childhood Classroom Assistant Teacher (ECCAT) classification title ("Aide/ECCAT").

The grievances were consolidated at level one for consideration and decision. A hearing was held at level one on May 7, 2018. and the grievance was denied at that level by a written decision issued on September 5, 2018. Grievant appealed to level two on September 11, 2018. A mediation session was held on November 13, 2018. Grievant appealed to level three on November 19, 2018. A level three hearing was held before

the undersigned Administrative Law Judge on May 3, 2019, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievants personally appeared and were represented by George B. “Trey” Morrone III, Esquire, WVSSPA.¹ Respondent appeared through Personnel Director, April Haught, and was represented by Richard S. Boothby, Esquire, Bowles Rice, LLP. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on July 12, 2019, on receipt of the last of these proposals.

Synopsis

Respondent determined that Grievants were tied for Early Childhood Classroom Assistant Teacher (ECCAT) seniority and required Grievants to participate in a random selection process to determine their ECCAT seniority ranking. Grievants argue that their ECCAT seniority should be calculated the same as their Aide seniority. Additionally, they aver that the process for determining the seniority ranking was untimely (after the statutory time limit for that procedure). It is established that ECCAT seniority is not the same as Aide seniority. *See Mayle v. Barbour County Bd. of Educ.*, Case No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision) ECCAT seniority accrual is independent of Aide seniority.

Grievants point out that Respondent failed to hold a random selection to set the seniority ranking for Grievants within thirty days of them all starting to work as ECCATs.

¹ At level one, Grievants were represented by Joe Spradling, Esquire, West Virginia School Service Personnel Association (WVSSPA). At levels two and three, Grievants were represented by George B. “Trey” Morrone III, Esquire, WVSSPA.

Grievants seems to argue that Respondent is now stuck with computing the ECCAT seniority based upon Aide seniority because it did not hold the tie-breaker within the statutory time line. A school board cannot continue to calculate seniority in a manner inconsistent with the law simply because they failed to timely hold a tie-breaker. This Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. Respondent's failure to hold a timely tie-breaker is understandable in the circumstance(s). The issue of ECCAT seniority accrual was less clear until the West Virginia Supreme Court addressed the issue. This Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Each of the eight Grievants² participating in this grievance work for Respondent as an Early Childhood Classroom Assistant Teacher (ECCAT). See generally, W. Va. Code § 18-5-18(c). Each of the Grievants is also an aide. See generally, W. Va. Code §§ 18A-4-8(i)(8)-(11) & (36)-(38).

2. On or after July 1, 2014, all aides in West Virginia working in preschool or Kindergarten classrooms were required to hold the position of Early Childhood Classroom Assistant Teacher - Temporary Authorization, or Early Childhood Classroom Assistant Teacher - Permanent Authorization, or Early Childhood Classroom Assistant Teacher.

² The eight Grievants are Catherine Skaggs, Angela Riggs, Pauletta Lafferre, Terry Keith, Debra Hought, Kimberly Oblinger, Lenora Beth Robertson, and Ruthie Seese.

See W. Va. Code § 18-5-18 (2013). Later, those class titles were changed to ECCAT I, II and III. See W. Va. Code § 18-5-18 (2017).

3. 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

4. Each Grievant obtained some form of the necessary ECCAT credentials from the State Department of Education by July 1, 2014, and all Grievants started the 2014-2015, in an ECCAT position.⁴ August 18, 2014, was the first day that all Grievants commenced employment in an ECCAT position although they had been employed in the Aide classification in prior years.

5. “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).

6. On or about May 24, 1984, Respondent passed Policy 5050, a random selection system for service personnel to comply with W. Va. Code § 18A-4-8g.⁵ R Ex 4.

7. In November of 2012, Policy 5050 was disseminated to all building principals and to employee association representatives. See R Ex 5.

8. No objections to Policy 5050 were noted.

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

⁴ Starting with the 2014-2015 school year all Aide positions in pre-school and Kindergarten class were referred to as Early Childhood Classroom Teacher Assistants, ECCATs.

⁵ W. Va. Code §18A-4-8g(i)(2) requires, “A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date.”

9. On December 10, 2012, Respondent re-adopted Policy 5050 after two readings. See R Ex 6 & 7.

10. Seven of the Grievants, at some point prior to the start of the 2014-2015 school year, obtained, at the very least, an initial ECCAT license from the West Virginia State Department of Education. R Ex 16

11. April Haught is Respondent's personnel director and director of instructional services.

12. Due to the administration's initial misunderstanding of how to determine ECCAT seniority dates for Grievants, the ECCAT seniority date information published on January 1, 2018, was incorrect. See R Ex 3; Level One Transcript at 85-87. Ms. Haught became aware of this error in early 2018 when reviewing potential reductions-in-force and transfers for the 2018 personnel season. See Level One Transcript at 82, l. 8-18. Also see Level Three Testimony of April Haught.

13. By January of 2018, declining student enrollment in Ritchie County Schools and related decreases in funding led to the decision to close Ellenboro Elementary School. This school had both Pre-K and Kindergarten classrooms. Around this time, Ms. Haught became familiar with the then-very-recent West Virginia Supreme Court of Appeals decision in *Mayle v. Barbour County Bd. of Educ.*, Case No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision).⁶

⁶ Judicial notice is taken of this W. Va. Supreme Court Memorandum Decision and it is a part of the instant record. See Ex 1

14. Upon reviewing W. Va. Code § 18-5-18 and the *Mayle* decision, Ms. Haught realized that many of the respondent's ECCATs should have been given the same ECCAT seniority date—their first day of work as an ECCAT after July 1, 2014. See W. Va. Code § 18-5-18 (2013); and R Ex 3 & 11. That first day of work was August 11, 2014.

15. Six (6) Grievants (Catherine Skaggs, Kimberly Oblinger, Ruthie Seese, Debra Haugh, Terry Keith and Angela Riggs) obtained the necessary ECCAT credentials from the State Department of Education by July 1, 2014. They were multi-classified by Respondent as Aide/ECCATs and they started the 2014-2015 school year in an Aide/ECCAT position. Grievants were assigned identical ECCAT seniority dates of August 11, 2014, the same being the first day they commenced employment in an Aide/ECCAT position.

16. After making initial corrections to the instant Grievants' and other ECCATs' seniority dates, the seniority dates for all of Respondent's ECCATs were as follows:

Oblinger, Kimberly	8/11/2014
Seese, Ruthie	8/11/2014
Skaggs, Cathy	8/11/2014
Walton, Diane	8/11/2014
Riggs, Angela	8/11/2014
Sellers, Angela	8/11/2014
Haugh, Debra	8/11/2014
Davis, Brian	9/24/2014
Lafferre, Pauletta	8/10/2015
Smith, Melissa	8/10/2015
Robertson, Beth	8/10/2015
Keith, Terry	8/11/2014
Clark, Michelle	8/8/2016

R Ex 11 (instant Grievants' names highlighted)

17. Two (2) Grievants (Pauletta Lafferre and Lenora Beth Robertson) were delayed in obtaining the necessary ECCAT credentials from the State Department of Education by July 1, 2014, due to confusion over whether they were subject to the grandfather provision of W. Va. Code § 18A-4-8(t). They too were multi-classified by Respondent as Aide/ECCATs and they started the 2015-2016 school year in an Aide/ECCAT position. They were assigned identical ECCAT seniority dates of August 10, 2015, the same being the first day they commenced employment in an Aide/ECCAT position.

18. In light of the numerous seniority ties on the ECCAT seniority list, it was determined that a tie-breaker needed to be conducted.

19. After meeting with legal counsel, Ritchie County Schools Personnel Director, April Haught, notified Grievants that a random selection procedure would be implemented to establish priority in ECCAT seniority between those with identical seniority dates.

20. The random selection procedure was conducted on February 5, 2018, with respect to the ECCATs with tied seniority dates established as August 11, 2014 and August 10, 2015

21. As a result of the tie-breakers conducted and other adjustments made to the ECCAT seniority list, as described above herein, the effective ECCAT seniority dates were as follows:

Oblinger, Kimberly	8/11/2014	(D1)
Seese, Ruthie	8/11/2014	(D2)
Skaggs, Cathy	8/11/2014	(D3)
Walton, Diane	8/11/2014	(D4)

Riggs, Angela	8/11/2014	(D5)
Sellers, Angela	8/11/2014	(D6)
Haugh, Debra	10/25/2014	
Davis, Brian	12/8/2014	
Lafferre, Pauletta	8/10/2015	(D1)
Smith, Melissa	8/10/2015	(D2)
Robertson, Beth	8/10/2015	(D3)
Keith, Terry	8/18/2015	
Clark, Michelle	8/8/2016	

See R Ex 11; also see L-1 record.

22. Neither Debra Haugh nor Terry Keith participated in the random selection procedure on February 5, 2018.⁷ At some point Respondent adjusted the ECCAT seniority dates of Debra Haugh and Terry Keith. As a result, Debra Haugh's seniority date was adjusted to October 25, 2014, and Terry Keith's ECCAT seniority date was adjusted to August 18, 2015.

23. The ECCAT classification title was created by the West Virginia Legislature, effective July 1, 2014, and the ECCAT is statutorily included within the Aide classification category. WEST VIRGINIA CODE § 18A-4-8 defines "aides" and "ECCATs" differently and establishes separate qualifications for the positions. Generally speaking all ECCATs are Aides but in contrast, all Aides are not ECCATs. ECCAT seniority accrual is independent of aide seniority. *Mayle v. Barbour County Bd. of Educ.*, Case No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision).

⁷ Terry Keith's position was terminated at some point after August 11, 2014. Later, he was able to once again obtain an ECCAT position. As a result, his correct ECCAT seniority date is August 18, 2015. See Respondent's Exhibit No. 10. Debra Haugh transferred to a non-ECCAT aide position for a short time in 2017. She later returned to an ECCAT position. As a result, her correct ECCAT seniority date is October 25, 2014.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Seniority dates are established when an employee enters upon his or her regular employment duties. See W. Va. Code § 18A-4-8g(a)(1). Grievants' main position is that when all parties have ECCAT certification, their seniority ranking should be based upon their Aide seniority not a separate ECCAT seniority. Their Aide seniority is based upon when each one of them first commenced work as an Aide. ECCAT seniority is based upon when each employee commences work as an ECCAT. Grievants argue that the random selection procedure conducted on February 5, 2018, is invalid, because both State code and local policy mandate the procedure to be utilized within thirty (30) days of the identical seniority dates being established. Grievants' desired resolution of this grievance, to use their aide seniority dates for hiring and other personnel decisions. This

is not the first time this issue has been pursued before this board. See *Carpenter, et al., v. Webster County Bd. of Educ.*, Docket No. 2018-1027 (March 27, 2019)

The West Virginia Supreme Court of Appeals has had an opportunity to address ECCAT seniority vis a vis Aide seniority. In *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision) the Court wrote:

We also find that the circuit court was not clearly wrong in concluding that ECCAT seniority accrues independently of aide seniority. West Virginia Code § 18A-4-8g, titled “[d]etermination of seniority for service personnel,” sets forth that “[f]or all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in [West Virginia Code § 18A-4-8e].” West Virginia Code § 18A-4-8e does not place aides and ECCATs into the same classification category. To the contrary, the statute provides that “[e]ach classification title defined and listed is considered a separate classification category of employment[.]” As set forth above, aides and ECCATs are defined separately. Accordingly, we find that the circuit court’s conclusion that “the Board was not permitted to count [p]etitioner’s [a]ide seniority as ECCAT seniority” was not clearly wrong. *Id.*

Grievants dispute that ECCAT seniority is required to trump Aide seniority in the multi-classified position of Aide/ECCAT. Grievant’s desired resolution of this grievance, to use their Aide seniority dates as their ECCAT seniority dates, is inconsistent with the application of separate classification interpretation. Grievants may need to recognize a factor is the type of position Grievants are applying for, be it an aide position or the better paying ECCAT position.

Grievants correctly point out that Respondent failed to hold a random selection to set the seniority ranking for Grievants within thirty days of them all starting to work as ECCATs. Grievants seems to argue that Respondent is now stuck with computing the ECCAT seniority based upon Aide seniority because it did not hold the tie-breaker within the statutory time line. This is improper.

The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). In this matter, Personnel Director, April Haught, discovered that Grievants all held the same ECCAT start date when reviewing potential reductions-in-force and transfers for the 2018 personnel season.⁸ After making that discovery, Respondent organized and held a random tie-breaker session to set the seniority rankings for the tied ECCATs. Prior to February 5, 2018, Respondent used Aide seniority date to make employment decisions within the Aide classification category. Personnel decisions about ECCATs would be made on the basis of ECCAT seniority, not Aide seniority⁹ which has been interpreted to includes the multi-classified position of Aide/ECCAT.

A Board cannot continue to calculate seniority in a manner inconsistent with the law simply because they failed to timely hold a tie-breaker. “[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final

⁸ Grievants were assigned identical ECCAT seniority dates of August 11, 2014, the same being the first day they commenced employment in an Aide/ECCAT position. See FOFs 12-15, *supra*.

⁹ Grievants alleged, but failed to provide any proof that Respondent had, at some point in the past, made a hiring or reduction-in-force decision for an ECCAT position on the basis of Aide seniority.

judgment.” *Miller v. Bd. of Educ. of Boone Cty.*, 190 W.Va. 153, 159, 437 S.E.2d 591, 597 (1993); *Mayle v. Barbour County Bd. of Educ.*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision). Respondent’s failure to hold the tie-breaker until February 2018 is regrettable but understandable in that the seniority issue of ECCAT certification was not clear to Respondent until the Supreme Court addressed the issue in *Mayle* which was issued in on January 18, 2018.

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

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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

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

4. WEST VIRGINIA CODE § 18A-4-8g requires, “A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date.” The same requirement is found in Board *Policy* 5050.

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

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

7. Grievants did not prove by a preponderance of the evidence that Respondent was required to use Aide seniority for ECCAT employment decisions because it did not meet the statutory time limit holding a tie-breaker to set the ECCAT seniority ranking for employees who held identical ECCAT seniority. *Also see Carpenter, et al v. Webster County Bd. of Educ.*, Docket No. 2018-1027 (March 27, 2019).

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 (2018).

Date: August 12, 2019

Landon R. Brown
Administrative Law Judge