MARY C. SITES, .

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Grievant, .

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v. . Docket No. 93-36-441

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PENDLETON COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

Mary Sites (hereinafter Grievant) filed this complaint against the Pendleton County Board of Education (hereinafter Board) on or about September 22, 1993. Her statement of grievance is as follows:

> Grievant has been employed as a supervisory aide for 4 years. Grievant's supervisory aide designation and pay has [sic] been removed effective for the 1993-1994 school year without notice or opportunity for a hearing. Grievant also alleges that she is continuing to perform the duties of a supervisory aide. The Grievant alleges a violation of W.Va. Code §18A-2-6 and §18A-5-8 and requests the return of the supervisory aide designation and wages from the beginning of her employment term of the 1993-1994 school year.

The grievance was denied at levels one and two and then waived to level four by the Board. An appeal to level four was received by this Grievance Board on October 19, 1993. A hearing was held onNovember 12, 1993, and Grievant's post-hearing brief was received on December 20, 1993.

Based upon a review of the evidence adduced at levels two and four, the following findings of fact are determined to be sufficient for purposes of this Decision.

Findings of Fact

1. Grievant is employed by the Board as an aide.

2. Grievant worked as an aide with a supervisory designation in charge of a Chapter 1 program at Seneca Rocks Elementary School for the schools years 1989-1990 through 1992-1993.

3. Grievant's position at Seneca Rocks Elementary School was eliminated as a result of rescheduling and reorganization at the end of the 1992-1993 school year.

4. Grievant received notice dated April 1, 1993, that she was being considered for transfer as a result of said rescheduling and reorganization.

5. On May 3, 1993, the Board approved Grievant's assignment to the transfer list for the 1993-1994 school year.

6. Grievant was ultimately assigned to a special education teacher's aide position at Circleville Elementary School prior to the beginning of the 1993-1994 school year.

7. Grievant's supervising teacher is Ms. Cindy Wilkins.

8. Grievant has not been assigned a supervisory aide designation by the Principal at Circleville.

9. Ms. Wilkins prepares and organizes the lesson plans, work assignments, and materials both she and Grievant utilize to teach the students.

10. Ms. Wilkins and Grievant physically work in a section of a double-wide mobile home which is divided into different work areas corresponding to the different grade level of students. These rooms are not located in close proximity to the rest of the classrooms at the School, as the trailer is separate from the main school building.

11. The students Ms. Wilkins and Grievant work with differ in their levels of mental impairment. One of the students is health impaired and another is visually impaired. These students range from grade levels kindergarten through six.

12. Only in an emergency would these students be left unattended by either Ms. Wilkins or Grievant.

13. Approximately four times throughout a normal school day, Grievant is responsible for either going to other classrooms and retrieving students or returning students to their original classrooms. Ms. Wilkins also has the same responsibilities. These escorted trips generally involve two to three children.

14. Grievant and Ms. Wilkins work with the same students during the school day but at different

times. The students are given instruction in small groups and these groups are rotated between Ms. Wilkins and Grievant.

15. Grievant is responsible for providing instructional duties, according to an individual education plan, to studentsduring the school day. Grievant covers such subject areas as math, reading and spelling.

16. During the week of November 1 through 5, 1993, Ms. Wilkins was off work due to illness and Grievant was responsible for continuing the instruction of the same students without a substitute teacher having been assigned to the classroom.

Parties' Contentions

Grievant first argues that because she worked as a supervisory aide for four years, the pay and responsibilities normally associated with a supervisory aide position became a part of her continuing contract of employment. Therefore, the Board could not rescind those two terms from her contract of employment without resorting to W.Va. Code §18A-2-6. Second, she avers that she performs the duties of a supervisory aide in her current position and that the Board is obligated to pay her according to the mandates of W.Va. Code §18A-5-8. The Board denies that Grievant was entitled to be assigned to a supervisory aide position as a result of her transfer at the beginning of the 1993-1994 school year or that she currently performs supervisory work.

West Virginia Code §18A-5-8(a) (1993) states as follows:

> Within the limitations provided, any aide who agrees to do so shall stand in the place of the parent or guardian and shall exercise such authority and control over pupils as is required of a teacher as defined and provided in section one [§ 18A-5-1] of this article. (See footnote 1) The principal shall designate such aides in the school who agree to exercise such authority on the basis of seniority as an aide and shall enumerate the instances in which such authority shall be exercised by an aide when requested by the principal, assistant principal or professional employee to whom the aide is assigned: Provided, that such authority does not extend to suspending or expelling any pupil, participating in the administration of corporal punishment or performing instructional duties as a teacher or substitute teacher.
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> An aide designated by the principal under this subsection shall receive a salary not less than one pay grade above the minimum salary to which said aide would otherwise be entitled under section eight-a [§ 18A-4-8a], article four of this chapter, and any county salary schedule in excess of the minimum requirements of this article.

This Grievance Board has interpreted Code §18A-5-8 in light of facts and argument similar to those in the instant case. In Montelione et al. v. Hancock Co. Bd. of Educ., Docket No. 89-15-272 (Dec. 29, 1989), it was recognized that "[I]n disputes of this nature the mere fact that an aide spends part of his or her on-duty time alone with a student or students is not controlling. citing Rymer/Miller v. Wood Co. Bd. of Educ., Docket No. 89-54-91 (Dec. 19, 1989). An aide must prove, rather, that she has been directed to supervise students, citing Ferguson v. Mingo Co. Bd. of Educ., Docket No. 89-29-58 (May 31, 1989), or that she exercises teacher-like control and authority over the students whether the designation is conferred or not." citing Montelione, p. 4. Further, in Rymer it was held that

> An aide, employed to assist a handicapped student, who alleges he or she acts in the stead of a teacher pursuant to Code §18A-5-8, must demonstrate that the duties performed are more than tasks which accommodate the functional needs of the afflicted student.

Rymer, Concl. Law 4. Finally, the statute itself explicitly prohibits the assignment of instructional duties to aides. Therefore, the fact that Grievant performs instructional duties is not determinative of whether she is entitled to the salary she seeks.

There is no question but that Grievant spends time alone with the students with which she works. This time is generally limited to when she is required to escort the students from various classrooms and/or return them to their classrooms; an activity that does not appear different or distinct from the responsibility shared by many other aides. It is determined based upon the facts of the case, Grievant has not proven by a preponderance of the evidence that she has acted as a supervisory aide during the 1993-1994 school year. Escorting students from one classroom to another is not the type of responsibility contemplated by Code §18A-5-8(a) when it refers to an aide standing in the place of a parent or guardian. Further, even if such activity were to be determined to be supervisory in nature, Grievant would not be entitled to a one-step increase in pay based upon the performance of an activity which takes only a minuscule portion of time from her other duties. Grievant's second argument that the Board improperly transferred her from a supervisory aide position to a generic aide position at the beginning of the 1993-1994 school year must be also be rejected. Grievant is employed by the Board as an Aide and there are only four recognized Aide classification titles recognized by Code §18A-4-8. Service personnel do not enter into employment contracts with boards of education as supervisory aides. Further, Code §18A-5-8 requires that when a aide is

assigned supervisory aide duties by a principal, said assignment of duties and responsibilities must be clarified in writing detailing the terms and conditions of the assignment. It was not established that Grievant had any such contract for the duties she performed during the 1992-1993 school year; however, if she did have such a contract it is doubtful that one of the terms was that she was to retain the supervisory aide designation for the balance of her employment with the Board. Grievant's assignment of supervisory duties during the previous year was just that, an assignment, she was still employed by the Board by contract as an Aide pursuant to Code §18A-4-8.

Grievant was been required to "stand in the place of the parent or guardian" when Ms. Wilkins was not present in the classroom. This is evident from the fact that she was responsible for the safety and welfare of the students in her program during a week when Ms. Wilkins was off work due to illness. Obviously Circleville's principal has faith in Grievant's abilities to care for the children and has, at times, allowed her to exerciseteacher-like control and authority over them. However, this type responsibility assigned to Grievant is in conflict with the statute. According to Code §18A-5-8(a), supervisory aides shall not be given the authority to provide instructional duties as a teacher or substitute teacher. (See footnote 2) Regardless, consistent with the discussion above, Grievant is entitled to be paid as a supervisory aide for this one week of work based upon the fact that she have responsibilities normally assigned to teachers under Code §18A-5-1.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. Grievant is not entitled to be paid a salary commensurate with that paid supervisory aides under W.Va. Code §18A-4-8a for the entire 1993-1994 school year because she has not proven by a preponderance of the evidence that she has been given the responsibility to stand in the place of a parent or guardian and exercise such authority and control over pupils as is required of a teacher pursuant to W.Va. Code §18A-5-1.

2. Grievant is entitled to be paid as a supervisory aide for the week of November 1, 1993 to November 5, 1993, when she was required to stand in the place of Ms. Wilkins during her (Ms. WIlkins' absense due to illness.

3. Grievant is not employed under a continuing contract of employment as a supervisory aide

even though she functioned in a supervisory role and was paid for such during the 1992-1993 school year. Grievant's transfer at the beginning of the 1993-1994 school year to an Aide position was not shown to be improper.

Therefore, this grievance is hereby **GRANTED IN PART** and **DENIED IN PART**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of pendleton County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 27, 1994

Footnote: 1W.Va. Code §18A-5-1 (1983) contains reference to the doctrine of in loco parentis, which is a common law concept that parents delegate part of their parental authority to school personnel while the child is in their custody and for purposes consonant to the school setting. See, Smith v. W.Va. State Bd. of Educ., 295 S.E.2d680 (W.Va. 1982). The applicable language of this statutory provision is as follows:

> *The teacher shall stand in the place of the parent or guardian in exercising authority over the school, and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes, except that where transportation of pupils is provided, the driver in charge of the school bus or other mode of transportation shall exercise such authority and control over the children while they are in transit to and from the school.*

Footnote: 2Consistent with the Board's argument in this case, it would appear that it was required to assign a substitute to Ms. Wilkins' room during her absence.