TWILA S. NORMAN, SUSAN HEFNER,

and GALE GREENWAY,

Grievants,

v.

DOCKET NO. 96-33-263

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants filed this grievance on or about May 20, 1996:

> Grievants are employed as aides by the Respondent. Grievants contend that they are assigned supervisory aide duties, but have been denied a supervisory aide contract and supplement in violation of West Virginia Code §§18A-4-8a & 18A-5-8. In addition grievants contend that teachers are paid extra for performing breakfast duty and they are not in violation of West Virginia Code §18-29-2(m). Grievants seek an award of supervisory aide status with back pay and other retroactive benefits and an award of equal compensation for performing breakfast duties.

A level two hearing was held on May 29, 1996, and a decision denying the grievance was rendered by the Superintendent's designee on June 19, 1996. The Greenbrier County Board of Education ("Board") waived participation at level three, and Grievants appealed to level four on or about June 25, 1996. Hearing was held on August 29, 1996, in the Board's offices in Lewisburg, West Virginia. This case became mature for decision on September 16, 1996, upon receipt of the parties' proposed findings of fact andconclusions of law. (See footnote 1) The material facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants are employed as regular kindergarten aides by the Greenbrier County Board of

Education ("Board") at Ronceverte Elementary School.

2. On a "regular", although not always daily basis, Grievants perform the duties which require supervision of children without the presence of a professional employee in the following areas:

(a) related to bus duty;

(b) escorting children to and from the bathroom;

(c) escorting children to physical education, library, or music;

(d) escorting children to lunch and/or playground; and

(e) preparing children to leave school for the day.

3. Grievant Norman spends one minute per day escorting children in connection with bus duty; five minutes per day escorting children to and from the bathroom; five minutes per day escorting children to library, physical education, or music; ten minutes per day related to duties at either lunch or playground; and eight minutes per day preparing the children to leave the school; for a total maximum of twenty-four minutes per day.

4. Grievant Hefner and her teacher split escorting requirements for the physical education class, which escorting duties consist of six minutes per occurrence; her escorting requirements for music and library amounts to one minute per day; she spends fiveminutes per day escorting children to and from the lunch area or playground; and five minutes of her day is spent preparing children to leave school. Further, about 25% of the time, when recess is conducted indoors, Grievant's class is separated from the class where the teacher is assigned, and for only 40% of that time does she remain in the class without the teacher supervising the children. The total maximum time Grievant Hefner spends performing these escorting duties is sixteen and one-half minutes per day.

5. Grievant Greenway also escorts her children to music, library, and physical education, about one time for every three times the teacher escorts the students. The escorting duty requires approximately two to three minutes per day. Approximately eight to ten minutes of the day Grievant Greenway prepares the children to leave school. Grievant Greenway's total maximum time spent escorting students amounts to no more than 14 minutes per day.

6. The principal at Ronceverte Elementary has never designated any aide at the school to serve in a supervisory capacity.

7. Grievant Norman normally arrives at school at 7:40 a.m. and leaves at 3:10 p.m. When Grievant Norman is assigned breakfast duty, she arrives at 7:30 a.m. and leaves at 3:00 p.m.

8. Grievant Hefner typically arrives at school at 7:40 a.m., but when she has breakfast duty, she arrives at 7:30 a.m.

9. Grievant Greenway arrives at school at 7:30 a.m. and departs at 3:30 p.m.

10. Two teachers perform breakfast duty, and they receive additional compensation for that duty. 11. Grievants are also assigned breakfast duty, on a rotating basis, but receive no additional compensation.

12. Grievants concede that the breakfast duty assignment does not alter or extend their work day.

Discussion

Grievants contend they are performing duties of a supervisory aide as enumerated in W. Va. Code § 18A-4-8a, and seek the additional pay provided by W. Va. Code § 18A-5- 8. Grievants also claim they are being discriminated against because they are not compensated for performing breakfast duty, while the teachers assigned to that duty receive additional compensation. The Board denies that it has violated the statutes cited by Grievants, or that it has discriminated against them in regard to breakfast duty.

W. Va. Code § 18A-4-8a(10) (1994) provides:

> For the purpose of qualifying for additional pay as provided in section eight [§ 18A-5-8], article five of this chapter, an aide shall be considered to be exercising the authority of a supervisory aide and control over pupils if the aide is required to supervise, control, direct, monitor, escort or render service to a child or children when not under the direct supervision of certificated professional personnel within the classroom, library, hallway, lunchroom, gymnasium, school building, school grounds or wherever such supervision is required.

W. Va. Code § 18A-5-8 provides, in pertinent part:

> (a) Within the limitations provided herein, 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. 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 expellingany pupil, participating in the administration or corporal punishment or performing instructional duties as a teacher or substitute teacher.
>
> 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.

With the employee's permission, a county board of education may, at its discretion, designate an aide to “stand in the place of the parent or guardian” and “exercise such authority and control over pupils as is required of a teacher.” The aide is then entitled to additional pay. W. Va. Code § 18A-5-8. An aide is deemed to be exercising the authority required of a teacher during virtually all times spent with pupils in the absence of certified professional personnel. W. Va. Code § 18A-4-8a(10). An aide who performs the duties enumerated in Code § 18A-4-8a without the direct supervision of a professional and has not been formally recognized as a “supervisory” aide per Code § 18A-5-8, may still maintain an action for the higher pay. Fergusen v. Mingo County Bd. of Educ., Docket No. 89-29-58 (May 31, 1989). However, neither Code § 18A-4-8a nor Code § 18A-5-8 mandates that an aide who performs supervisory duties on any occasion for any length of time receive the “supervisory” designation and additional compensation. Rather, the language of the statutes suggest that these benefits are reserved for those aides who have been formally recognized by the county board or have otherwise been directed to perform such duties on a regular basis for significant periods of time. A case-by-case analysis is necessary to determine whether a particular aide has assumed sufficient supervisory duties to qualify him or her for the additional pay. Johnson v. Monroe County Bd. of Educ., Docket No. 95-31-354 (Dec. 22, 1995). The parties do not dispute that an aide is not automatically entitled to the classification of supervisory aide and higher compensation bymerely performing the duties described in Code § 18A-4-8a(10), but rather, it is the degree with which one is performing those duties that dictates the higher classification and compensation.

While it is concluded that virtually all Grievants' unsupervised tasks with students fall within the purview of Code § 18A-4-8a(10), the total amount of time spent by each Grievant, as enumerated in the above findings of fact, illustrates that this unsupervised time constituted an insignificant portion of the Grievants' overall work time for the referenced period and is clearly insufficient to qualify them for supervisory pay. As stated by Grievants' witness, Ms. Loretta Morris, a teacher at Ronceverte: “There is no way in this day and time that the aides cannot be in charge of a student or students without a

teacher. There is always one getting hurt, throwing up, throwing temper tantrums, having to go to the bathroom, or other such things that occur daily in the life of a child." G. Ex. 1. It cannot be the intent of the Legislature in enacting Code § 18A-4-8a(10), that every time one of these incidents occurs and an aide is required to escort the student out of the room, the aide becomes a supervisory aide entitled to higher compensation under Code § 18A-5-8. If that were the case, all aides would become supervisory aides, because one of the purposes of their being in the classroom is to assist the teacher with incidents such as the ones described by Ms. Morris.

With regard to Grievants' claim of discrimination regarding their breakfast duty, the undersigned finds Grievants have not made a prima facie case of discrimination. W. Va. Code § 18-29-2(m) defines "discrimination" 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 ofdiscrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). In the instant case, Grievants have not shown that they are similarly situated, in a pertinent way, to one or more employees. Grievants are the only aides at Ronceverte Elementary and they all have breakfast duty. Grievants compare themselves with two teachers who also have been assigned breakfast duty. However, Grievants, school service personnel, cannot be found to be similarly situated to professional employees. Service and professional personnel are governed by different statutes in many aspects of their employment, including establishment of their work day, overtime compensation, and extra duty and extracurricular contracts. Just because the teachers receive

additional compensation for agreeing to perform breakfast duty does not mandate that Grievants receive additional compensation. Indeed, as conceded by the Grievants, performing the breakfast duty does not alter or extend their work day.

Conclusions of Law

1. With the employee's permission, a county board of education may, at its discretion, designate an aide to “stand in the place of the parent or guardian” and “exercise such authority and control over pupils as is required of a teacher.” The aide is entitled to additional pay. W. Va. Code § 18A-5-8.

2. An aide is deemed to be exercising the authority required of a teacher during virtually all times spent with pupils in the absence of certified professional personnel. W. Va. Code § 18A-4-8a(10).

3. An aide who performs the duties enumerated in Code § 18A-4-8a without the direct supervision of a professional and has not been formally recognized as a “supervisory” aide per Code § 18A-5-8, may still maintain an action for the higher pay. Fergusen v. Mingo County Bd. of Educ., Docket No. 89-29-58 (May 31, 1989).

4. Neither Code § 18A-4-8a nor Code § 18A-5-8 mandates that an aide who performs supervisory duties on any occasion for any length of time receive the “supervisory” designation and additional compensation. Rather, the language of the statutes suggest that these benefits are reserved for those aides who have been formally recognized by the county board or have otherwise been directed to perform such duties on a regular basis for significant periods of time. Johnson v. Monroe County Bd. of Educ., Docket No. 95-31-354 (Dec. 22, 1995).

5. A case-by-case analysis is necessary to determine whether a particular aide has assumed sufficient supervisory duties to qualify him or her for the additional pay. Since the record herein supports that the supervisory duties performed by Grievants during the period identified were incidental to their positions as kindergarten aides and consumeda minute part of their total work time, they have failed to show entitlement to the extra compensation.

6. Grievants have failed to prove discrimination under W. Va. Code § 18-29- 2(m).

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier 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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MARY JO SWARTZ

Administrative Law Judge

Dated: April 15, 1997

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge on March 27, 1997, for administrative reasons.