PATRICIA JOHNSON

v. Docket No. 95-31-354

MONROE COUNTY BOARD OF EDUCATION

DECISION

The grievant, Patricia Johnson, is employed by the Monroe County Board of Education (Board) as an Aide IV assigned to Union Elementary School. In this complaint, filed at Level I May 2, 1995, she alleges that since January 17, 1995, she has been performing the duties of a supervisory aide, and seeks the additional pay provided by W.Va. Code §18A-5-8. (See footnote 1) Her supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held July 17, 1995. The Board, at Level III, declined to address the matter, and appeal to Level IV was made August 4, 1995. The parties subsequently agreed to submit the case for decision on the record developed at Level II. Neitherparty submitted proposed findings of fact and conclusions of law by the November 30, 1995 deadline. (See footnote 2)

The grievant was employed as a "regular" aide prior to January 17, 1995. Effective that date, she was appointed to her present special education aide position and assigned to the classroom of UES special education teacher Mark Czaja. The grievant immediately began keeping a daily log of specific times during which she believed that she was exercising exclusive care and control over one or more of the four mildly to moderately impaired students assigned to Mr. Czaja's classroom. (See footnote 3) The Board does not dispute that the log accurately reflects at least nineteen occasions between January 20, 1995 and June 8, 1995, during which the grievant spent from five to forty-six minutes with the students when Mr. Czaja was not present. (See footnote 4) The record as a whole reflects that there were no other teachers present during these times.

The principal at UES has never designated any aide at the school to serve in a supervisory capacity. (See footnote 5)

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

> 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 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.

The Grievance Board has made several pronouncements on the statute since its enactment in 1988. Fergusen v. Mingo County Bd. of Educ., Docket No. 89-29-58 (May 31, 1989) held that an aide who exercised "such authority and control over pupils as is required of a teacher" could maintain an action for the higher pay provided in the statute despite that the school principal had not formally conveyed the "supervisory" title. Rymer v. Wood County Bd. ofEduc., Docket No. 89-54-91 (Dec. 19, 1989) found that aides designated "special education" could perform tasks without the direct supervision of a teacher, including accompanying physically-impaired students to various parts of a school, and not necessarily be entitled to the higher paid designation. The key holding in the case was that the statute contemplated a higher level of authority over pupils than that required for duties "inherent" in the nature of special education assignments.

Montelione et al. v. Hancock County Bd. of Educ., Docket No. 89-54-91 (Dec. 19, 1989) stressed that time alone with students was not controlling and that the aide must necessarily show that she has been directed to supervise students or that she exercises "teacher-like" control over them. Id. at 4. Sites v. Pendleton County Bd. of Educ., Docket No. 93-36-441 (April 27, 1994) followed the holdings in Rymer and Montelione and added that the statute implicitly requires that supervisory tasks be more than a "minuscule" portion of the aide's overall duties.

Effective July 1, 1994, the following provision was added to W.Va. Code §18A-4-8a,

> 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.

This language leaves little doubt about the types of tasks encompassed by Code §18A-5-8. The record in the present case fully supports that most if not all of the duties performed by the grievant on the nineteen occasions recorded in her log fell squarely within this definition.

The undersigned finds, however, that the cited portion of Code §18A-4-8a does not mandate that an aide who performs supervisory duties on any occasion be given the designation and additional compensation. The statute, particularly the language "For the purpose of qualifying for additional pay," is noticeably open-ended and suggests that something more than a single exercise of authority over pupils is necessary. It appears that the Legislature made the addition to the statute to clarify the terms "authority" and "control" as they are used in Code §18A-5-8 and not to automatically grant supervisory status to the aide whose time alone with students is minimal.

Accordingly, it is concluded that while virtually all unsupervised tasks with students have been brought within the purview of Code §18A-5-8, a case-by-case analysis is still necessary to determine the amount of time spent on such tasks and whether they have become a regular and integral part of the aide's overall duties. Little analysis is needed in the present case. The grievant's log reflects that she spent, at best, only three and one-half hours of unsupervised time with Mr. Czaja's students over a period of ninety-nine working days. The undersigned finds that this was an insignificant portion of the grievant's overall worktime for the referenced period and is clearly insufficient to qualify her for the supervisory pay.

In addition to the foregoing discussion, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) From January 17, 1995 to June 8, 1995, the grievant, an Aide IV, was assigned to the special education classroom of Union Elementary School teacher Mark Czaja. During this period, the

grievant performed tasks while not under the direct supervision of Mr. Czaja or other Union Elementary teachers.

2) The unsupervised tasks included escorting physically and/or mentally impaired students to the cafeteria, gymnasium and bathroom. Occasionally, the grievant remained with the students in the classroom while Mr. Czaja was called away for telephone calls, conferences with parents or other miscellaneous work-related duties. The grievant spent a total of approximately three and one-half hours on these tasks over a period of ninety-nine work days. 3) The principal at Union Elementary has never designated the grievant or any other aide at the school as "supervisory."

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.

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 the grievant during the period identified were incidental to her position as a special education aide and consumed a minute part of her total work

time, she has failed to show entitlement to the extra compensation.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Monroe 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: December 22, 1995

Footnote: 1As of July 17, 1995, the date of the Level II hearing, the grievant had been placed on a transfer list for reassignment during the 1995-96 school year. She, therefore, seeks only back pay for the identified period.

Footnote: 2The parties made their legal positions clear at the lower levels through opening and closing remarks.

Footnote: 3It appears that the grievant believed, prior to her appointment, that any special education aide position was by nature a supervisory aide post and had decided from the outset to contest the matter.

Footnote: 4The log actually lists twenty-two occasions. The Board takes exception to three of the entries and the record generally supports that in those instances, another teacher may have been present. This minor factual dispute is of little if any significance to the ultimate conclusions in the case.

Footnote: 5It is noted that the grievant testified at Level II that she accompanied a Peterstown Elementary School impaired student on hismorning bus ride from Marie to Linside. It appears that the trip takes approximately one hour. This time is not recorded in the grievant's log as "supervisory" time and her arguments do not cite the duty as supportive of her claim that she should have had that designation. The undersigned takes notice that in a separate grievance, filed at Level IV November 15, 1995, (Johnson v. Monroe County Bd. of Educ., Docket No. 95-31-502), there are lower level findings which suggest that the grievant had a separate agreement with the Board to make the daily bus trip and was afforded overtime wages. Accordingly, this duty was not given consideration herein.