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GREG RYMER and CATHY MILLER

v.

Docket No. 89-54-91

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants Greg Rymer and Kathy Miller, school aides at Parkersburg High School (PHS), filed a grievance on January 4, 1989, when respondent Wood County Board of Education (WCBE) would not heed their claims to entitlement and advance each one's employment status and salary from Aide IV to what they termed "supervisory" Aide, pursuant to newly-enacted W.Va. Code §18A-5-8. Grievants did not prevail at levels one through three, and the grievance was advanced to level four in early March 1989. After two scheduled hearings were continued for cause shown, the matter was heard May 18, 1989, and proceeded in accordance with grievants' announced intention to only present

evidence supplementing the record developed at level two.¹ At the conclusion of the hearing, grievants requested that the record remain open in order to file evidence not yet available to them.²

This controversy arose as a result of the parties' differing view and interpretations of W.Va. Code §18A-5-8, effective July 1, 1988. In pertinent part the statute provides:³

(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 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 Provided, That such authority does not extend to . . . 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

(b) . . . Aides shall have the option of agreeing to supervise students and of renewing related assignment annually: Provided, That should an aide elect not to renew the previous agreement to supervise

¹A level two hearing was conducted February 3, 1989, and the transcript of that proceeding was submitted prior to the level four hearing.

²Grievants filed an additional document on or about June 12, 1989, and the parties completed their submission of proposed findings of fact and conclusions of law by June 26, 1989.

³§18A-5-8 also states that "the operation of this section" shall not require an aide to work anytime beyond that for which is contracted, or beyond that required of aides in the same school, unless the parties agree and the agreement is school board approved. New considerations pertaining to the employment and training of aides are also discussed.

students, the minimum salary of such aide shall revert to the pay grade . . . [of] the classification title held by the aide. . . .

The basic facts in this matter are not in dispute. Both grievants were employed by WCBE as classroom aides to work with and assist handicapped students on a mostly one-to-one basis. Grievant Rymer had worked with the same spastic-quadruplegic male student, Chris, for at least four years, two at PHS, and grievant Miller, with several physically-handicapped students at PHS since the 1984-85 school year. Ms. Miller had two students during the 1988-89 school year. While the particulars of grievants' duties are not disputed, each party attaches a different view of the nature and significance of those duties in light of Code §18A-5-8.

Grievants stated that when they learned of the importance of the statute as they believed it related to them, they attempted to so inform PHS Principal Steve Summers. Grievants claimed that Mr. Summers, newly appointed to PHS in Fall 1988, was unaware of the provisions of the statute and, as a result of their approach to him about it, another more-senior PHS aide was designated for the advanced salary but they were not.

Grievants assert that, while performing their respective aide duties, they are at times alone with their students, without a teacher or other professional present. They claim that at such times they have the sole responsibility for their

charges and act in the stead of parents in the manner of a teacher.⁴

Grievants advance the theory that despite Principal Summers' refusal to officially designate them as supervisory aides, WCBE has a non-discretionary duty to so "reclassify" them pursuant to W.Va. Code §18A-4-8:

Upon the change in classification or upon meeting the requirements of an advanced classification of or by any employee, his salary shall be made to comply with the requirements of this article . . . based upon his advanced classification and allowable years of employment.

. . . .

The county boards shall review each service personnel employee job classification annually and shall reclassify all service employees as required by such job classifications.

WCBE argues that no violation of Code §18A-5-8 has been shown in this grievance. It contends that all classroom aides perform tasks with students of a general supervisory nature, but

⁴W.Va. Code §18A-5-1 describes teacher authority while students are attending school. The statute, in part, provides:

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 The teacher shall have authority to suspend any pupil guilty of disorderly, refractory, indecent or immoral conduct

. . . .

Teachers shall exercise such other authority and perform such other duties as may be prescribed for them by law or by the rules of the state board of education not inconsistent with the provisions of this chapter and . . . [§18-1-1 et seq.].

that those aides, in turn, work under the specific supervision of teachers and professionals. WCBE argues that grievants' duties, in particular, entail no more than such general supervision of students and fall short of parent-like authority and control over students as contemplated by the statute.⁵ WCBE also argues that the statute clearly states a supervisory aide must be designated by the school's principal, and the designation cannot otherwise be conferred. Respondent points out that a non-designated aide may refuse to perform assigned duties of a supervisory nature.

⁵In WCBE's lengthy post-hearing submission, it posed the following about grievants' duties and claims:

If this "general supervision" amounted to the exercise of parent-like authority or control over students . . . [and] necessarily places an aide in loco parentis -- then upon what legal basis was such authority and control exercised by aides prior to school year 1988-89? No statute or common law doctrine gave aides that power until §18A-5-8 went into effect at the beginning of school year 1988-89. If as a matter of law grievants . . . could not have stood in loco parentis before school year 1988-89, and if, as they have testified, the duties the grievants were expected to perform were the same before and after 1988-89, by what leap of logic do they now maintain that the very same duties and responsibilities are no longer those of an aide but, instead, are like those heretofore reserved only to teachers?

WCBE's logic begs the question. Although the statute does not specifically address aides whose employment parallels grievants', this is not to say that some aides were not previously assigned to supervisory, teacher-like duties and were simply not compensated for their efforts. Notice can be taken that at least some of the statutory scheme of Chapters 18 and 18A evolved to monetarily benefit employees as well as to keep up with the changing needs of the State's schools as WCBE argues.

The West Virginia Education and State Employees Grievance Board has previously determined that, when an aide has been given supervisory tasks, even without official designation, she must also be given the advanced salary. See Ferguson v. Mingo Co. Bd. of Educ., Docket No. 89-29-58 (May 31, 1989). Code §18A-4-8 does not trigger the obligation; rather, Code §18A-5-8(a) operates to create the mandatory salary enhancement. This is evident because, according to §18A-5-8(b), the supervisory aide designation is clearly a matter of annual agreement and renewal; thus, §18A-4-8 is not applicable because reclassification does not occur. It seems quite clear that whether the principal assigned the supervisory tasks but refused to confer the designation, as occurred in Ferguson, or the supervision is inherent in the position, that is, if the supervision meets the threshold of responsibility where an aide acts in the stead of a teacher, that aide is deserving of the attendant salary enhancement.

The issue remains whether grievants' duties during the 1988-89 school year rose to the level of authority and control contemplated by Code §18A-5-8. Of necessity, the duties grievants performed with their assigned students were partially delineated on each student's Individualized Education Program (IEP) compiled by his or her Placement Advisory Committee (PAC), a collaboration of parents and relevant teacher(s), professionals and administrator(s).

Each day grievants met their charges at the bus and escorted them to "Room 101," a suite of several classrooms which

serves as PHS's base of operations for special education students, although some students are "mainstreamed" into the general school population for at least some classes. Grievants then helped their students with winter wraps, assembled their learning materials for the day, transported the wheelchair-bound students to various classes and assisted them with personal hygiene. No professional employee accompanied grievants while they performed those activities.

PHS has staggered "open" lunch periods, and students may eat at various campus locations or leave the campus for home or elsewhere. During the school term grievant Miller remained in Room 101 with one of her students during that child's lunch hour because the child, self-conscious, refused to eat in the school's designated eating areas. Ms. Miller then had her own separate lunch period and generally left the campus at that time.⁶ Grievant Rymer voluntarily remained in the school's lunchroom with his student, giving up his own lunch period, as he feared Chris might choke on his food. After this grievance was filed, a determination was made that, indeed, Chris could not eat lunch by himself, notwithstanding general school supervision.⁷ Mr. Rymer agreed to continue to forego his lunch hour

⁶It appears that, at least in 1987-88, Ms. Miller took the child out to eat at a fast food restaurant on occasion. In past years she also assisted with gym techniques and exercises for at least one of her students.

⁷According to Mr. Summers, the lunchroom and campus are "patrolled" by at least two administrative personnel during each of the school's two lunch periods.

and remain with Chris for which he received extra compensation amounting to one-eighth of his regular salary.

Mr. Rymer performed duties with Chris in addition to those caretaker-type ministrations performed by both him and Ms. Miller⁸ for their students. For example, before Chris' instructional day began, grievant performed relaxation exercises with him for twenty or thirty minutes to relieve his spasticity. Also, because of Chris' condition, he had developed some behavioral problems in class. By third period, Mr. Rymer may have had to remove Chris from class to work on behavior modification, which he did unsupervised for upwards to thirty or forty-five minutes. If testing was required during Chris' mainstream fourth-period economics or psychology class, Mr. Rymer was required to remove Chris from the classroom, because of noise levels, and administer the test in another room where no teacher was present. He was then responsible for returning the finished quiz or exam to the teacher. Mr. Rymer also was directed to perform similar tasks with Chris at Martin School, an off-campus special facility where Chris received treatment most afternoons.

W.Va. Code §§18A-5-1 and 18A-5-8 lack any discussion of either a teacher's or an aide's specific duties with respect to

⁸Ms. Miller submitted a PAC written for a student named William, see n. 2, which contained a March 14, 1989, addendum referring to her. The notation generally stated that the child will have an aide between classes, to and from lunch and after school; no students shall push the wheelchair; the aide will be available to the child throughout the day as needs arise; and specific daily routine and special needs "will be dealt with" by Ms. Miller and Ms. Mathis, the special education teacher.

the parent-like supervision of students. Code §18A-5-1 instead speaks of exercising school authority and administering discipline and control over students. Given the details of each grievant's day-to-day duties with his or her respective students during the 1988-89 school year, it can be determined that Ms. Miller performed those tasks for which she was employed: She, at various times on a one-to-one basis with no professional staff immediately present, assisted non-ambulatory students, who were under the overall supervision of PHS's professional staff, with functional tasks. Mr. Rymer, on the other hand, performed duties of a specialized nature which embodied the administration of discipline and teacher-like authority over his student, see Code §§18A-5-1 and 18A-5-8.

In addition to the foregoing, the following findings of fact and conclusions of law are made. The contentions and arguments of the parties have been examined and considered and are incorporated herein to the extent they are consistent with the findings and determinations of the undersigned.

FINDINGS OF FACT

1. Public schools must accommodate physically-handicapped students, some who must have continuous one-on-one assistance from school staff to function in the school setting. Grievants are school aides who have been specifically employed to work exclusively with one or two severely physically-handicapped students on a mostly one-to-one basis.

2. Individualized educational requirements for students with special needs are mandated by state and federal law. Grievants' duties, to assist their students when needed, are necessarily set forth on IEPs prepared by each student's PAC. Grievants perform a variety of tasks for their charges including assisting them with personal hygiene, eating needs and transportation within the school as well as gathering and setting up materials for their daily instruction.

3. For the most part during the 1988-89 school year, grievants accompanied and assisted their students with functions that ambulatory students would accomplish alone and without aid, that is, without a teacher necessarily present but rather within the context of general school supervision. At those times a professional staff member likewise was not physically present with grievants and their students.

4. In addition to the general assistance he provided his physically-handicapped student, grievant Rymer administered some testing, behavior modification and relaxation exercise-therapy, at his discretion and without the presence of professional staff. Those are specialized tasks which a teacher or other professional would have had to assume but for Mr. Rymer.

CONCLUSIONS OF LAW

1. Beginning the 1988-89 school year, classroom aides could be selected or designated on the basis of seniority to act in the stead of a teacher and exercise authority and control

over students. Aides who have been directed to supervise students in this manner must be paid at one pay grade higher than the aide classification held. W.Va. Code §18A-5-8(a); Ferguson v. Mingo Co. Bd. of Educ., Docket No. 89-29-58 (May 31, 1989).

2. The aide designation and attendant salary enhancement is not reclassification per Code §18A-4-8, but is a limited agreement and appointment which must be yearly renewed if at all. Code §18A-5-8(b).

3. WCBE has long-employed aides whose duties may be set forth on the students' IEPs. Notwithstanding the importance of such employment, an aide assigned to attend to the functional needs of a physically handicapped student under the general supervision of the professional staff does not perform duties entailing supervision of the student as contemplated by Code §18A-5-8.

4. 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.

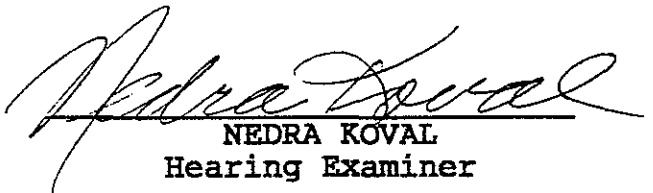
5. In conjunction with his student's needs and IEP, grievant Rymer performed specialized tasks of an authoritative nature while alone with the student. To this extent, Mr. Rymer acted in the stead of the teacher or other professional and has met his burden of proof in this grievance.

6. Grievant Miller has not demonstrated that she performed specialized tasks with her students or otherwise assumed teacher-like authority over the students in a professional's stead.

Accordingly, Mr. Rymer's grievance is **GRANTED**, but Ms. Miller's is **DENIED**. The Wood County Board of Education is **ORDERED** to award Mr. Rymer back pay for 1988-89, and if he performs the same duties the present school year, 1989-90, to adjust his salary one pay rate higher for the entire year.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

December 19, 1989


NEDRA KOVAL
Hearing Examiner