JUDITH SHEEHAN,

Grievant,

v. **Docket No. 04-10-147**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Judith Sheehan ("Grievant") initiated this proceeding on May 16, 2003, seeking credit for vocational training in order to received a monthly salary increase pursuant to W. Va. Code § 18A-4-8a. The grievance was denied at level one on May 16, 2003. A level two hearing was conducted on January 8, 2004, and the grievance was denied on April 14, 2004. (See footnote 1) Level three consideration was bypassed, and Grievant appealed to level four on April 20, 2004. On June 22, 2004, the parties elected to submit this grievance for a decision based upon the lower level record, supplemented by fact/law proposals, which were submitted on July 26, 2004. (See footnote 2) In order to expedite the level four decision in this matter, this grievance was reassigned to the undersigned administrative law judge on August 12, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is regularly employed by Respondent as a cook.

2. On March 26, 2003, Grievant sought to receive training credit for various seminars, meetings and programs she attended between 1984 and 2001. She alleged that she had received 129 contact hours of training.

3. In support of her request, Grievant provided various meeting agendas, notices of training, meeting schedules, and certificates.

4. The majority of the meetings/training sessions for which Grievant seeks credit were mandatory in-service, staff development sessions required by the Fayette County Board of Education

for employees in the food service classifications.

5. Grievant provided no grade report or certification of credit hours awarded for any of the staff development meetings she attended over the years.

6. In February of 1992, Grievant received 10 credit hours for “sanitation” training. The record does not reflect who provided this training or what its purpose was.

7. Grievant attended a seminar sponsored by the U.S. Foodservice on June 11, 2002, entitled “Increasing Your Value/Proving your Worth.” The record does not reflect what type of entity U.S. Foodservice is, or how many hours of training this program included.

8. Grievant received certification from the American School Food Service Association as a Technical Assistant 1 on May 19, 1992. The record does not reflect how many hours of training were required in order to obtain this certification.

9. Grievant completed two courses in the Comprehensive Training Program in 1984 and 1985, certified by the West Virginia Department of Education, Child NutritionDivision. The records do not indicate how many hours of training were involved in this program.

10. Several other cooks employed by Respondent have received vocational credit hours for pay increases. Those cooks provided detailed documentation of where their training was obtained, along with verification of the number of credit hours granted for participation in each seminar or class.

11. Some cooks may have previously received vocational credit hours for county staff development training sessions, which was granted by Respondent's previous Personnel Director, Douglas Kincaid, who is no longer employed by Fayette County.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant contends that she is entitled to credit for all of the training she has attended, pursuant to the provisions of W. Va. Code § 18A-4-8a, which provides that service personnel are entitled to additional monthly pay for college hours “or comparable credit obtained in a trade or vocational

school as approved by the state board." The additional pay is granted in increments according to the number of credit hours the employee holds, beginning with a minimum of 12 hours. Grievant argues that other employees have received credit for the same training programs she has attended, whichshe has attempted to show through documents allegedly turned in by each of those employees who were granted credit.

The State Board of Education has adopted a legislative rule setting forth the requirements for receiving credit for vocational training. It has defined "approved trade, vocational, technical, business or similar institution" as "an institution approved by a state or national institutional or specialized accrediting agency or the Bureau of Apprenticeship and Training, U.S. Department of Labor." 126 CSR 163 § 3.2. In addition, the rule provides that credit for hours obtained in a trade or vocational school is granted in increments of fifteen contact hours of training being equivalent to one semester hour of college credit. Thus, in order to obtain the minimum of twelve hours of credit for the lowest salary increase, an employee would need at least 180 contact hours in a vocational program.

Clearly, Grievant has failed to meet the criteria set forth in the statute and the State Board's regulations. Not only are the training sessions for which she seeks credit NOT obtained from an accredited trade or vocational school, but she has also provided alleged "proof" of only 129 contact hours, which falls far below the minimum of 180 hours needed to received credit for 12 college hours. (See footnote 3) Moreover, the State Board's legislative rule also requires that credit hours must be verified through an "official transcript of course work completed" or "a grade report of completed contact hours in . . . an approved trade, vocational, technical, business, or similar institution." The rule further states that "[e]achemployee is responsible for obtaining and providing official copies of the required records to his/or employer." 126 CSR 163 § 4.1. Grievant's various memorandums of meeting agendas, certificates, and her own statements regarding how many hours were obtained do not constitute verification of hours from an institution providing training. Indeed, none of the documents Grievant has provided indicate any number of training hours, with the exception of the "sanitation" course for which she received 10 credit hours. As this Grievance Board has previously held in similar cases, employees must comply with the specific mandates of the State Board's rules, and "more than on-the-job training and in service is required." Sexton v. Boone County Bd. of Educ., Docket No. 00-03-373 (Mar. 29, 2001); See Neil v. Lincoln County Bd. of Educ., Docket No. 02-22-210 (Nov. 21, 2002). While the evidence is somewhat confusing and unclear, it does

appear that some other employees have received some credit for in service training from Respondent in the past. Grievant argues that this constitutes discrimination, which is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a *prima facie* (See footnote 4) case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievant must show:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievants establish a *prima facie* case of discrimination, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievants must show that the offered reasons are pretextual. Prince v. Wayne County Bd. of Educ., Docket No. 90-50- 281 (Jan. 28, 1990).

While Grievant has, indeed, established a *prima facie* case of discrimination, Respondent counters that, if credit was given to other employees for similar training, it was granted in error by its previous personnel director. This Grievance Board has previously held that, when benefits were erroneously granted to other employees, this does not necessarily constitute discrimination. Ritchie v. W. Va. Div. of Corrections/Huttonsville Correctional Center, Docket No. 98-CORR-105 (Nov. 30, 1998); Ritchie v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). Mistakes by employers do not usually entitle a grievant to relief. White v. Div. of Highways, 00-DOH- 313D (Jan. 17, 2001); Crosston v. W. Va. Div. Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). Specifically, it is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. White, *supra*. The Grievance Board has consistently refused to grant the type of relief Grievant seeks because of a mistake or a violation of a policy, because such actions

constitute ultra vires acts, and because twowrongs do not make a right. See Guthrie v. W.Va. Dep't of Health and Human Resources Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest and Hatfield v. Southern W.Va. Community College, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), rev'd, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also Roberts v. W.Va. Dep't of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); Gilliam v. W.Va. Dep't of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997).

Accordingly, Grievant has failed to meet her burden of proof in this matter, and she is not entitled to the relief requested.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. In order to receive credit for vocational training for purposes of increased pay under W. Va. Code § 18A-4-8a, the employee must provide a grade report from an accredited vocational, trade, technical or business institution, and is entitled to one college credit hour for every fifteen contact hours in such a program. 126 CSR 163.

3. Employees must comply with the specific mandates of the State Board's rules to obtain college equivalent credit, and “more than on-the-job training and in service isrequired.” Sexton v. Boone County Bd. of Educ., Docket No. 00-03-373 (Mar. 29, 2001); See Neil v. Lincoln County Bd. of Educ., Docket No. 02-22-210 (Nov. 21, 2002).

4. It is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. White v. Div. of Highways, 00-DOH-313D (Jan. 17, 2001).

5. Grievant has failed to prove by a preponderance of the evidence that she is entitled to 12 hours of college equivalent credit for vocational training.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Fayette 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.

Date: August 27, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, the delays at level two were caused by the illness of the grievance evaluator.

Footnote: 2

Grievant was represented by counsel, John E. Roush of WVSSPA, and Respondent was represented by counsel, Erwin L. Conrad.

Footnote: 3

At best, Grievant only provided one document showing that she had completed 10 hours of training in a "sanitation" course, for which she could arguably receive credit under the State requirements.

Footnote: 4

Prima facie is a Latin term meaning, literally, "at first sight." A prima facie claim is one that will prevail until contradicted or overcome by other evidence. Black's Law Dictionary, 5th Ed., 1979.