

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DONNIS DAVIS, KAREN HOLCOMB,
AUDREY FLANAGAN, AND
SAMANTHA MCCOURT,

Appellants/Grievants below,

v.

Civil Action No. 19-AA-42
The Honorable Louis H. Bloom

WEBSTER COUNTY BOARD OF EDUCATION,

Appellee/Respondent below.

FINAL ORDER

Pending before the Court is a *Petition for Appeal* filed on May 3, 2019, by the Petitioners/Grievants below; Donnis Davis, Karen Holcomb, Audrey Flanagan, and Samantha McCourt; by counsel, Andrew J. Katz.¹ The *Petition* seeks to reverse the *Decision* entered on March 27, 2019, by the West Virginia Public Employees Grievance Board. On July 10, 2019, the Grievants filed their *Brief*, and on August 9, 2019, the Respondent Webster County Board of Education filed its *Brief*, by counsel, Richard S. Boothby. On September 12, 2019, the Court held a hearing at which both parties presented oral argument. Upon reviewing the record, applicable law, and oral arguments, this Court finds and concludes as follows.

STANDARD OF REVIEW

1. A party may appeal a decision of the West Virginia Public Employees Grievance Board (“the Grievance Board”) within 30 days of the decision.² The decision may be appealed on the grounds that it

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge's statutory authority;
- (3) Is the result of fraud or deceit;

¹ On May 16, 2019, the Court entered an *Order Granting Motion to Consolidate* which consolidated the appeals of Holcomb, Flanagan, and McCourt (19-AA-43, 44, and 45) into the appeal of Davis.

² W. Va. Code § 6C-2-5(c) (2007).

- (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.

W. Va. Code § 6C-2-5(b) (2007). “Grievance rulings involve a combination of both deferential and plenary review.”³ In reviewing a Grievance Board decision, the reviewing court gives deference to the Grievance Board’s findings of fact but reviews *de novo* all conclusions of law and applications of law to the facts.⁴ The Grievance Board’s decision should not be reversed unless it was clearly wrong.⁵

FINDINGS OF FACT

2. The Grievants are employed as aides by the Respondent Webster County Board of Education. All Grievants are certified as Early Childhood Classroom Assistant Teachers (“ECCAT”) as required by W. Va. Code § 18-5-18(c).⁶ Although each Grievant began working as an aide at a different time, each Grievant began working as an ECCAT on August 18, 2014.
3. Near the beginning of the 2018-2019 academic year, Webster County School Administrators believed that a reduction in force of ECCATs may be necessary. Accordingly, the Board’s personnel director, Brenda Knight, began to calculate the ECCAT seniority rankings. However, Ms. Knight determined that because the Grievants all began working as ECCATs on the same day, the Grievants’ seniority rankings were identical, with all seniority beginning on August 18, 2014. Pursuant to W. Va. Code § 18A-4-8g(i), the Board held a random drawing

³ Syl. Pt. 1, *Cahill v. Mercer County Board of Education*, 208 W. Va. 177, 177, 539 S.E.2d 437, 437 (2000).

⁴ *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995).

⁵ *Id.*

⁶ “Beginning July 1, 2014, any person previously employed as an aide in a kindergarten program 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 II.”

to determine their seniority.⁷ The drawing resulted in each Grievant's aide seniority ranking being different than their ECCAT seniority ranking. Ultimately, no reduction in force occurred.

APPLICABLE LAW

4. W. Va. Code § 18A-4-8g(a)(1) states that “[s]eniority accumulation for a regular school service person [b]egins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five, article two of this chapter”
5. W. Va. Code § 18A-4-8b(i) provides that “seniority of a service person is determined on the basis of the length of time the employee has been employed by the county board within a particular job classification.” W. Va. Code § 18A-4-8b(d)(2)(C) states 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”
6. W. Va. 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 governs “competency testing for service personnel” and states 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”

CONCLUSIONS OF LAW

7. The Grievants offer only a single argument: the Board erred in finding that Respondent correctly determined the Grievants' seniority. The Grievants argue that their seniority should have been calculated according to when they were hired as aides, not ECCATs. For support, the Grievants refer to W. Va. Code § 18A-4-8b, which states that service personnel seniority

⁷ “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.”

is calculated within particular job classifications, and that the same statute places early childhood assistant teachers within the same classification category as aides. In other words, the Grievants argue that because seniority is calculated according to how long a service employee has been working within a particular classification, and because aides and ECCATs are placed in the same classification, time spent working as an aide should count toward ECCAT seniority. The Grievants thus argue that their ECCAT seniority should be the same as their aide seniority, in direct contrast to the random drawing.

8. 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.
9. Respondent also offers *Mayle v. Barbour County Board of Education*.⁸ In *Mayle*, an individual without ECCAT certification sought to obtain an ECCAT position, arguing that her lack of ECCAT certification should not enable an ECCAT-certified individual with less seniority to

⁸ No. 17-0204, 2018 WL 317375 (W. Va. Jan. 8, 2018).

obtain the position over her. The Supreme Court of Appeals of West Virginia held that “[i]n short, West Virginia Code § 18A-4-8 defines ‘aides’ and ‘ECCATs’ differently and establishes separate qualifications for the positions . . . Accordingly, because petitioner did not hold an ECCAT classification title, we find that the circuit court was not clearly wrong in determining that petitioner was simply not qualified for the posted position.”⁹

10. In *Mayle*, the State Supreme Court further held that “the circuit court was not clearly wrong in concluding that ECCAT seniority accrues independently of aide seniority.” The Court held that “West Virginia Code 18A-4-8e does not place aides and ECCATs into the same classification category,” and thus affirmed the circuit court’s holding that the petitioner’s aide seniority could not be used as ECCAT seniority.

11. This Court finds that the State Supreme Court’s holdings in *Mayle* are distinguishable from the facts in this case. The issue in *Mayle* asked whether an individual without ECCAT certification could obtain an ECCAT position, or in the alternative, whether the individual’s time spent as an aide could count toward ECCAT seniority, if the individual lacked ECCAT certification. The *Mayle* Court correctly found that a non-certified individual was not qualified for and could not obtain such a position, and that the individual could not accrue ECCAT seniority when she was not – nor ever was – ECCAT certified. In short, the *Mayle* Court held that W. Va. Code § 18A-4-8g calculates seniority within “particular classification categories of employment as those classification categories are referred to in W. Va. Code § 18A-4-8e,” then correspondingly that “West Virginia Code § 18A-4-8e does not place aides and ECCATs into the same classification category.”¹⁰ On this basis, the State Supreme Court held that W. Va. Code § 18A-4-8g does not enable individuals to use aide seniority toward ECCAT seniority.

⁹ *Id.* at *3.

¹⁰ *Id.*

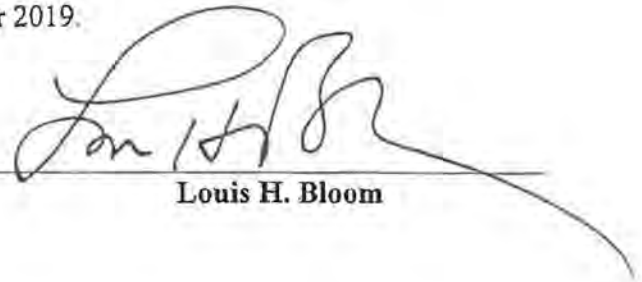
12. This Court **FINDS** W. Va. Code § 18A-4-8b to be controlling in this case. The *Mayle* Court considered this section, but only for the purpose of finding that the petitioner therein was not qualified for an ECCAT position. Applied here, W. Va. Code § 18A-4-8b clearly directs aide seniority to be calculated as ECCAT seniority. Subsection (i) mandates that seniority be determined by the length of time an individual spends “within a particular job classification,” then subsection (d)(2) of the same statute places ECCATs and aides in the same job classification category. Simply put, the statute is clear on its face and Respondent fails to offer an explanation for why it should not be applied directly as it reads.
13. While the State Supreme Court held in *Mayle* that aide seniority should not be calculated as ECCAT seniority, that holding stemmed from a greatly differing set of facts. It would be illogical to permit the *Mayle* petitioner to use her aide seniority as ECCAT seniority when she was never certified to be an ECCAT. Here, the Grievants are all certified as ECCATs and had worked as aides for varying amounts of time before beginning as ECCATs.
14. Respondent argues that because the Grievants began working as ECCATs on August 18, 2014, they cannot accrue ECCAT seniority before this date because the classification did not yet exist. Adhering to Respondent’s line of argument would suggest that the State Legislature possesses the ability to unilaterally eradicate any amount of a public employee’s seniority simply by requiring a new certification. For example, one Grievant began working as an aide in 1985. To say that she should lose 34 years of seniority and be placed at risk of being either passed over for promotions or laid off during reductions in force in favor of less-senior employees, simply because the Legislature required a new certification, seems to defeat the purpose of accruing seniority and remaining in the same position in public employment.

15. This Court **FINDS** that the West Virginia Public Employees Grievance Board was clearly wrong as a matter of law in holding that the Respondent Webster County Board of Education correctly calculated the Grievants' seniority. This Court **FINDS** that the Respondent Board of Education should have used the Grievants' aide seniority as ECCAT seniority because W. Va. Code § 18A-4-8b places aides and ECCATs in the same classification category, and seniority is accrued according to classification category.

DECISION

Accordingly, the Court does **REVERSE** and **VACATE** the *Decision* of the West Virginia Public Employees Grievance Board. The Court **ORDERS** that the Grievants' seniority be calculated according to their hire dates as aides, resulting in their ECCAT seniority mirroring their aide seniority. The Court additionally **ORDERS** that the results of the random selection process be vacated and not used for any purpose. There being nothing further, the Court does **ORDER** that the above-styled appeal be **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all parties and counsel of record.

ENTERED this 10 day of October 2019.



Louis H. Bloom

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 11
DAY OF October, 2019
Cathy S. Gatson
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOARD OF EDUCATION OF WEBSTER COUNTY,

Respondent Below, Petitioner,

vs.

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

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

Petitioners Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, hereby certifies that on the 8th day of November, 2019, he served the foregoing **PETITIONER'S NOTICE OF APPEAL AND PETITIONER'S ATTACHMENT TO NOTICE OF APPEAL** upon counsel of record by depositing the same in the United States Mail, postage prepaid, addressed to:

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Joshua A. Cottle (WVSB 12529)