

101219

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

KANAWHA COUNTY BOARD OF EDUCATION,

Petitioner,

v.

CIVIL ACTION NO. 09-AA-87
JUDGE JAMES C. STUCKY

JONATHAN DARBY,

Respondents.

2010 APR 20 PM 1:58
COURT REPORTER
KANAWHA COUNTY CIRCUIT COURT

FINAL ORDER

This matter comes before the Court on Petitioner Kanawha County Board of Education's, (hereinafter "Petitioner") Petition For Appeal pursuant to West Virginia Code § 6C-2-5. Petitioner appeals West Virginia Public Employees Grievance Board's (hereinafter "Board") Decision determining that the charges against Jonathan Darby (hereinafter "Darby") had not been proven by sufficient credible evidence and ordered Darby reinstated to his former position. After careful consideration, this Court **REVERSES** the Administrative Law Judge's (hereinafter "ALJ") Decision.

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states,

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996).

A brief recitation of the facts is as follows. Darby was employed by Petitioner as a school bus operator. Around August 15, 2008, Darby was told by Petitioner that it had received information that he had engaged in an inappropriate relationship with a student. Darby was given notice of the charges against him. A hearing was held, and his employment was terminated on December 1, 2008. Darby filed a grievance protesting the termination of his employment.

An ALJ issued a Level III decision dated April 9, 2009, that determined that the charges against him had not been proven by sufficient credible evidence and ordered him reinstated to his former position. The ALJ reasoned that his termination was based on allegations, conjecture, and rumors.

Petitioner filed the appeal to this Court and argues that the ALJ's decision used an incorrect standard in determining the weight of the evidence, made incorrect credibility findings, and did not consider certain evidence which was introduced by the petitioner.

The Code of State Regulations provides

The grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.

156 CSR 1§ 3.

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY (6th ed. 1991).

Here, the ALJ ruled that "[w]here a definitive credibility determination cannot reliably be made from the evidence related to material facts in a disciplinary hearing, the employer cannot meet its burden of proof." The ALJ's Decision also stated that "[t]he evidence clearly establishes there was a friendship between Grievant and A.J. Unfortunately, whether it involved an inappropriate sexual relationship cannot be definitively discerned based on the testimony of the witnesses." This is a more stringent standard of proof than the preponderance of evidence standard required. Because the ALJ used the wrong standard in deciding this case, this Court reverses her Decision allowing Darby to return to work as a school bus driver.

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 541, 453 S.E.2d 374, 375 (1994) syl. pt. 2. West Virginia Code § 18A-2-8 provides the following:

- (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

W. Va. Code § 18A-2-8.

Although an ALJ is charged with assessing the credibility of the witnesses, this Court finds in light of the reliable, probative, and substantial evidence on the whole record, the ALJ was clearly wrong in determining that the Petitioner failed to prove its allegations against Darby by a preponderance of evidence standard.

RULING

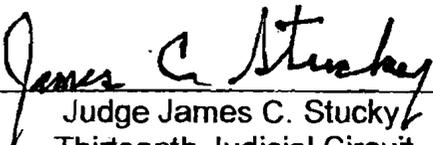
Accordingly, this Court Orders the following:

The Decision of the Board is **REVERSED**, and the termination of the employment of Jonathan Darby is upheld. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to all counsel of record:

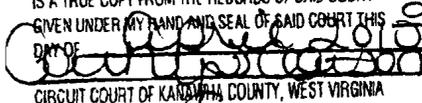
John Everett Roush, Esquire
Legal Services
WVSSPA
1610 Washington Street East
Charleston, WV 25311

James Withrow, Esquire
Kanawha County Schools
200 Elizabeth Street
Charleston, WV 25311

Enter this Order the 20th day of April, 2010.



Judge James C. Stucky
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20th
DAY OF April 2010


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. _____

JONATHAN DARBY,

Appellant,

v.

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA

Appellee.

COUNTY CLERK
KANE COUNTY, WV
REC'D

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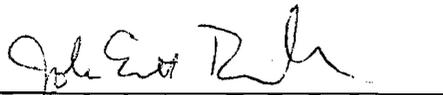
FILED

DESIGNATION OF THE RECORD

Now come the Appellant herein, by counsel, John Everett Roush, and designates the entire record of this case to be submitted with the Petition of Appeal in the above-styled case to the West Virginia Supreme Court of Appeals.

Respectfully submitted this the 14th day of August, 2010.

JONATHAN DARBY
By Counsel



John Everett Roush, Esq.
West Virginia School Service
Personnel Association
1610 Washington Street East
Charleston, West Virginia 25311
(304) 346-3544
State Bar I.D. No: 3173

CERTIFICATE OF SERVICE

I, John Everett Roush, Counsel to the Appellant, hereby certify that I have served the original and nine copies of the foregoing Docketing Statement and its attachments upon the following by hand-delivery on this the 14th day of August, 2010:

Ms. Cathy Gatson, Clerk
Circuit Court of Kanawha County
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

CATHY S. GATSON, CLERK
KANAWHA COUNTY JUDICIAL COURT

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FILED

Furthermore, a true and exact copy of the foregoing Docketing Statement and its attachments have been served upon the following by the depositing of the same in a properly addressed envelope, U.S. First Class postage affixed thereon, in the United States Mails on this the 14th day of August, 2010:

James Withrow, Esq.
Kanawha County Schools
200 Elizabeth Street
Charleston, WV 25311



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