JERRY SEXTON,

Grievant,

v. Docket No. 00-03-373

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jerry Sexton, filed this grievance September 20, 2000, against his employer, the Boone County Board of Education ("BCBOE" or "Board"). The statement of Grievance reads:

> **Grievant, a regularly employed custodian, was denied credit for vocational training for supplemental pay pursuant to W. Va. Code §§ 18A-4-8a(3) and W. Va. State Board of Education Policy No. 5301. Grievant alleges violation of that statute and policy.**
>
> **Relief Sought: Grievants (sic) seeks credit for his educational training and the supplement pay ($60 per month) to which that credit would entitle him retroactive to July 1, 2000[,] with interest and any applicable benefits.**

This grievance was denied at all lower levels and appealed to Level IV on December 6, 2000. A Level IV hearing was held on February 5, 2001, and this case became mature for decision on March 7, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argues that the mine foreman - fire boss certificate he received in 1976 should be accepted as either college hours or equivalent trade school training to qualifyfor the supplement pay set out in W. Va. Code § 18A-4-7a(3). Grievant notes that to sit for the mine foreman examination an applicant must meet identified requirements, and he met these requirements through five years of experience that included frequent in service training.

Grievant also notes he voluntarily took a refresher course before he passed the mine foreman examination, and this course consisted of 160 hours of class time. Grievant also reported he had received other certificates.

Respondent maintains the certificates and five years of experience do not meet the requirements and standards set out in W. Va. Code § 18A-4-7a(3) and 126 CSR 163 (Policy 5301). Respondent also notes Grievant is responsible for verification of his course work pursuant to 126 CSR 163, and Grievant has not presented a transcript or any other documentation as required by this policy. Respondent notes that to credit Grievant for the training without verification would be in violation of Policy 5301, and to do so could lead to accounting and financial problems for BCBOE.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed with BCBOE for approximately fifteen years and is currently classified as a Custodian III.

2. Prior to his employment with BCBOE, Grievant worked in the mines.

3. After five years of experience, Grievant took a test and received his mine foreman - fire boss certificate on August 11, 1976. This certification was issued by the West Virginia Department of Mines. Admin. Exh. No. 1 at Level II, page 4. 4. Pursuant to W. Va. Code § 22A-2-7, an applicant for certification as a mine foreman must meet one of the following conditions listed in (2), and pass the test identified in (3):

> **(2) [H]ave had a least five years' experience in the underground working, ventilation and drainage of a coal mine, which shall include at least eighteen months' experience on or at a working section of an underground mine or be a graduate of the school of mines at West Virginia University or of another accredited mining engineering school or be a graduate of an accredited engineering school with a bachelor's degree in mining engineering technology, electrical, mechanical or civil engineering; and have had at least two years' practical experience in an underground mine, which shall include at least eighteen months' experience on or at a working section of an underground mine; or be a graduate of an accredited college or university with an associate degree in mining, electrical, mining engineering technology, mechanical engineering or civil engineering, and have had at least four years' practical experience in an underground mine, which shall include at least eighteen months' experience on or at a working section of an underground mine; and (3) have demonstrated his or her knowledge of dangerous mine gases and their detection, mine safety, first aid, safety appliances, state and federal mining laws**

and regulations and other subjects by completing such training, education and examinations as may be required of him or her under article seven of this chapter.

5. During his mining employment and prior to taking the examination, Grievant attended the on-the-job training all mine employees were required to attend. The content of the majority of these sessions dealt with mine safety and recent changes in the law.

6. Grievant's on-the-job training consisted of: 1) a weekly one hour meeting; 2) a monthly one hour meeting; and 3) a yearly eight hour meeting.

7. Prior to taking the examination for the mine foreman, Grievant voluntarily attended a 160 hour refresher course to help prepare him for the test. 8. Grievant submitted into evidence a copy of his Notification of Examination Scores for the mine foreman examination. This copy was not signed or dated. Grt. Ex. No. 2, at Level IV.

9. Also during his years in mining, Grievant received certificates in Dust Sampling (1980) and Shot Firing (1975). He also completed Eastern Associated Coal's Supervisory Training Program in 1978. Admin. Exh. No. 1 at Level II, pages 5 & 7.

10. W. Va. Code § 18A-4-8a(3) provides for supplemental pay of an additional ten dollars a month for service personnel who have completed "twelve college hours or comparable credit obtained in a trade or vocational school as approved by the state board." An additional ten dollars of supplemental pay is earned with each addition of twelve hours up to sixty dollars for seventy-two hours of credit.

11. In 2000, the State Board wrote 126 CSR 163 or Policy 5301, "College Hours or Comparable Training in a Trade or Vocational School". The purpose of this policy was to "provide[ ] guidance to county boards of education in determining the additional monthly pay for service personnel who have earned . . . college hours or comparable training in a trade or vocational school."

12. Policy 5302 defines an approved trade, vocational, technical, business or similar institution as "[a]n institution approved by a state or national institutional or specialized accrediting agency or the Bureau of Apprenticeship and Training, U.S. Department of Labor." Section 3.2.

13. Section 3.3.3 notes comparable credit obtained in a trade or vocational school as

"fifteen contact hours of training obtained from an approved trade, vocational,technical, business or similar institution shall be equivalent to one semester hour of college credit."

14. Section 4.1 requires the following: "[v]ertification of credit will be an official transcript of course work completed from an accredited institution of higher education or a grade report of completed contact hours in a post-secondary program from an approved trade, vocational, technical, business or similar institution. Each employee is responsible for obtaining and providing copies of the required records to his/her employer."

15. Section 4.2 notes "County boards of education are responsible for verifying the number of hours completed by respective employees for additional pay purposes."

16. None of the certifications Grievant received were issued by an approved trade, vocational, technical, business or similar institution as they were not given by "[a]n institution approved by a state or national institutional or specialized accrediting agency or the Bureau of Apprenticeship and Training, U.S. Department of Labor." Section 3.2.

17. Grievant did not receive any training from an approved trade, vocational, technical, business or similar institution.

18. All hours Grievant spent in obtaining certifications are self-reported and without accompanying documentation.

19. Grievant submitted no grade report of completed contact hours in a post- secondary program from an approved trade, vocational, technical, business or similar institution.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The focus of Grievant's argument is that while Grievant did not receive his training from "an approved trade, vocational, technical, business or similar institution", the training was provided by his employer, and Grievant avers his employer was, in essence, approved as a source of training by the state legislature pursuant to W. Va. Code § 22A-2-7. Grievant notes a mine foreman is a statutory officer and to not grant him credit is to exalt form over substance.

Grievant also believes it is not necessary to submit a grade report of completed contact hours because he maintains his certification proves he met the requirements, passed the certification test, and had the five years required by the W. Va. Code § 22-2-7 for sitting for the examination. In the alternative, Grievant argues he should be allowed to use his experience and/or his in service hours to receive supplemental pay. First, Grievant argues he has five years of experience at eight hours a day, and this time is greater than the required 1080 contact hours. Second, Grievant asserts that because a college graduate requires two to four years of mining experience, depending of the nature of the degree, before he/she can sit for the mine foreman examination, the legislature has recognized three years of experience as equivalent to a degree from the West Virginia University School of Mines and one year of experience as equivalent to other engineering bacccalaurate degrees; thus, he is entitled to the supplemental pay. Third, Grievant argues he should be allowed to add up all the in service training he received over his years prior to obtaining his mine foreman certificate for 510 hours, add to that the 160 hours he received in his refresher course, add to that the 112 hours for his supervisor training certificate, and add to that the 16 hours for his Dust Sampling certificate. This addition would result in 798 contact hours, which divided by fifteen would at least result in 53.2 credit hours to at least receive supplemental pay for 48 credit hours.

Respondent argues it is bound by the policy developed by the state, and the guidelines must be followed before it can grant Grievant any supplemental pay. Respondent notes Grievant did not attend an approved trade, vocational, technical, business or similar institution which must be "[a]n institution approved by a state or national institutional or specialized accrediting agency or the Bureau of Apprenticeship and Training, U.S. Department of Labor." Policy 5301, Section 3.2. Respondent also notes that Policy 5301 at Section 4.1 requires Grievant to provide verification of crediteither with "an official transcript of course work completed from an accredited institution of higher education or a grade report of

completed contact hours in a post-secondary program from an approved trade, vocational, technical, business or similar institution", and he has failed to do so.

Although it is commendable Grievant received training from his former employer and obtained the important position of mine foreman, none of his on-the-job training or in service hours meet the requirements set out by 126 CSR 163. **(See footnote 2)** **The legislature directed the State Department of Education to develop guidelines for county boards of education to utilize when assessing materials for supplemental pay. These guidelines are clear and reasonable. To receive credit for training, a service personnel employee must attended "an approved trade, vocational, technical, business or similar institution." This Grievant did not do. To receive credit for training, a service personnel employee must have contact hours of training. It is noted that while much vocational training may occur on-the-job, this training is under the direction of a qualified instructor or craftsman who assesses and critiques the work. Additionally, some classroom time is included in this training, to enable the student to learn information about his vocational area. For example, a home health aide would receive some training on basic physiology, or an electrician would receive some training on the basic science of electricity. This on-the-job training and classroom time is recorded in contact hours and is graded. The last issue to address is also an important one. The employee seeking the supplemental pay, is required to provide " a grade report of completed contact hours in a post-secondary program from an approved trade, vocational, technical, business or similar institution. Each employee is responsible for obtaining and providing copies of the required records to his/her employer." This Grievant has not done and cannot do. There is no such grade report, because Grievant did not participate in a graded program. While experience is important, it is clear that for a service personnel employee to obtain supplemental pay, more than on-the-job training and in service is required.**

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County

Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. In order to receive the supplemental pay identified in W. Va. Code §18A-4- 8a(3), an applicant must follow the guidelines set forth in Policy 5301.

3. Grievant has not carried his burden of proof and has not demonstrated he met the guidelines set out in Policy 5301 in order to receive the supplemental pay granted for "credit obtained in a trade or vocational school as approved by the state board." W. Va. Code § 18A-4-8a(3). Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 29, 2001

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Timothy Conaway.

Footnote: 2

Grievant argued his former employer had been authorized as a source of training by the state legislature in W. Va. Code § 22A-2-7. The undersigned Administrative Law Judge did not find this type of authorization in the statute.