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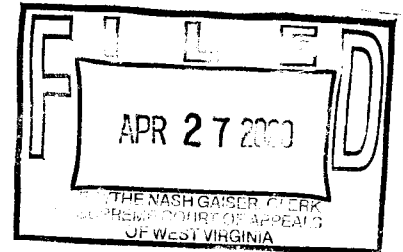
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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE NO.: 19-1028**

**(Kanawha County Circuit Court Docket No.: 19-AA-42)**

**WEBSTER COUNTY BOARD OF EDUCATION,  
Petitioner-Appellant,**



**v.**

**DONNIS DAVIS, KAREN HOLCOMB,  
AUDREY FLANAGAN AND SAMANTHA  
MCCOURT,  
Petitioners-Appellants.**

**APPELLEE'S BRIEF**

Andrew J. Katz, Esquire  
The Katz Working Families' Law Firm, LC  
The Security Building, Suite 1106  
100 Capitol Street  
Charleston, West Virginia 25301  
(304) 342-5579  
ajk792000@yahoo.com  
*Counsel for Appellees*

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### **III. ASSIGNMENT OF ERROR**

Appellant's assignment of error were adequately set forth in Appellant's Brief.

### **IV. STATEMENT OF THE CASE**

The Statement of the Case was adequately set forth in Appellant's Brief.

### **V. SUMMARY OF ARGUMENT**

In opposing the Circuit Court's ruling that an ECCATs seniority is determined by their over all Aide seniority, Appellant listed two numbered assignments of error and broke down the second Assignment into three subparts. For the first error, Appellant contends that "[t]he Circuit Court was clearly wrong in holding that the Webster County Board of Education incorrectly calculated the Respondents' Aide and ECCAT seniority." This assignment essentially is nothing more than stating, in a general way, that the lower court reached the wrong result. In fact, the lower court correctly ruled that Aide seniority is the relevant factor by applying two statutes, W. Va. Code Section 18A-4-8b(I), which states that seniority is to be determined by each classification category and W. Va. Code Section 18A-4-8b(d)(3), which states that Aides and ECCATs are in the same classification category. Thus, the lower court correctly ruled in favor of Appellees.

The second allegation of error states that the lower 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 [Sections] 18A-4-8g and 18A-4-8e; and (iii) holding West Virginia Code [Section] 18A-4-8b(d) controls for purposes of determining

service personnel seniority, over [Section] 18A-4-8g, the specific statute governing determinations for seniority county boards.” In reply, Appellee notes that the first subpart herein is really nothing more than a restatement of its allegation of error number 1.

In regard to the second and third subpart, Appellant fails to note, let alone discuss, several statutory provisions that support the lower court’s ruling. For example, Section 18A-4-8e, upon which rests the foundation of Appellant’s argument, itself states that: “the requirements of this section do not alter the definition of class titles as provided in section eight of this article [18A-4-8] or the procedure and requirements of section eight-b of this article [18A-4-8b].”). Thus, the provision upon which Appellee’s position entirely relies states that 18A-4-8b is controlling. Moreover, Appellee seeks to degrade the importance of West Virginia Code Section 18A-4-8e as dealing only with promotions, when, in fact, it deals with the seniority rights of school service personnel generally. Moreover, there is a specific sub-section dealing with seniority for reductions in force as we have here. This provision states that: “all decisions by county boards concerning reduction in work fore of service personnel shall be made on the basis of seniority as provided in this section.” W. Va. Code Section 18A-4-8e(h). And, again, Section 18A-4-8e states that ECCATs and Aides generally have the same classification. Thus, Appellee’s points are not well taken.

## **VI. STATEMENT REGARDING ORAL ARGUMENT**

While Appellee does not agree with Appellant that the issue in dispute herein are “well settled law,” they do not oppose a hearing in this case. Ultimately, Appellees recognize that this Honorable Court is in the best position to judge whether an oral argument would be helpful in the adjudication of this matter.

## VIII. ARGUMENT

The issue before the Court is whether a county board of education that desires to create a seniority list for the purpose of conducting a reduction in force of their ECCAT employees should base seniority solely as ECCATs or by using their more general seniority as Aides. The Circuit Court of Kanawha County correctly relied on the statutory provisions which states that seniority should be based on service time within a job classification and that ECCATs and other Aide sub-divisions should all be considered as within the Aide classification. The Board of Education of Webster County appeals.

### A. STANDARD OF REVIEW

The appeal provisions of W. Va.. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W. Va.. Code, 29-6A-1, *et seq.* [(1988) (Repl. Vol.2004)], and based upon findings of fact, should not be reversed unless clearly wrong.” Quinn v. West Virginia v. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996). Further, the West Virginia

High Court explained that in reviewing an ALJ's decision, a circuit court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). A circuit court should affirm the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. Id. There is a *de novo* review of the conclusions of law and application of law to the facts. Id. Quinn, 197 W.Va. at 316, 475 S.E.2d at 408, *citing* Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995). Ultimately, a circuit court uses both a deferential and plenary standard of review. giving some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts. Under this standard of review, Petitioner's appeal should be granted.

## B. DISCUSSION

### **THE LOWER COURT CORRECTLY RULED THAT THE WEST VIRGINIA CODE AND THIS COURT'S PRECEDENTS MANDATE THAT THE RELEVANT SENIORITY FOR ECCAT-AIDS IS THEIR GENERAL AID SENIORITY, NOT THEIR SPECIFIC ECCAT SENIORITY**

This case involves a simple legal issue. The legal issue is whether the Circuit Court is legally correct when it ruled that in determining the seniority rights of ECCATs, such rights must be based on their overall Aide seniority, not their ECCAT seniority. The West Virginia Code and this Court's prior decisions demonstrate that it was.

The West Virginia Code states that: "The seniority of a service person is determined on the basis of the length of time that the employee has been employed by the county board within a particular job classification." W. Va. Code Section 18A-4-8b(I). The West Virginia Code also

states that: “. . . early classroom assistant teacher [and other named] class titles are included in the same classification as aides.” W. Va. Code Section 18A-4-8b(d)(2)(D). Since seniority for support personnel begins when the employee works in a particular job classification and ECCATs are considered within the Aide classification, then obviously Respondent should have considered the total Aide seniority in ranking its employees by seniority instead of creating a new seniority list based on the ECCAT employment date. Appellants make several arguments that will be responded to below.

**1. In Arguing That West Virginia Code Sections 18a-4-8g and 18a-4-8e “Unambiguously” Provides That Eccats and Aides Are Not in the Same Classification And, Thus, Have Independent Accrual of Seniority, Appellants over Look Key Provisions of Section 18a-4-8(u) Section 18a-4-8e.**

Appellant proposes a simplistic two part analysis of West Virginia Code Sections 18A-4-8g and 18A-4-8e. Section 18A-4-8g states that seniority is accumulated within classification categories as referred to in Section 18A-4-8e and 18A-4-8e(a) states that each classification title defined in West Virginia Code Section 18A-4-8 is a separate classification category of employment, except for those class titles that have Roman numeral designations, which are to be considered the same class. According to Appellant, since Aides and ECCATs have different definitions in 18A-4, they are different classification categories.

However, Appellant overlooks two significant provisions of the West Virginia Code. First, 18A-4-8(u) states that aides that become ECCATs hold a multi-classification status in *accordance with section eight -b of this article.* This italicized language is very important because if the West Virginia Legislature had intended for Aide and ECCAT seniority to be



considered separately, it would have referred to West Virginia Code Section 18A-4-8g, not 18A-4-8b. Section 18A-4-8g(l) states that those with a multi-classification designation accrues seniority separately in each classification. However, 18-4-8(u), when mentioning ECCATs, specifically refer not to 18A-4-8b, but to 18A-4-8b. And, again, 18A-4-8b states that ECCATS are within the Aide classification. The fact that Section 18A-4-8(u) refers to Section 18A-4-8b and not 18A-4-8g shows that ECCATS are in the same classification as Aides and their seniority as ECCAT is not independent from their seniority as Aides.

Additionally, a key Code provision of 18A-4-8e goes unmentioned by Appellee. This statutory provision states that: “the requirements of this section do not alter the definitions of class titles as provided in section eight of this article or the procedure and requirements of section eight-b of this article.” Thus, the very statutory provision relied upon by Appellants refers back to, and defers to, Section 18A-4-8b, which is relied upon by Appellees and the lower court. In the very least, this creates an ambiguity. And if no ambiguity exists, then the reference in 18A-4-8e to Section 18A-4-8b, which is relied upon by Appellees, means that the Circuit Court’s ruling should be upheld.

**2. Appellant Is Incorrect When it Argues That 18a-4-8g Trumps 18a-4-8b Because the Former More Specifically Deals with Seniority for a Reduction in Force.**

Appellee makes two related claims: that 18A-4-8g should prevail over 18A-4-8b because it is the more specific Code provision on point and that the latter provision deals primarily with promotions not seniority of service personnel generally. However, this argument is not well taken.

Section 18A-4-8b is not a promotion statute, but an all purpose provision that provides for seniority rights for service personnel generally. Indeed, this section specifically refers to the role of seniority in a reduction in force situation, as Appellee believed it faced here. Section 18A-4-8b states, in pertinent part: “[a]ll decisions by county boards concerning reductions in force of service personnel shall be made on the basis of seniority, as provided in this section.” In regard to seniority, Section 18a-4-8b states that: . . . early classroom assistant teacher. . .[is] included in the same classification category as aides” and that “[t]he assignment of an aide to a particular position within a school is based on seniority within the aide classification category if the aide is qualified for the position.” Thus, 18A-4-8e specifically discusses seniority in the context of a reduction in force, refers to the section itself in how to determine seniority and states that for the purpose of seniority, aides and ECCAT seniority is one and the same, so long as the aide is qualified to be an ECCAT. If anything, the fact that 18A-4-8e specifically discusses seniority in the context of a reduction in force and 18A-4-8g does not, that is further grounds for upholding the Circuit Court’s ruling.

**C. An in Para Materia Comparison of Sections 18A-4-8b and 18A-4-8e Shows that the Circuit Court’s Ruling Should be Upheld.**

Above, Appellee made the following points: (1) if the statutory provisions at issue are unambiguous, the language thereof leads to the conclusion that the Circuit Court ruled correctly; and (2) if there is ambiguity and this Court desires to resolve such ambiguity on the basis of the language of the more specific provision controlling over the general, then the language of 18A-4-8e prevails because it is the statute that most specifically discusses seniority calculations

for reductions in force. Finally, if this Court desires to resolve this matter by reviewing the language side by side and harmonizing the two, this also leads to the conclusion that the Circuit Court's ruling should be upheld.

As stated above Appellant relies on 18A-4-8g, which refers to 18A-4-8e in determining the classifications for aides generally and ECCATs specifically. Appellee relies on the language of 18A-4-8b. Looking at the language of 18A-4-8b and 18A-4-8e is instructive. Paragraph (a) of 18A-4-8e, starting on the fourth line and part (d)(3) of Section 18A-4-8e are almost identical. They both refer to the classifications created by Section 18A-4-8, minus the ones that contain Roman numbers. Similarly, both provisions then go on to state exceptions to the general rule outlined. In almost the exact same language, the two Code provisions note that cafeteria managers are in the same class as cooks, executive secretaries are in the same class as secretaries and mechanic assistants and chief mechanics are in the same classifications. Compare 18A-4-8b(2)(A)(B) and (D) with 18A-4-8e(a)(1)-(3). The only difference between the two provisions are that 18A-4-8b lists ECCATS, and other sub-categories of Aides as being in the same classification as Aides and 18A-4-8g does not. Clearly, what has happened is that the Legislature simply did not add the language in sub-part 18A-4-8b(2)©, stating that ECCATs and others are to have the same classification as Aides, to part 18A-4-8e(a) when it created the ECCAT position.

Regardless of the reason for the change in language, looking at the two statutes together and harmonizing both shows that the part © of 18A-4-8b should be read into Code Section 18A-4-8e. Indeed, there is no reason to believe that the Legislature intended to treat the calculation of Aide and ECCAT seniority differently depending on whether there was a

promotion or some other event. Indeed, the opposite is the case. That would make no sense and simply confuse the issue of seniority. In fact, if Appellant's position is correct, then county boards of education will have to keep two separate seniority lists—one for promotions and one for everything else. Surely, the Legislature did not intend this. Logic suggests that the Legislature would want the calculation of seniority of ECCATS to be the same, regardless of whether the issue was for promotion or some other issue. Thus, part C of 18A-4-8b should be read into 18A-4-8e<sup>1</sup>.

**D. The Precedent of this Court Sides With Appellee, Not Appellant.**

Respondent places great reliance on the dicta contained in this Court's opinion in Mayle v. Barbour County Bd. of Educ., No. 17-0204 (W. Va. Jan. 8, 2018). However, this reliance is misplaced. True, this Court did say that the lower court did not err in finding that "ECCAT seniority accrues independent of aid seniority." However, the basis of that ruling is that the employee there did not have ECCAT certification. Id. Thus, the appellant in that case was not qualified for the job and the decision not to hire her was proper.

Moreover, the statement by the Mayle Court that ECCAT seniority accrues independently of Aide seniority *was true under the circumstances in that case*. The issue in Maye was whether **all** Aides should be able to use their Aide seniority to bump into an ECCAT position *even if they*

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<sup>1</sup> Appellant also argued that the lower court should be reversed because its ruling wrongly limits the discretion of a board of education, though it did not list it as an Assignment of Error. This position is also not well founded. As stated herein, the correct construction of the West Virginia Code is that the relevant seniority of ECCAT-Aides is their seniority as Aides. Because the West Virginia Code provides for such consideration of seniority, school boards do not have the authority to discount the Aide seniority of Aides who are qualified to work as ECCATs.

*do not have ECCAT certification.* Under that circumstance, the statement of law made by the Court is not incorrect. However, here we have the opposite case. All Petitioners are qualified as ECCATs and of course all are in the Aide classification. Thus, aide seniority is what is controlling here, not ECCAT seniority

This Court's decision in the case of Jennifer Bowyer v. Fayette County Bd. of Educ., 14-0261 (W. Va. 2014) supports Appellee's reading of Mayle. There, two Autism/Aide positions were vacant. One was filled by the Fayette County Board of Education by using the applicant's summer seniority pursuant to West Virginia Code Section 18-5-39(f). Id at p. 2. The other position was filled by the applicant using her Aide seniority, even though she had no seniority as an Autism/Aide and other applicants did<sup>2</sup>. Id. at p. 4. The Bowyer Court upheld the Grievance Boar's determination that the Board of Education of Fayette County did not abuse its discretion in hiring a qualified Aide based on greater Aide seniority than the appellant, who had greater

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<sup>2</sup> Another statutory provision supporting the Bowyer decision is West Virginia Code Section 18A-4-8b(d)(3): "[t]he assignment to an aide to a particular position within a school is based on the seniority of the aide classification category if the aide is qualified for that position." While the Bowyer decision precedes the creation of the above cited statutory provision, such provision seems to codify such holding. As stated above, the Bowyer Court upheld the use of the applicant's seniority in the aide classification category in light of her being qualified to be an autism/aide. Finally, while the parties did not address this statutory provision in either their legal memoranda or oral argument, Respondent could argue that by stating that the seniority accrued within the "Aide classification category," the Code means to count the seniority by years of service as an ECCAT or other position stated in Section 18A-4-8b(d)(2)(D). However, there are two reasons why this is not the proper interpretation of this section. First, if the Code wanted to use the seniority created within the listed position, it would have said the aide's classification category, not aid classification category. Even more telling, if the Code had meant that seniority is governed by the individual's ECCAT seniority, for example, then it would not have needed to use the words "if the aide is qualified for the position." An individual would not have ECCAT seniority if he or she was not qualified to fill that position. This provision, taken as a whole, only makes sense if it is stating that an aide filling a position uses his or her Aide seniority to fill the position, if he or she is qualified for the job. Again, that is what happened in Bowyer.

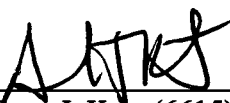
seniority as an autism aid, noting that the school board “was entitled to fill the employment position with applicants who held more seniority in the aide position than Ms. Boyer was not arbitrary and capricious.”

These two cases together demonstrate that when the Aide with the most seniority is qualified to be an ECCAT, his or her seniority should be based on years service as an Aide. However, if the Aide is not qualified to be an ECCAT, then such individuals Aide seniority does not trump the ECCAT seniority of another Aide. This determination is not only consistent with the rulings in these two cases, but is consistent with the language of 18A-4-8b(d)(3).

#### **VIII. CONCLUSION**

The Circuit Court’s decision should be upheld for the reasons contained herein.

Donnis Davis, et al  
By Counsel

  
\_\_\_\_\_  
Andrew J. Katz (6615)  
The Katz Working Families Law Firm, LC  
The Security Building, Suite 1106  
100 Capitol Street  
Charleston, West Virginia 25301

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
Docket No.: 19-1028**

**THE BOARD OF EDUCATION FOR WEBSTER COUNTY**

**Petitioner/Appellant,**

**v.**

**DONNIS DAVIS ET AL,**

**Respondent.**

**CERTIFICATE OF SERVICE**

Please take notice that on this the 27<sup>th</sup> day of April, 2020, I have caused to be served a copy of a

**APPELLEE'S BRIEF** via US mail to the individual listed below:

Richard Boothby  
Joshua A. Cottle  
Bowles Rice  
600 Quarrier St  
Charleston WV, WV.

DONNIS DAVIS  
By Counsel



---

Andrew J. Katz (6615)  
The Katz Working Families Law Firm LC  
The Security Building, Ste. 1106  
100 Capitol Street  
Charleston, West Virginia 25301