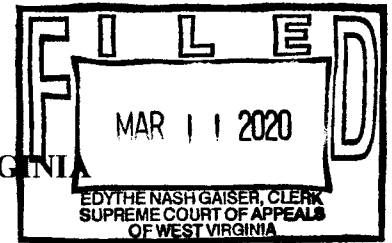


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-1028



BOARD OF EDUCATION OF WEBSTER COUNTY,

Respondent Below, Petitioner,

v.

**DONNIS DAVIS, KAREN HOLCOMB,
AUDREY FLANAGAN, and SAMANTHA
McCOURT,**

Petitioners Below, Respondents.

Appeal from a final order of the Circuit
Court of Kanawha County, West Virginia,
Civil Action No. 19-AA-42

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ASSIGNMENTS OF ERROR

1. The Circuit Court's was clearly wrong in holding that the Webster County Board of Education incorrectly calculated the Respondents' Aide and ECCAT seniority.

2. The Circuit Court erred by (i) holding that the County Board must use the Respondents' Aide Seniority as ECCAT seniority; (ii) failing to apply the unambiguous language of West Virginia Code §§ 18A-4-8g and 18A-4-8e; and (iii) holding West Virginia Code § 18A-4-8b(d) controls, for purposes of determining service personnel seniority, over §18A-4-8g, the specific statute governing seniority determinations for county boards.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This appeal arises from Level One grievances filed on February 28, 2018 by the Respondents and two other employees of the school system against the Webster County Board of Education (the "County Board"). App. 1-2. The Respondents, all of whom are employed by the County Board in the Aide classification and certified as Early Childhood Classroom Assistant Teachers ("ECCAT"), alleged that because, under West Virginia Code § 18A-4-8b(d), ECCATs are included in the classification category of employment as Aides, their seniority is gained in the Aide category. App. 1.

The grievances were consolidated at Level One of the grievance procedure and, following a Level One hearing, the grievances were denied. App. 134. Following an unsuccessful mediation, the Respondents appealed to Level Three of the grievance procedure. App. 134. A Level Three hearing was held on January 4, 2019 before an administrative law judge of the Grievance Board. App. 134. The Grievance Board then issued a Decision on March 27, 2019, denying the grievances. App. 133-44.

In its Level Three Decision, the Grievance Board held that, pursuant to this Court's clear holding in *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018) (memorandum opinion), ECCAT seniority accrues independently of Aide seniority. App. 142. The Grievance Board thus held that the Respondents failed to prove, by a preponderance of the evidence, that the Respondents' ECCAT seniority should be determined based upon the time the Respondents were employed as Aides. App. 142.

The Respondents¹ then filed a Petition for Appeal with the Circuit Court of Kanawha County on May 3, 2019, asking that the Circuit Court reverse the Grievance Board's Decision. App. 145-220. By a Final Order entered on October 10, 2019, the Circuit Court erroneously held that the Grievance Board was clearly wrong in holding that the County Board correctly calculated, pursuant to West Virginia Code §§ 18A-4-8g and 18A-4-8e, the Respondents' Aide and ECCAT seniority separately. App. 243-49. Instead, the Circuit Court reasoned, contrary to this Court's clear precedent, that the County Board should have used the Respondents' Aide seniority as ECCAT seniority because, under another statute (that does not pertain to seniority), West Virginia Code § 18A-4-8b(d), Aides and ECCATs are considered to be in the same classification category. App. 249.

The County Board filed a timely Notice of Appeal with this Court on November 8, 2019. The County Board asks that this Court reverse the Circuit Court's Final Order because it

¹ As noted in the County Board's Notice of Appeal to this Court, the Respondents are all represented by the West Virginia Education Association ("WVEA"). One of the other six grievants, Dianne Carpenter, is represented by the West Virginia School Service Personnel Association ("WVSSPA"). Grievant Carpenter, by the WVSSPA, filed a separate administrative appeal with the Circuit Court, which was not consolidated with the WVEA appeal at the Circuit Court. In that case, *Dianne Carpenter v. Webster County Board of Education*, Civil Action No. 19-AA-49, the Circuit Court issued a Final Order on February 14, 2020 that specifically relied upon the Circuit Court's ruling that forms the basis of this appeal. Any decision by this Court in the instant appeal will dispose of all issues in the *Carpenter* case.

failed to follow this Court's clear precedent, misapplied and misconstrued the relevant statutes, and was, thus, clearly wrong.

II. STATEMENT OF THE FACTS

Near the beginning of 2018, County Board administrators became concerned that the County Board may need to reduce the number of ECCATs employed by the school system. App. 136. That concern required the County Board's personnel director to examine its seniority list to determine the seniority ranking for the possible reduction in force. App. 136.

After reviewing the seniority list, the personnel director discovered that all of the ECCATs employed by the County Board, including the Respondents, commenced work in the ECCAT classification title on the same date: April 18, 2014. App. 136. Thus, each held the same seniority date for the ECCAT classification. Accordingly, pursuant to West Virginia Code §§ 18A-4-8g(d) and 18A-4-8g(i), the personnel director determined that, because all of the ECCATs were tied in seniority, a random selection method would need to be used to establish a seniority ranking for the employees in the ECCAT positions.² App. 137. The County Board used a drawing to determine the Respondents' ECCAT seniority. App. 137.

² West Virginia Code § 18A-4-8g(i) provides, "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. (2) As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the board shall be permanent for the duration of the employment within the same classification category of the employees by the board. This random selection priority applies to the filling of vacancies and to the reduction in force of school service personnel." W. Va. Code § 18A-4-8g(i).

The Respondents did not object to the specific procedure utilized for the random selection to establish the ECCAT seniority ranking, nor the way it was conducted, and the issues presented on appeal do not concern the use of the random selection process used by the County Board. If this Court reaffirms its holding in *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018) (memorandum opinion), and holds that Aide and ECCAT seniority accrue independently, then West Virginia Code § 18A-4-8g(i) clearly provides that a random selection system must be used to determine the Respondents' ECCAT seniority dates.

As noted above, all of the employees in the ECCAT classification were also employed in the Aide classification, including the Respondents. App. 135. Following the random drawing, the ECCAT seniority for each of the employees was listed separately from their Aide seniority. App. 137. Each employee held a different ranking for Aide seniority and ECCAT seniority as represented by the following:

Audrey Flannigan	Aide Rank	1st	ECCAT Rank 4th
Donnis Davis	Aide Rank	2nd	ECCAT Rank 6th
Karen Lawson	Aide Rank	3rd	ECCAT Rank 7th
Dianne Carpenter	Aide Rank	4th	ECCAT Rank 9th
Susan Wilkins	Aide Rank	5th	ECCAT Rank 1st
Sandy Ayres	Aide Rank	6th	ECCAT Rank 2nd
Samantha McCourt	Aide Rank	7th	ECCAT Rank 8th
Karen Holcomb	Aide Rank	8th	ECCAT Rank 5th
Cheri Wolford	Aide Rank	9th	ECCAT Rank 3rd

App. 137. Following the County Board's drawing, the Respondents filed grievances, challenging the County Board's reliance upon West Virginia Code § 18A-4-8g ("Determination of seniority for service personnel") to calculate ECCAT and Aide seniority. Instead, the Respondents argue, their seniority in the Aide classification should be used to determine their ECCAT seniority.

SUMMARY OF THE ARGUMENT

Despite the clear language of West Virginia Code §§ 18A-4-8g and 18A-4-8e and this Court's controlling precedent, which establishes that under West Virginia Code § 18A-4-8g, ECCAT seniority accrues independently of Aide seniority, the Circuit Court held, in its Final Order, that the County Board incorrectly calculated the Respondents' Aide and ECCAT seniority independently and should have used the Respondents' Aide seniority. The Circuit Court's holding

is contrary to the clear language of the relevant statutes, this Court's decision in, among other cases, *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018) (memorandum opinion), and long-established rules of statutory construction.

West Virginia Code § 18A-4-8g, titled "Determination of seniority for service personnel," governs how seniority is accumulated by school service personnel and how a county board must calculate and determine seniority. That statute specifically and unambiguously provides that for all purposes, including the filling of vacancies and reductions in force, seniority is accumulated within particular classification categories of employment, such as Aide and ECCAT, as those classification categories are referred to in West Virginia Code § 18A-4-8e. Because, under West Virginia Code § 18A-4-8e, ECCAT seniority accrues independently of Aide seniority, the Circuit Court erred in failing to follow the unambiguous statutory directive of West Virginia Code §§ 18A-4-8g and 18A-4-8e when it held that the Grievance Board was clearly wrong in holding that the County Board correctly calculated the Respondents' Aide and ECCAT seniority.

Contrary to the Circuit Court's erroneous decision, this Court explicitly held, in *Mayle v. Barbour Cty. Bd. of Educ.* that, despite the placement in West Virginia Code § 18A-4-8b(d)(2) of Aides and ECCATS into the same classification categories, ECCAT seniority accrues independently of Aide seniority pursuant to the clear language of West Virginia Code §§ 18A-4-8g and 18A-4-8e. This Court's holding in *Mayle* was based upon the proper construction of the relevant statutes and should be reaffirmed in this case.

Moreover, the Circuit Court's holding contravenes, at least, four tenets of this Court's jurisprudence on statutory construction. First, the Circuit Court construed, rather than applied, West Virginia Code § 18A-4-8g, an unambiguous statute, despite this Court's repeated instruction that "[w]hen a statute is clear and unambiguous and the legislative intent is plain the

statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute.” *Keatley v. Mercer Cty. Bd. of Educ.*, 200 W. Va. 487, 493, 490 S.E.2d 306, 312 (1997).

Second, the Circuit Court modified the clear language of West Virginia Code § 18A-4-8g by holding that West Virginia Code § 18A-4-8g determines seniority for service personnel who must perform competency testing. The statute contains no such limitation, and the Circuit Court exceeded its authority by modifying and/or amending, under the guise of interpretation, a clear and unambiguous statute. *See State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959).

Third, this Court has required, on multiple occasions, that a “specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” *See Syl. Pt. 1, UMW v. Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). Because West Virginia Code § 18A-4-8g(d) specifically provides that for all purposes, including a reduction in force, seniority shall be accumulated within particular classification categories of employment as set forth in West Virginia Code § 18A-4-8e, it must be given precedence over West Virginia Code 18A-4-8b(d). The Circuit Court’s holding to the contrary is clearly wrong.

Fourth, the Court created a conflict between West Virginia Code §§ 18A-4-8g and 18A-4-8b(d)(2) rather than harmonizing the statutes. The purpose of West Virginia Code § 18A-4-8b(d)(2) is to define a “promotion”—not to determine how seniority is accumulated in particular classification categories. That interpretation gives meaning to both statutes and is consistent with this Court’s precedent.

Finally, this Court has recognized the need and sound policy of granting school boards discretion in matters relating to the hiring, assignment, transfer, and promotion of school

personnel, including seniority determinations. Syl. Pt. 3, *Dillion v. Wyoming Cnty. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). In *Bowyer v. Fayette Cty. Bd. of Educ.*, No. 14-0261, 2014 WL 6607691 (W. Va. Nov. 21, 2014) (memorandum decision), this Court held that where a multi-classified position, such as Aide/Autism Mentor or Aide/ECCAT, is at issue, a county board may look to the position to examine the job duties and then look to seniority of the multi-classified individual to determine in which position seniority is more important for purposes of the position. The Circuit Court's decision is just the opposite. Its decision instructs that, in all cases, a county board must use seniority in the Aide classification. In summary, the Circuit Court construed the statutes in such fashion to ignore the Legislature's clear statutory policy, limited the broad discretion that county boards have in applying the policy, and failed to follow this Court's precedent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument in this case pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. This Court held in *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018) (memorandum opinion), that, under West Virginia Code 18A-4-8g, "ECCAT seniority accrues independently of aide seniority." Contrary to that direct, unambiguous holding, the Circuit Court held that Aide and ECCAT seniority do not accrue independently. Rule 19 oral argument is, thus, necessary because this case involves "assignments of error in the application of settled law [.]” See Rule 19(a) of the West Virginia Rule of Appellate Procedure.

ARGUMENT

I. STANDARD OF REVIEW

In *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406 (2011), at syllabus points one, two, and three, this Court articulated the following standard of review for appeals from the circuit court concerning decisions of the Grievance Board:

1. When reviewing the appeal of a public employees' grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge.
2. "Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo." Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).
3. "A final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C-2-1], et seq. [], and based upon findings of fact should not be reversed unless clearly wrong." Syl. pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

II. THE CIRCUIT FAILED TO APPLY THE UNAMBIGUOUS LANGUAGE OF WEST VIRGINIA CODE §§ 18A-4-8g AND 18A-4-8e AND THIS COURT'S CLEAR PRECEDENT, WHICH ESTABLISHES THAT ECCAT SENIORITY ACCRUES INDEPENDENTLY OF AIDE SENIORITY.

The central issue before this Court concerns the interplay between four different statutory sections of West Virginia Code Chapter 18A, Article 4: W. Va. Code §§ 18A-4-8, 18A-4-8b, 18A-4-8g, and 18A-4-8e. The first statute, West Virginia Code § 18A-4-8, defines and lists the various service personnel positions, identified as "classifications," that county boards employ. Here, the two service personnel positions at issue are the Aide and ECCAT classifications.

Specifically, West Virginia Code § 18A-4-8 defines four different levels for Aides: Aide I, Aide II, Aide III, and Aide IV. *See* W. Va. Code § 18A-4-8(h)(8)-(11). Likewise, it defines three different levels for ECCATS: ECCAT I, ECCAT II, and ECCAT III. *See* W. Va. Code § 18A-4-8(h)(36)-(38).

Secondly, West Virginia Code § 18A-4-8b governs the qualifications of school service personnel and the related priority rights that a county board of education must consider in determining how vacant service personnel positions must be filled.

The third statute, West Virginia Code § 18A-4-8g, titled “Determination of seniority for service personnel,” governs how seniority is accumulated by school service personnel and how a county board must calculate and determine seniority. That statute specifically provides that for all purposes, including the filling of vacancies and reductions in force, seniority is accumulated within particular classification categories of employment, such as Aide and ECCAT, as those classification categories are referred to in West Virginia Code § 18A-4-8e. Thus, the statute that specifically tells county boards how they must determine seniority, points county boards to West Virginia Code § 18A-4-8e, the fourth statute at issue, to determine seniority for “classification categories.”

West Virginia Code § 18A-4-8e does not place ECCAT and Aide personnel in the same classification category. Rather, West Virginia Code § 18A-4-8e provides that each class title defined and listed in West Virginia Code 18A-4-8 is considered a separate classification category of employment for service personnel, except for (i) those class titles having a Roman numeral designation and (ii) certain specific class titles, such as cafeteria manager, executive secretary, and mechanic.

That should have been the end of the matter in this case because the County Board did exactly what West Virginia Code § 18A-4-8e directs. When determining how to determine

seniority for the purpose of implementing its reduction in force for Aides/ECCATs, the County Board looked to § 18A-4-8g. Section 18A-4-8g, in turn, told the County Board that, for purposes of a reduction in force, seniority is accumulated within the particular classification categories as referred to in § 18A-4-8e. Under § 18A-4-8e, Aides and ECCATs are not included in the same classification category of employment and, accordingly, § 18A-4-8g instructs that Aide and ECCAT seniority accrues independently.

The Grievance Board applied the above statutes and this Court's clear precedent, held that Aide and ECCAT seniority accrue independently, and affirmed the County Board's actions. However, the Circuit Court misconstrued and misapplied the above statutes and this Court's precedent, and erroneously held (i) that under a more general statute that does not bear on seniority determinations, West Virginia Code § 18A-4-8b(d)(2), Aides and ECCATs are included in the same classification category, and (ii) that seniority under the Aide classification is the same as, and interchangeable with, ECCAT seniority. The Circuit Court's decision is directly contrary to this Court's precedent and the clear, unambiguous language of West Virginia Code §§ 18A-4-8g and 18A-4-8e.

Despite this Court's clear holding, in *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018) (memorandum opinion), that, under West Virginia Code 18A-4-8g, "ECCAT seniority accrues independently of aide seniority," the Circuit Court held that *Mayle* was not dispositive of the case at bar. The Circuit Court's decision fails to give due weight to this Court's precedent and attempts to distinguish this case from *Mayle* on facts that, even if different, are not dispositive of the issue before this Court.

In *Mayle*, the county board posted a notice of vacancy for an Aide/ECCAT position. The grievant in the case did not hold an ECCAT certification but had more seniority in the Aide

classification than the successful applicant for the job, Ms. Jones. Although Ms. Jones had less Aide seniority than the grievant, she was certified as an ECCAT. After the county board awarded the job to Ms. Jones, the grievant filed a grievance, alleging, like the Respondents in this case, as follows:

Petitioner cites West Virginia Code § 18A-4-8b(d)(2) for the proposition that all ECCAT classification titles have been placed into the aide classification category. This statute provides 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[.]” Petitioner contends that, as a result, employees holding any classification within the aide classification category are qualified for ECCAT positions, that all employees within the aide classification category are to be given first priority in filling ECCAT positions, and that no specific ECCAT seniority accrues; rather, “[s]ervice in ECCAT positions results in the accrual of ‘aide’ seniority.” Consequently, because petitioner had more aide seniority than Ms. Jones, she maintains that she was qualified for the position at issue and should have been appointed to it.

Id. at *2 (emphasis added). The circuit court, in *Mayle*, rejected the grievant’s argument, holding “the Administrative Law Judge correctly held that the [p]etitioner was not qualified for the Aide/ECCAT vacancy [and] [p]etitioner’s seniority as an [a]ide did not count as seniority as an ECCAT[.]” *Id.* (brackets in original). Thus, one of the specific issues before this Court in *Mayle* was whether the lower court correctly held that the grievant’s “seniority as an [a]ide did not count, as seniority as an ECCAT.”

Regarding that specific issue, this Court held:

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. at *3 (emphasis added). This Court’s holding and direction to county boards, the Grievance Board, and to the circuit courts could not be more clear: ECCAT seniority accrues independently of Aide seniority. Despite that clear holding, in this case the Circuit Court held, “[t]his Court finds that the West Virginia Public Employees Grievance Board was clearly wrong as a matter of law in holding that the [County Board] correctly calculated the Grievants’ seniority. This Court finds that the [County Board] should have used the Grievants’ aide seniority as ECCAT seniority because West Virginia Code § 18A-4-8b places aides and ECCATS in the same classification category, and seniority is accrued according to classification category.” App. 249.

The Circuit Court’s decision defies logic. Despite this Court’s holding in *Mayle* that the lower court “was not clearly wrong in concluding that ECCAT seniority accrues independently of aide seniority,” here, the Circuit Court held that the Grievance Board “was clearly wrong” for concluding that ECCAT seniority accrues independently of aide seniority. In so holding, the Circuit Court’s decision was clearly wrong and should thus be reversed. Moreover, in addition to failing to follow this Court’s clear precedent in *Mayle*, the Circuit Court also failed to follow this Court’s rules of statutory construction.

III. THE CIRCUIT COURT ERRED BY INCORRECTLY CONSTRUING, RATHER THAN APPLYING, THE RELEVANT STATUTES AND BY OTHERWISE FAILING TO FOLLOW THIS COURT’S CLEAR PRECEDENT OF STATUTORY CONSTRUCTION.

West Virginia Code § 18A-4-8g, titled “Determination of seniority for service personnel,” instructs county boards on how to calculate and determine seniority for service personnel. It, among other things, provides how regular school service personnel (full-time employees) accumulate seniority (W. Va. Code § 18A-4-8g(a)), how substitute school service

personnel accumulate seniority (W. Va. Code § 18A-4-8g(b)), and places limitations on seniority under certain situations, such as when an employee is off work due to a concerted work stoppage (W. Va. Code § 18A-4-8g(c)).

Relevant to this case, West Virginia Code § 18A-4-8g(d) provides 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 section eight-e of this article [W. Va. Code § 18A-4-8e].” Thus, West Virginia Code § 18A-4-8g(d) requires a county board to look to West Virginia Code § 18A-4-8e to determine how seniority is accumulated within particular classification categories, such as for those in the Aide category (Aide I, II, III, and IV) and the ECCAT category (ECCAT I, II, and III).

As this Court held in *Mayle*, West Virginia Code § 18A-4-8e does not place the Aide and ECCAT classifications in the same category. *Mayle v. Barbour Cty. Bd. of Educ.*, No. 17-0204, 2018 WL 317375, at *3. Rather, it provides, in relevant part:

(a) The state board shall develop and make available competency tests for all of the classification titles defined in section eight of this article and listed in section eight-a 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.

(1) The cafeteria manager class title is included in the same classification category as cooks and has the same competency test.

(2) The executive secretary class title is included in the same classification category as secretaries and has the same competency test.

(3) The classification titles of chief mechanic, mechanic and assistant mechanic are included in one classification title and have the same competency test.

W. Va. Code § 18A-4-8e (a) (emphasis added). The above statute refers to “classification titles defined in section eight of this article [W. Va. Code § 18A-4-8]”

West Virginia Code § 18A-4-8 defines the various classifications of school service personnel. Relevant to this case, West Virginia Code § 18A-4-8 defines four different levels for Aides: Aide I, Aide II, Aide III, and Aide IV. *See* W. Va. Code § 18A-4-8(h)(8)-(11). Likewise, it defines three different levels for ECCATs: ECCAT I, ECCAT II, and ECCAT III. *See* W. Va. Code § 18A-4-8(h)(36)-(38).

Thus, West Virginia Code § 18A-4-8e(a) provides that each classification title defined and listed in West Virginia Code § 18A-4-8 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. Therefore, the class titles Aide I, II, III, and IV are considered a single classification category because they have Roman number designations. Likewise, the class titles ECCAT I, II, and III are considered a single classification category because they too have Roman numeral designations.

The only exception to the Roman numeral rule provided above is the reference in West Virginia Code § 18A-4-8e(a)(1)-(3) to the following class titles:

- (1) The cafeteria manager class title is included in the same classification category as cooks and has the same competency test.
- (2) The executive secretary class title is included in the same classification category as secretaries and has the same competency test.
- (3) The classification titles of chief mechanic, mechanic and assistant mechanic are included in one classification title and have the same competency test.

W. Va. Code § 18A-4-8e(a)(1)-(3).

Thus, going back to West Virginia Code § 18A-4-8g, that statute tells county boards 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 [W. Va. Code § 18A-4-8e].” W. Va. Code § 18A-4-8g(d). Because the Aide and ECCAT classification titles are separate classification categories of employment, West Virginia Code § 18A-4-8g(d) requires that seniority be accumulated “within [those] particular classification categories of employment,” i.e., seniority within the Aide classification category (Aide I, II, III, and IV) and seniority within the ECCAT classification category (ECCAT I, II, and III).

A. West Virginia Code §§ 18A-4-8g and 18A-4-8e Unambiguously Provide that Aides and ECCATS Are Not Included in the Same Classification Category for Seniority Purposes and, Therefore, Aide and ECCAT Seniority Accrue Independently.

The Circuit Court erred by construing otherwise unambiguous statutes, West Virginia Code §§ 18A-4-8g and 18A-4-8e, in such fashion as to create a conflict between those statutes and West Virginia Code § 18A-4-8b(d)(2). This Court has consistently held that “[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute.” *Keatley v. Mercer Cty. Bd. of Educ.*, 200 W. Va. 487, 493, 490 S.E.2d 306, 312 (1997); Syl. Pt. 1, *State ex rel. Fox v. Bd. of Trustees of Policemen’s Pension or Relief Fund of City of Bluefield*, 148 W. Va. 369, 370, 135 S.E.2d 262, 263 (1964), overruled on other grounds by *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995); *see also State ex rel. Wheeling Downs Racing Ass’n v. Perry*, 148 W. Va. 68, 75, 132 S.E.2d 922, 927 (1963) (“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the

courts, but will be given full force and effect.”); *In re Hillcrest Mem’l Gardens, Inc.*, 146 W. Va. 337, 348, 119 S.E.2d 753, 759 (1961).

West Virginia Code § 18A-4-8g is unambiguous. That section tells county boards that seniority is accumulated within classification categories as those categories are referred to in West Virginia Code § 18A-4-8e. The Circuit Court erroneously held that under West Virginia Code § 18A-4-8b(d)(2), a more general statute that does not bear on the seniority determination at issue, Aides and ECCATs are included in the same classification category, and that seniority under the Aide classification is the same as, and interchangeable with, ECCAT seniority. The Circuit Court glossed over critical parts of West Virginia Code § 18A-4-8e, clearly misconstrued West Virginia Code § 18A-4-8g, and, in doing so, erroneously reasoned 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.

App. 246.

The Circuit Court’s holding that, because section 8e only provides a limited number of classification categories and because grievants are not included in section 8e, West Virginia Code § 18A-4-8g should not be used to determine their seniority, is clearly wrong. It is not the province of the court to construe an unambiguous statute and cherry-pick to whom the statute applies. The

Legislature directed that county boards turn to West Virginia Code § 18A-4-8e for seniority determinations for classification categories, and that is where county boards must go.

Moreover, the Circuit Court's statement that "Grievants are not included in West Virginia Code § 18A-4-8e" is simply incorrect. Section 18A-4-8e(a) specifically provides that "[e]ach 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 . . ." (emphasis added).

In other words, the Circuit Court overlooked the underscored rule and went straight to the second of two exceptions under the statute. The underscored language clearly states that the separate classification titles defined and listed in West Virginia Code § 18A-4-8 are considered separate classification categories of employment, except those (the first exception) having Roman number designations, such as Aide I, II, III, and IV (the Aide category), and ECCAT I, II, and III (the ECCAT category). Only then does the statute go on to list the other exception (the second exception) by providing (1) the cafeteria manager class title is included in the same classification category as cooks and has the same competency test; (2) the executive secretary class title is included in the same classification category as secretaries and has the same competency test; and (3) the classification titles of chief mechanic, mechanic and assistant mechanic are included in one classification title and have the same competency test. In short, just because Aides and ECCATS are not the specifically mentioned classifications does not mean that West Virginia Code § 18A-4-8e does not address those classification categories. Quite the opposite, § 18A-4-8e directs that the Aide and ECCAT classification titles are separately defined and listed and are thus considered separate classification categories of employment.

The Circuit Court's duty was to apply, rather than construe, the unambiguous language of West Virginia Code §§ 18A-4-8g and 18A-4-8e and to give those statutes full force and effect. Having failed to do so, the Circuit Court was clearly wrong, and its decision should thus be reversed.

B. In Erroneously Holding that West Virginia Code § 18A-4-8g Only Determines Seniority for Service Personnel Who Must Perform Competency Testing, the Court Modified and Revised an Otherwise Unambiguous Statute.

The Circuit Court violated this Court's clear rules of statutory construction and, thus, erred by holding "[i]t 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." This Court has consistently held that "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959). Rather, "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992)); *Taylor-Hurley v. Mingo Cty. Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001).

A thorough review of West Virginia Code § 18A-4-8g reveals no such limitation as the one provided by the Circuit Court. As addressed above, West Virginia Code § 18A-4-8g contains multiple subsections, and in none of those subsections does the Legislature declare that the statute applies only to seniority determinations for service personnel who must perform competency testing. Nevertheless, the Circuit Court, against this Court's clear precedent concerning statutory construction, modified West Virginia Code § 18A-4-8g, an unambiguous statute, by

erroneously holding that it only applies to seniority determinations for service personnel who must perform competency testing.

The Circuit Court lacked the authority to read into a statute a limitation that does not exist, even if it disagrees with the ultimate effect or policy of a statute. As this Court has recognized, when confronted with interpreting educational statutes regarding multi-classified employees:

[T]he absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said. The absurd results doctrine merely permits a court to favor an otherwise reasonable construction of the statutory text over a more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose. *See State ex rel. McLaughlin v. Morris*, 128 W. Va. 456, 461, 37 S.E.2d 85, 88 (1946) (citing *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938)). It does not, however, license a court to simply ignore or rewrite statutory language on the basis that, as written, it produces an undesirable policy result.

Taylor-Hurley v. Mingo Cty. Bd. of Educ., 209 W. Va. 780, 787–88, 551 S.E.2d 702, 709–10 (2001) (emphasis added).

The Circuit Court may ultimately disagree with this Court’s decisions in *Mayle* and its clear application to this case, and it may well believe that West Virginia Code §§ 18A-4-8g and 18A-4-8e, as written, produce an undesirable policy result. However, it is the province of the Legislature, not circuit courts, to set the education policies of this state.

C. West Virginia Code § 18A-4-8g is the Specific Statute Governing the Determination of Seniority for School Service Personnel and Takes Precedent Over Any Conflicting Statute.

The Circuit Court compounded its errors by holding that West Virginia Code § 18A-4-8b(d) (which deals with promotions) controls, for purposes of determining service personnel seniority, over §18A-4-8g, the specific statute governing seniority determinations for county boards. This Court’s precedent dictates that “[s]tatutes which relate to the same subject

matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975); *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670–71, 815 S.E.2d 474, 481–82 (2018). Even "where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. Pt. 4, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958).

However, when it is not reasonably possible to give effect to both statutes, the more specific statute will prevail. *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670–71, 815 S.E.2d 474, 481–82 (2018); *see also*, Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."); *Int'l Union of Operating Eng'rs v. L.A. Pipeline Constr. Co., Inc.*, 237 W. Va. 261, 267, 786 S.E.2d 620, 626 (2016) ("[W]here two statutes apply to the same subject matter, the more specific statute prevails over the general statute."); *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference is generally accorded to the specific statute."). Because West Virginia Code § 18A-4-8g(d) specifically provides that for all purposes, including a reduction in force, seniority shall be accumulated within particular classification categories of employment as set forth in West Virginia Code § 18A-4-8e, it must be given precedence over West Virginia Code 18A-4-8b(d). The Circuit Court's holding to the contrary is clearly wrong.

D. West Virginia Code § 18A-4-8b(d) Places Aides and ECCATs in the Same Classification Category of Employment Solely for Purposes of Issues Concerning Promotions.

In this case, assuming there is an apparent conflict between West Virginia Code § 18A-4-8b(d) and § 18A-4-8g—which as discussed below, there is not—those statutes should be construed together in order to give effect to each. As set forth in detail above, West Virginia Code § 18A-4-8g clearly provides that, for purposes of a reduction in force, seniority is determined within classification categories as set forth and provided for in West Virginia Code § 18A-4-8e. The remaining issue, then, for the purpose of harmonizing the statutes, is the import and effect of West Virginia Code § 18A-4-8b(d).

West Virginia Code § 18A-4-8b(d)(1)-(2), upon which the Circuit Court relied, provides:

(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.

(1) A promotion includes a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that 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; and

(D) The mechanic assistant and chief mechanic class titles are included in the same classification category as mechanics.

W. Va. Code § 18A-4-8b(d)(1)-(2). What is immediately clear about the above language is it says nothing about how seniority is determined for those classification categories. Rather, the sole purpose of subsections (2)(A) through (D) is to qualify subsection (d) and (d)(1). As set forth above, subsection (d) provides that “[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 (emphasis added). Subsection (d)(1) then provides that “[a] promotion includes a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment.” (emphasis added). Subsections (d)(2)(A)-(D) then seek to define the phrase “classification category of employment,” which is used in subsections (d) and (d)(1). Again, however, subsections (d) and (d)(1) deal only with “promotions”—not seniority determinations—by a county board.

Further, prior legislative enactments of West Virginia Code § 18A-4-8b(d) support that it applies only to issues concerning promotions. For instance, in 2001, subsection (d) was enacted by the Legislature and provided as follows:

(d) A promotion shall be defined as any change in his employment that the employee deems to improve his working circumstance within his classification category of employment and shall include a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment. Each class title listed in section eight of this article shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment. The cafeteria manager class title shall be included in the same classification category as cooks. The executive secretary class title shall be included in the same classification category as secretaries. Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides.

School Personnel Laws—General Enactments, 2001 West Virginia Laws Ch. 105 (S.B. 227); W. Va. Code § 18A-4-8b(d) (2001) (emphasis added). Thus, at that time, section (d) did not contain any subsections, all terms were included in the same paragraph, and it was thus abundantly clear that the sole purpose of the statute was to define and qualify the meaning of “classification category” for the purpose of defining a “promotion.”³ In 2007, the Legislature broke down the parts of West Virginia Code § 18A-4-8b(d) by adding subsections, but made no substantive changes to the statute:

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

(1) A promotion includes a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that 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 shall be 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 and braille or sign language specialist class titles are included in the same classification category as aides; and

(D) The mechanic assistant and chief mechanic class titles are included in the same classification category as mechanics.

³ Note that at the time the above amendment to W. Va. Code § 18A-4-8b went into effect in 2001, the position of ECCAT was not recognized under West Virginia law.

Education—Schools and School Districts, 2007 West Virginia Laws Ch. 86 (H.B. 2189); W. Va. Code § 18A-4-8(d) (2007).⁴ The Legislature did not break down section (d) into subsections for the purpose of defining seniority for the above classification categories. If that was the Legislature’s intention, it would have said so, or at a minimum, created standalone provisions (sections not under section (d)) regarding seniority for classification categories. *See Taylor-Hurley v. Mingo Cty. Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001) (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”) The purpose of West Virginia Code § 18A-4-8b(d)(2)(A)-(D) is to define a “promotion”—not to determine how seniority is accumulated in particular classification categories.

In summary, the Circuit Court erred first by failing to apply the unambiguous language of West Virginia Code §§ 18A-4-8g and 18A-4-8e, which govern how county boards must determine seniority within classification categories. It compounded that error by construing West Virginia Code § 18A-4-8g contrary to its clear language, by holding that section 8g only applies to determinations of seniority for service personnel who must take competency tests. The Court then further erred by creating a conflict between the two statutes and, flowing from that error, holding that, West Virginia Code § 18A-4-8b(d) takes precedence, for service personnel seniority determinations, over West Virginia Code §§ 18A-4-8g, the specific statute pertaining to service personnel determinations. Instead, the Circuit Court should have, as this Court has repeatedly countenanced, harmonized the statutes and held that while West Virginia Code § 18A-4-8b(d) places ECCATs and Aides in the same classification category for purposes of promotions, West Virginia Code § 18A-4-8g governs seniority determinations for the Aide and ECCAT

⁴ In 2015, the Legislature added the ECCAT classification to West Virginia Code § 18A-4-8 and amended West Virginia Code § 18A-4-8b(d)(2)(C) to state that ECCATs were included within the Aide classification category for purposes of a promotion.

classifications. That interpretation, as set forth below, would have been consistent with this Court's precedent, which establishes that county boards have discretion in making seniority decisions for multi-classified personnel.

IV. THE CIRCUIT COURT'S HOLDING WOULD OVERTURN LONG-ESTABLISHED PRECEDENT AND HINDER A COUNTY BOARD'S DISCRETIONARY DECISION-MAKING ON LOCAL SCHOOL BOARD MATTERS.

If this Court were to affirm the Circuit Court's decision below, this Court would effectively overrule its decision in *Bowyer v. Fayette Cty. Bd. of Educ.*, No. 14-0261, 2014 WL 6607691 (W. Va. Nov. 21, 2014) (memorandum decision). In *Bowyer*, another multi-classified Aide position, the Aide/Autism Mentor position, was at issue. Just as with ECCATs, West Virginia Code § 18A-4-8b(d)(2)(C) places Aides and Autism mentors in the same classification category for purposes of a promotion. This Court held in *Bowyer* that where a multi-classified Aide position, such as Aide/Autism Mentor, is at issue, a county board may look to the position to examine the job duties to determine which classification is more important for purposes of the position. *Id.* at *3. The county board may then look to seniorities of the multi-classified applicants in awarding the position. *Id.* ("We find that it was not unreasonable for the board to examine the primary responsibilities of the job position and then look to an applicant's seniority as part of the selection process."). The Circuit Court's decision is just the opposite. It instructs that, in the analogous case of the Aide/ECCAT multi-classified position, a county board must use seniority in the Aide classification.

As this Court instructed in *Bowyer*, "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." *Bowyer v. Fayette Cty. Bd. of Educ.*, No. 14-0261, 2014 WL 6607691, at *3 (W. Va. Nov. 21, 2014); Syl. Pt. 3, *Dillion v. Wyoming Cnty. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58

(1986). The Circuit Court's decision would severely limit the discretion that county boards must use when making difficult, local decisions concerning hiring, reductions in force, and the related educational needs of the school system. For instance, a county board could face a situation in which it has a high number of children with autism in one classroom. Thus, the county board may believe that it is in the best interests of its school children to employ the applicant with the most seniority in the Autism Mentor classification. The Circuit Court's decision, however, would require a county board to award the position to the multi-classified applicant with the most Aide seniority, even if that applicant had substantially less seniority in the Autism Mentor classification. So viewed, the Circuit Court's decision, in addition to being clearly wrong because it fails to follow this Court's precedent, also imposes policy decisions on county boards regarding decisions that affect the delivery of educational programs at a local level.

In this case, the Circuit Court construed the statutes in such fashion to ignore the Legislature's clear statutory policy, limited the broad discretion that county boards have in applying the policy, and failed to follow this Court's precedent. This Court should, therefore, reverse the Circuit Court's erroneous decision.

CONCLUSION

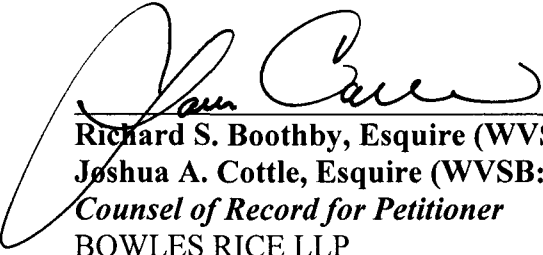
For the reasons set forth herein, and for all those apparent from the record, the County Board respectfully asks that this Court reaffirm and hold that seniority in the Aide and ECCAT classifications of employment accrues independently, reverse the Circuit Court's decision,

and affirm the decision of the Grievance Board, which held that the County Board appropriately calculated the Respondents' seniority in the Aide and ECCAT classifications.

Respectfully submitted,

THE BOARD OF EDUCATION OF THE
COUNTY OF WEBSTER,
Petitioner.

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-1028

BOARD OF EDUCATION OF WEBSTER COUNTY,

Respondent Below, Petitioner,

v.

Appeal from a final order of the Circuit
Court of Kanawha County, West
Virginia, Civil Action No. 19-AA-42

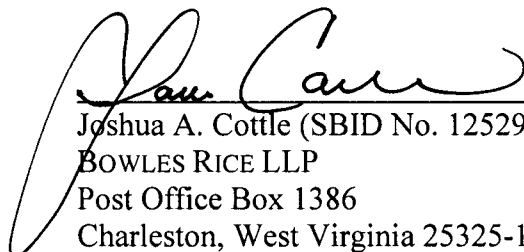
DONNIS DAVIS, KAREN HOLCOMB,
AUDREY FLANAGAN, and SAMANTHA
McCOURT,

Petitioners Below, Respondents.

CERTIFICATE OF SERVICE

I, Joshua A. Cottle, hereby certify that on this 11th day of March 2020, the foregoing *Petitioner's Brief* and all documents attached or appended thereto were served via U. S. Mail, postage prepaid, upon the following:

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