

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KELLEY BARKER, et al.,**

**Grievants,**

**v.**

**Docket No. 2019-1239-CONS**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **DISMISSAL ORDER**

Grievants are employed by Respondent, Cabell County Board of Education, in the classifications of Aide/Early Childhood Classroom Teacher ("ECCAT"). On March 13 and 14, 2019, Grievants filed grievances stating as follows:

Statement of Grievance: We were required to establish seniority by lot when there was no requirement to change the seniority list in violation of W. Va. Code §§ 18A-4-8g and 18A-4-8b.

Relief Sought: To revert to the seniority list as it existed prior to the determination of seniority by lot.

Following a March 18, 2019, level one conference, the grievances were denied by a level one decision dated April 1, 2019. Grievants appealed to level two on April 3, 2019, and a mediation session was held on May 16, 2019. Grievants appealed to level three on May 21, 2019.

On December 10, 2019, Respondent, by counsel, submitted a motion to hold the grievances in abeyance pending the outcome of decision of the Supreme Court of Appeals of West Virginia regarding an appeal of a final order issued by the Circuit Court of Kanawha County in a civil action styled *Donnis Davis et al. v. Webster County Board*



*of Education*, Civ. Act. No. 19-AA-42 (Oct. 11, 2019) (Bloom, J.) (the “Davis Case”). Respondent asserted in its motion that the decision of the Supreme Court of Appeals in the *Davis* Case would be dispositive of the issues in the current grievance. Grievants by representative concurred. For good cause shown, the undersigned granted Respondent’s motion and issued an Order of Abeyance on December 12, 2019. The issue of establishing ECCAT seniority was tabled awaiting a determination on the issue and related activity by the WV Supreme Court of Appeals. The parties have notified this Grievance Board that the Supreme Court of Appeals rendered a decision in the *Davis* Case in *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021). The Grievance Board therefore directed Grievants to provide their position regarding the necessity of a level three hearing and directed that Respondent may provide a proposed dismissal order by May 4, 2021. Grievants were represented by the West Virginia School Service Personnel Association. Respondent is represented by legal counsel Joshua Cottle, Bowles Rice, LLP.

### **Synopsis**

Aides and ECCATs are separately defined by WV statute. As a result of the independent nature of the two classifications and because seniority dates are established as an employee enters upon his or her duties within the classification for the regular employment assignment, the Supreme Court of Appeals of West Virginia has recognized that ECCAT seniority accrues independently of aide seniority. The primary issue of the instant grievance has been determined. In accordance with the conditions of the abeyance this matter has been held for approximately 16 months, this matter is now ripe for dismissal.



The following Findings of Fact and Conclusions of Law are based upon a review of the record created in this grievance.

### **Findings of Fact**

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

2. Each of the Grievants, except Aaron Ross and Katherine James, 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. August 1, 2014, was the first day of work for these Grievants in their roles as ECCATs. This became their ECCAT seniority date.

3. Aaron Ross began in an ECCAT assignment on August 10, 2015, along with four other employees. This became his ECCAT seniority date. Although Katherine James began in an ECCAT assignment prior to August 13, 2015, this became her ECCAT seniority date after she bid into and worked in an aide only assignment. As a result, she was not tied with any other ECCAT employee and was, therefore, not required to participate in a random tiebreaker.

4. In early February of 2019, Assistant Superintendent David Tackett determined that Grievants, except Katherine James, had ECCAT seniority dates that were tied with other ECCAT employees because these Grievants entered into their



ECCAT duties on the same date as other ECCAT employees: August 1, 2014 or August 10, 2015. Other Aide/ECCATs, who have not filed grievances, also had tied ECCAT seniority dates, some tied with Grievants and some tied with others.

5. Having determined that Grievants, except Katherine James, and others, had identical ECCAT seniority, Assistant Superintendent Tackett arranged for seniority tie-breakers to be conducted. On February 21, 2019, a random tie-breaker was held to establish each of the Grievants' ECCAT seniority order among each employee who also had the same seniority date. The drawn order is not the same as the aide seniority order for the Grievants. Pursuant to the tie-breaker, Grievants have separate seniority dates for the ECCAT classification.

6. Grievants clarified at the level one conference that the relief they were seeking is to apply their Aide seniority to their ECCAT seniority, such that they would not have separate seniority for their Aide and ECCAT classifications.

7. Aides and ECCATs are separately defined. See W. Va. Code § 18A-4-8(i) (8-11) & (36-38).

8. Because all or several of the Grievants have identical ECCAT seniority, Respondent conducted a random drawing in accordance with West Virginia Code to determine their respective rank for any anticipated reduction in force.

9. The parties agree that there was an identified case before the WV Supreme Court of Appeals which would be wholly dispositive regarding the issue(s) of the instant matter. Accordingly, for good cause shown, this matter was held in abeyance. The WV Supreme Court of Appeals rendered a decision in the *Davis Case* on March 26, 2021 in *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021). The Court held that



the Legislature intended that seniority for Aide and ECCAT class titles accrue independently from each other for purposes of a reduction in force, regardless of which level of ECCAT classification is held, and regardless of whether an ECCAT employee qualifies for multiclassification status.

### **Conclusions of Law**

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3. *Sprouse v. Gilmer Cnty. Bd. of Educ.*, Docket No. 2020-0886-GilED (Dec. 29, 2020).

2. West Virginia Code § 18-5-18(c) states in relevant part:

Beginning July 1, 2014, any person previously employed as an aide in a kindergarten program and who is employed in the same capacity on and after that date and any new person employed in that capacity in a kindergarten program on and after that date shall hold the position of aide and either Early Childhood Classroom Assistant Teacher I, Early Childhood Classroom Assistant Teacher II or Early Childhood Classroom



Assistant Teacher III. Any person employed as an aide in a kindergarten program that is eligible for full retirement benefits before July 1, 2020, may remain employed as an aide in that position and shall be granted an Early Childhood Classroom Assistant Teacher permanent authorization by the state superintendent pursuant to section two-a, article three, chapter eighteen-a of this code.

3. West Virginia Code § 18A-4-8g(i) states:

(i) If two or more service personnel accumulate identical seniority, the priority shall be determined by a random selection system established by the service personnel and approved by the county board.

(1) A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date. All service personnel with an identical seniority date within the same class title or classification category shall participate in the random selection.

4. The Supreme Court of Appeals of West Virginia's decision in *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021) is dispositive of the definitive issue in the current grievance.

5. "Under West Virginia Code sections 18A-4-8g(d) (eff. 2007), 18A-4-8(i) (eff. 2015), and 18A-4-8a(2) (eff. 2019), the school service personnel classifications of Aide and Early Childhood Classroom Assistant Teacher (ECCAT) accrue seniority independently from each other for purposes of a reduction in force. As such, only the seniority for the specific classification subject to a reduction in force shall be considered in ranking the seniority of the affected personnel." Syl. Pt. 1, *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021).

6. "Under West Virginia Code sections 18A-4-8b(h), (i), & (j) (eff. 2016), the school service personnel classifications of Aide and Early Childhood Classroom Assistant Teacher (ECCAT) accrue seniority independently from each other for purposes of a reduction in force. As such, only the seniority for the specific classification subject to a



reduction in force shall be considered in ranking the seniority of the affected personnel.” Syl. Pt. 2, *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021).

7. “A school service employee who has held or holds an Aide title and becomes employed as an Early Childhood Classroom Assistant Teacher (ECCAT) shall hold a multiclassification status. As a multiclassification status employee, the method of calculating such an employee's seniority rank for purposes of a reduction in force is governed by West Virginia Code section 18A-4-8g(l) (eff. 2007) . . . Under these authorities, seniority for the Aide and Early Childhood Classroom Assistant Teacher (ECCAT) classification titles accrue independently from each other.” Syl. Pt. 4, *Webster Cty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021).

8. Respondent determined, after reviewing its seniority rankings that certain Grievants and other employees had identical seniority in the ECCAT classification. Because, pursuant to the Supreme Court’s holding in *Davis*, seniority for the Aide and ECCAT classification titles accrue independently, Grievants’ seniority in the Aide classification does not determine their seniority in the ECCAT classification. Therefore, it was proper for the Respondent, pursuant to the Supreme Court’s holding in *Davis*, to conduct a random selection process to establish seniority rankings for Grievants in the ECCAT classification, separate and apart from their seniority in the Aide classification.

Accordingly, it is **ORDERED** that this matter is **DISMISSED** and **STRICKEN** from the dockets of the Grievance Board.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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: June 3, 2021**



**Landon R. Brown**  
**Administrative Law Judge**