

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER YOUNG, et al.,¹

Grievants,

v.

Docket No. 2019-0840-CONS

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants filed this grievance against their employer, Respondent, Greenbrier County Board of Education, dated January 31, 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-4-8.” As relief sought, Grievants seek “to revert to the seniority list as it existed prior to seniority dates being changed and/or determined by lot.”

On or about February 11, 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 May 10, 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.² Respondent appeared by counsel, Jason S. Long, Esq., Dinsmore & Shohl,

¹ The Grievants are Jennifer Young, Lori Boswell, Jill Huffman, Kimberly Osborne, Etta Russell, Kathy Scruggs, Linda Thomas, Mandy Vandall, and Terri Webb.

² Grievants Etta Russell and Terri Webb did not appear in person at the level three hearing. Their counsel, Mr. Morrone, appeared on their behalf and had the authority to proceed in their absence.

LLP, and was represented in person by Doug Clemons, Associate Superintendent for Greenbrier County Schools. This matter became mature for decision on July 19, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.³

Synopsis

Grievants are employed by Respondent as Aides holding ECCAT certification, multiclassified as Aide/ECCATs. In the past, Respondent ranked these employees for seniority purposes based upon their overall Aide seniority for employment decisions. In late 2018 or early 2019, the Associate Superintendent was advised that Respondent needed to conduct random selection drawings to establish ECCAT seniority rankings for Grievants and other ECCAT employees who shared identical ECCAT seniority dates. Grievants were thereafter required to participate in the random selection process to determine their ECCAT seniority ranking. Eight of the Grievants shared the ECCAT seniority date of August 4, 2014. One of the Grievants shared the ECCAT seniority date of August 21, 2017, with a non-party employee. Grievants argue that their overall Aide seniority should control for employment decisions and that the random selection drawings held in January 2019 were invalid and unnecessary. 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:

³ The date for submission set at the end of the level three hearing was June 21, 2019. However, on June 19, 2019, counsel for Grievant asked for an extension of the submission date to July 5, 2019. There being no objection from opposing counsel, this ALJ granted the same. On July 3, 2019, Grievant's counsel asked for a second extension to July 19, 2019. Counsel for Respondent did not object to the extension, and this ALJ again granted same.

Findings of Fact

1. Grievants are employed by Respondent Greenbrier 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. Eight of the Grievants (Jennifer Young, Jill Huffman, Kimberly Osborne, Etta Russell, Kathy Scruggs, Linda Thomas, Mandy Vandall, and Terri Webb) obtained the necessary credentials and began working as ECCATs on August 4, 2014, which was the first day of school of that year. Therefore, they shared the ECCAT seniority date of August 4, 2014.

5. Grievant Lori Boswell received the necessary ECCAT certification prior to 2017, but she was not given her ECCAT credentials until August 21, 2017, when she returned to a kindergarten assignment. Therefore, Grievant Boswell's ECCAT seniority date was set as August 21, 2017. She shared this same seniority date with another employee who is not a party to this action.

6. 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).⁴

⁴ The titles were changed when the statute was amended in 2017.

7. Even though eight of the Grievants began working in the ECCAT classification category on August 4, 2014, and Grievant Boswell, on August 21, 2017, they all had been employed in the Aide classification in prior years.

8. “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).

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

a) Kimberly Osborne	January 16, 1992	5 th
b) Jennifer Young	January 16, 1997	8 th
c) Linda Thomas	January 19, 1999	11 th
d) Kathy Scruggs	February 16, 1999	12 th
e) Lori Boswell	January 21, 2002	14 th
f) Terri Webb	December 16, 2002	16 th
g) Jill Huffman	May 5, 2007	20 th
h) Etta Russell	December 12, 2007	21 st
i) Mandy Vandall	March 12, 2010	24 th

10. Prior to January 18, 2019, Respondent did not use ECCAT seniority dates to make employment decisions for the multiclassified Aide/ECCAT position.

11. Associate Superintendent Doug Clemons was advised at a human resource officer meeting in late 2018 or early January 2019 that random tie-breaker drawings had to be conducted when employees shared the same ECCAT seniority dates in order to establish a seniority ranking for these employees.

12. Associate Superintendent Clemons prepared a random selection process and by letters dated on or about January 14, 2019, invited those employed as Aide/ECCATs who had identical seniority dates to a drawing to be held on January 18,

2019, to create a seniority ranking.⁵ There were to be two drawings because there were two seniority dates that were being shared by the Aide/ECCAT employees. Eight Grievants and other employees shared the date August 4, 2014, and Grievant Boswell and another employee who is not a party to this action shared August 21, 2017, as their ECCAT seniority date.

13. The two drawings were held as scheduled. Following the random drawing, the ECCATs' seniority was listed separately from their Aide seniority. Each employee held a different ranking for Aide seniority and ECCAT seniority, as represented by the following:

a) Kimberly Osborne	Aide Rank	5 th	ECCAT Rank	1 st
b) Jennifer Young	Aide Rank	8 th	ECCAT Rank	11 th
c) Linda Thomas	Aide Rank	11 th	ECCAT Rank	18 th
d) Kathy Scruggs	Aide Rank	12 th	ECCAT Rank	6 th
e) Lori Boswell	Aide Rank	14 th	ECCAT Rank	28 th
f) Terri Webb	Aide Rank	16 th	ECCAT Rank	21 st
g) Jill Huffman	Aide Rank	20 th	ECCAT Rank	8 th
h) Etta Russell	Aide Rank	21 st	ECCAT Rank	15 th
i) Mandy Vandall	Aide Rank	24 th	ECCAT Rank	19 th

14. As a result of the random drawings, some of the Grievants moved up in the ECCAT seniority rankings higher than others who had more overall Aide seniority, and others fell in the rankings. However, all Grievants want the overall Aide seniority to control personnel decisions for Aide/ECCAT positions as it did before the January 18, 2019, drawings.

15. None of the ECCATs with a seniority date of August 4, 2014, or August 21, 2017, were eliminated for the 2019-2020 school year.

⁵ See, Grievants' Exhibit 6, January 14, 2019, letter.

16. Respondent conducted the drawings years after Grievants first established identical ECCAT seniority dates. Respondent was aware since at least 2014 that 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 January 18, 2019, drawings are 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 further argue that the tie-breaker drawings were not needed as Grievants are multiclassified, their Aide seniority can be used instead of ECCAT seniority for making employment decisions for Aide/ECCATs. Therefore, there was no mistake to be corrected. Grievants assert that their seniority should be based upon their overall Aide seniority, not their ECCAT seniority, like it was prior to the January 18, 2019, drawings. Respondent denies Grievants’ claims and asserts that it was correct to conduct the random selection drawings as Grievants shared ECCAT seniority dates with other employees even though the drawings were conducted well after the thirty-day statutory time period. Respondent

also argues 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.* The same requirement is found in Respondent’s *Policy 4370*.⁶ Respondent admits that years ago, it failed to conduct the random drawings within thirty days of Grievants being assigned August 4, 2014, and August 21, 2017, as their ECCAT seniority dates. From August 4, 2014, until the January 2019 drawing, Respondent had used Grievants’ overall Aide seniority in making employment decisions, including those pertaining to Aide/ECCAT positions, and not the ECCAT seniority dates. It appears that until 2019, Grievants’ ECCAT seniority dates were largely considered of no consequence. It was only after the West Virginia Supreme Court of Appeals decided the case of *Mayle v. Barbour County Board of Education*, No. 17-0204 (W. Va. Supreme Court) (January 8, 2018) (memorandum decision), that Associate Superintendent Clemons was advised later that year at a human resource officer meeting that tie-breaker drawings were to be conducted for any ECCATs who had identical ECCAT seniority dates. Such is because ECCAT seniority accrues separately from Aide seniority. *See Id.*

Many of Respondent’s employees shared the same ECCAT seniority dates because those seniority dates were set based upon the first day of school of the school year after the ECCAT classification category came into existence by statute on July 1, 2014. Thereafter, the ECCAT seniority date was set as simply the first day the employees began working in that classification category whether first day of school year or not.

⁶ See Grievants’ Exhibit 1.

Associate Superintendent Clemons organized and conducted the tie-breaker drawings on January 18, 2019. Grievants' new ECCAT seniority rankings were established that date. Grievant's argue that the tie-breaker drawings are invalid because they were not conducted within thirty days of the establishment of the identical seniority dates. A similar issue arose 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. The actual mistake to be corrected by the January 2019 random selection drawing was Respondent's calculating seniority in a manner inconsistent with the law. The failure to have drawings in 2014 and 2017 was a mistake, but the 2019 drawings were held to correct the incorrect calculation of seniority. Shortly after learning that Respondent was supposed to hold random selection drawings to establish seniority rankings for the ECCATs who shared identical seniority dates, Assistant Superintendent Clemons organized and conducted the drawings. It was certainly outside the thirty-day statutory timeline, but as in *Carpenter*, Respondent's failure to hold the tie-breaker until January 2019 is understandable given the confusion surrounding the ECCAT classification category. Further, Associate Superintendent Clemons took action to correct the mistake when he learned a mistake had been made. As such, the random selection drawings held in January 2019, are valid.

Grievants also argue that the random selection drawings were unnecessary because Respondent's *Policy 4370* states, in pertinent part, "[w]hen filling multiclassification vacancies, the applicant with the greatest seniority in any one (1) of the classification titles included within the multiclassified position shall be deemed the most senior applicant for the position." Grievants argue that such policy permits Respondent to continue to use Aide seniority rather than ECCAT seniority in making employment decisions for the multiclassified position of Aide/ECCAT. This is incorrect.

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.

Grievants failed to prove that the January 2019 random selection drawings were invalid. Grievants failed to prove that Respondent was required to use Aide seniority for Aide/ECCAT position employment decisions because Respondent did not meet the

statutory timeline for holding a tie-breaker drawing to establish ECCAT seniority rankings for employees who held identical ECCAT seniority dates. Grievants also failed to prove by a preponderance of the evidence that the random selection drawings were unnecessary. The drawings were necessary to establish ECCAT seniority rankings because Grievants shared identical ECCAT seniority dates with other employees. Until that time, Respondent had incorrectly used the employees' overall Aide seniority for Aide/ECCAT employment decisions. Accordingly, 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." The same requirement is found in Respondent's *Policy 4370*.

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 and/or unnecessary. Grievants failed to prove that Respondent was required to use their overall Aide seniority dates for ECCAT employment decisions because these positions are multiclassified as Aide/ECCATs.

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: August 29, 2019.

Carrie H. LeFevre
Administrative Law Judge