

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

JONATHAN DARBY,
Appellant.

v.

Appeal No. _____
Civil Action No. 09-AA-87

KANAWHA COUNTY BOARD OF EDUCATION,
Appellee,

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PETITION OF APPEAL TO THE WEST VIRGINIA SUPREME COURT
OF APPEALS FILED ON BEHALF OF APPELLANT JONATHAN DARBY

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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I. Procedural History

By letter dated August 15, 2008, Superintendent Duerring notified Appellant that he was suspending Appellant with pay pending an investigation of allegations of a violation of Policy G50.08. A predisciplinary hearing evidentiary hearing was conducted on September 22, 2008 before a hearing officer appointed by Appellee. By letter dated November 19, 2008, Dr. Duerring notified Appellant that he had received the recommended decision from the hearing officer. He informed Appellant that Appellant's suspension had been changed from "paid" to "unpaid" status. Dr. Duerring also indicated that he would recommend Appellant's termination to Appellee. By letter dated December 2, 2008 and received by counsel the next day, Superintendent Duerring notified Appellant that the Appellee had terminated Appellant on December 1, 2008. Appellant appealed his termination directly to level III on December 9, 2008. The administrative law judge conducted an evidentiary hearing at level III to supplement the record on March 2, 2009. By decision dated April 9, 2009, the administrative law judge granted the grievance and ordered Appellant reinstated with compensation for lost wages with interest. Appellee filed an appeal to circuit court on or about May 13, 2009. By order entered April 20, 2010, the circuit court reversed the decision of the administrative law judge. Appellant seeks reversal of the decision of the circuit court and reinstatement of the decision of the administrative law judge.

II. Statement of Case

Jonathan Darby, Appellant, was employed by Appellee as a bus operator prior to the current litigation. The Kanawha County Board of Education, Appellee, is a quasi-public corporation created by statute for the management and control of the public

schools of Kanawha County.

During the 2007-2008 school year, Mr. Darby performed a bus route serving Herbert Hoover High School. In the spring of 2008, a young woman on Mr. Darby's bus, AJ¹, began talking with Mr. Darby concerning personal issues in her life. Mr. Darby had some acquaintance with AJ and her family, being a friend of AJ's uncle. Mr. Darby was also aware that AJ had previously been abused by an adult in an unofficial custodial relationship, i.e. her mother's live-in boy friend. He knew that her mother had been incarcerated as a consequence of that situation. Therefore, Mr. Darby knew that AJ's relationship with her immediate family was strained and that she might have no one else to whom she could talk. He thought it would be kind and helpful to simply listen to AJ.

AJ somehow acquired Mr. Darby's cell phone number² and began contacting him on his cell phone. The vast majority of the calls were either initiated directly by AJ or indirectly by Mr. Darby returning AJ's calls. AJ spoke about her relationship with her mother³ and her boyfriends. The topic of sex never came up.

On a few occasions Mr. Darby spoke with AJ at Herbert Hoover High School prior to his evening run. Mr. Darby would enter the school for various reasons such as need for a rest room break or simply to escape the heat in the air-conditioned school. Seeing him, AJ would come over and talk with him. On one occasion she came onto his bus briefly to speak with Appellant. The contact between AJ and Mr. Darby seems to have ended around early May 2008.

¹ This young woman has since married and is no longer a minor. Her initials would now be AB. For the sake of consistency, we will retain the initials AJ in the current document.

² Appellant has allowed students to use his cell phone on several occasions and theorizes that this is how AJ acquired the number.

³ The notes of the undersigned are not clear as to whether the references were to AJ's birth mother or her

At no time did Appellant and AJ have sexual relations. At the time, Mr. Darby did not believe that his relationship with AJ had any romantic overtones at all. In retrospect, Appellant believes that AJ may have been developed feelings for him during this time period.

III. Citation of Error

- A. The circuit court erred as a matter of law in holding that the administrative law judge did not apply the appropriate burden of proof in reviewing the evidence of this grievance.
- B. The circuit court erred in reversing a decision of an administrative law judge on factual issues without explaining the basis and rationale for his ruling.

IV. Citation of Authority

- a. West Virginia Code §6C-2-5
- b. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989)
- c. Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995)
- d. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).
- e. Black's Law Dictionary (6th Ed. 1991)
- f. The New Oxford American Dictionary (2nd Ed. 2005)

V. Argument

Prior to addressing the issues peculiar to this case, Appellant will address two general issues common to all administrative appeals from the West Virginia Education and State

Employees Grievance Board. The first of these issues is the standard of review applicable to this appeal. The second is the statutory construction to be applied to school personnel laws.

- **STANDARD OF REVIEW**

The appeal to the circuit court was controlled by West Virginia Code §6C-2-5. The language of this section is virtually identical to the language contained in the former section of law dealing with appeals of grievance board decisions, i.e. West Virginia Code §18-29-7. Hence, case law construing the latter section is applicable to West Virginia Code §6C-2-5 as well.

In construing West Virginia Code §18-29-7, the West Virginia Supreme Court of Appeals has held that the standard of review that it applies to the decisions of the circuit court is the same standard that the circuit court is to apply to decisions of the administrative law judge. The standard is two fold.

First, judicial review of a decision on factual issues is similar to the standard of review under the Administrative Procedure Act, § 29A-5-4, in that both require that evidentiary findings made at an administrative hearing not be reversed unless they are clearly wrong. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989) The West Virginia Supreme Court of Appeals has explained how the “clearly wrong” standard of review for factual questions is applied in Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995). In Martin, the Court held that the reviewing body in such situations must, “uphold any of the ALJ’s factual findings that are supported by substantial evidence, and ... owe substantial deference to inferences drawn from these facts. Further, the ALJ’s credibility determinations are binding unless patently without basis in the record.”

On legal issues or the application of the law to facts, decisions are reviewed *de novo*. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399 (W.Va. 1995)

- STATUTORY CONSTRUCTION

The long-standing rule regarding statutory construction of laws and regulations dealing with school personnel is that such laws and regulations are to be strictly construed and in favor of the employee(s) that the law or regulation is designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Now let us proceed to the specific issues raised by this appeal.

A DID THE ADMINISTRATIVE LAW JUDGE APPLY THE APPROPRIATE BURDEN OF PROOF TO THIS GRIEVANCE?

It is well-settled law that the employer has the burden of proof in disciplinary matters and that the burden of proof is to establish the charges against the employee by the preponderance of the evidence. Further, proof by 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).

The circuit court held that the administrative law judge did not apply the appropriate burden of proof to the evidence of the record. On page 3 of the final order the circuit court stated:

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 the burden of proof." The ALJ's decision also stated that "[t]he evidence clearly established 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 the 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 operator.

Appellant contends that the circuit court erred in interpreting the language of the Administrative Law Judge as applying a higher burden of proof than proof by a preponderance of the evidence. Appellant contends that the language used by the Administrative Law Judge was merely a paraphrase or restatement of the formula for preponderance of the evidence burden of proof. In essence, the Administrative Law Judge held that conflicting evidence was presented on the issue of whether an inappropriate sexual relationship existed between Appellant and A.J. As a consequence, she was obligated to make a judgment as to the credibility of the evidence to determine which was more persuasive. She did so and found that the evidence in support of the existence of such an inappropriate relationship was not more credible than the evidence contradicting the existence of such an inappropriate relationship. In short, Appellee was not able to establish that it was more probable than not that such a relationship existed. That being the case, Appellee did not carry the burden of proof and therefore lost.

The circuit court seems to have latched onto the word “definitive” and asserted that the administrative law judge was applying the standard of proof by “clear and convincing evidence” as opposed to proof by preponderance of the evidence. That is not quite correct. “Definitive” is defined principally as meaning “done or reached decisively and with authority”. Decisive in turn means “settling an issue, producing a definite result”. The New Oxford American Dictionary (2nd Ed. 2005) There is no indication in the

decision of the Administrative Law Judge to indicate that she used the term “definitive” in any other sense than “one side outweighs the other”, which is in accord with the preponderance of the evidence standard.

Second, note that the circuit court reversed the Administrative Law Judge’s decision based upon this alleged error in application of the appropriate burden of proof. An error in application of the burden of proof would only justify reversal of the decision if the Administrative Law Judge reached the wrong decision as a consequence. Otherwise, the error would be harmless.

B. DID THE CIRCUIT COURT ERR IN REVERSING A DECISION OF AN ADMINISTRATIVE LAW JUDGE ON FACTUAL ISSUES WITHOUT EXPLAINING THE BASIS AND RATIONALE FOR HIS RULING.

Circuit Court reversed the ruling of the Administrative Law Judge on a factual issue. In doing so the Circuit Court held on page 4 of the final order the following:

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 the allegations against Darby by a preponderance of the evidence standard.

As the administrative law judge’s credibility determinations are *binding* unless patently without basis in the record, reaching the conclusion that she was clearly wrong required to Circuit Court to conclude that there was *no basis* in the record for the Administrative Law Judge’s decision. In short, the circuit court had to conclude that the record lacked any evidence in support of the finding that an

improper relationship was not proven to have existed between Appellant and AJ. Such a finding is incredible. Even Appellee admitted *in effect* that there is a basis in the record for the credibility judgments of the administrative law judge, because it attacked those criteria in its brief to the circuit court. For example, the Appellee contended it was improper to discount AJ's contention that she had sex with Appellant because she could not give a time frame for the act and because she initially denied such a relationship when speaking with her stepmother. Whether one agrees with the reasoning or not, it is clear that there is a basis in the record for the findings of the Administrative Law judge.

The circuit court was not charged with second guessing the credibility judgments of the administrative law judge. In Martin this court held that the circuit court had to

... uphold any of the ALJ's factual findings that are supported by substantial evidence, and [the circuit court] owe substantial deference to inferences drawn from these facts. Further, the ALJ's credibility determinations are binding unless patently without basis in the record.

Given the limitations on the scope of the review permissible for the circuit court, the circuit court should have simply determined whether or not there was any basis in the record for the Administrative Law Judge's credibility judgments. Clearly, the circuit court went beyond the statutory limitations of its review.

This court must now, though, apply the appropriate standard of review to the order of the circuit court. In Martin this court made it clear that when it reviewed a decision of a circuit court that *affirmed* an Administrative Law Judge's findings of fact, it would give considerable deference to said findings. In the present case the circuit court reversed

the decision of the Administrative Law Judge. Thus, it is not clear what deference this court owes to the circuit court's factual determinations. However, even in cases in which the circuit court affirmed the findings of the Administrative Law Judge, this Court determines whether the ALJ's findings were reasoned, i.e., whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record. If this court applies these same criteria to the order of the circuit court, it comes up woefully short.

The circuit court did not explain the factors upon which it relied in reversing the decision of the Administrative Law Judge nor did it lay out its reasoning process. It simply said that the Administrative Law Judge was clearly wrong. Presumably, it had a reason for reversing the decision, but it did not see fit to reveal it.

Of course, the overarching question is whether the decision of the Administrative Law Judge was supported by evidence in the record. Appellant contends that not only is there ample evidence in the record to support the Administrative Law Judge's decision, the evidence as a whole virtually dictates that decision.

Let us begin by briefly reviewing the documentary and testimonial evidence introduced in the two evidentiary hearings, starting with the evidence presented at the pre-disciplinary hearing on September 22, 2009.

The first piece of documentary evidence is the purported journal of AJ. There is only one reference to a "John" in the entire document. It is on the page dated April 15, 2008. This part of the document is "decorated" with doodling. No other part of the journal, except the title page, contains doodles. This may mean that this portion was added by another hand. The journal was offered by a witness (Ms. Webb) who had in

turn obtained the document from her daughter (Mara) who was a friend of AJ. Allegedly Mara found the journal after AJ, who had temporarily left home to live with Mara, left Mara's house to live with her grandmother. We should note that Mara was not present to testify in support of this claim. Although AJ identified the document at level III, she gave it only a cursory examination. For that reason and because of the actual contents of the document, it would still appear to be of very little value in proving Appellee's case. Besides being a tedious read, the undersigned notes that journal provides no corroboration to the notes *allegedly* found by AJ's stepmother, Ms. Jarvis.

These "notes" constitute the second bit of evidence, although it is difficult to describe them as "documentary". AJ's stepmother claims to have found notes that recorded various steps in the progression of the alleged physical relationship between AJ and Mr. Darby, culminating in the two of them "doing it" on April 30, 2008. Of course Ms. Jarvis could not provide these notes, though she was "gracious" enough to tell us what they said. We are supposed to accept, solely on her word, not only the existence of the notes, the authenticity of the notes and her interpretation of what they meant. Rather than documentary evidence, these "phantom" notes constitute a particularly dubious brand of hearsay evidence. The notes were also not introduced at the level III hearing, though AJ was at that hearing. These phantom notes can be safely disregarded.

Next, let us address the testimony of Ms. Webb and Ms. Melissa Jarvis.⁴ It is obvious that these individuals suspect an improper relationship between AJ and Mr. Darby. However, they offered only conjecture and innuendo in support of their charge. They only provided a few bits of "corroborative" details, i.e. description of Mr. Darby's vehicle and the date of his bus accident. This information could have been easily obtained in a

⁴ Ms. Jarvis is AJ's stepmother. Ms. Webb's stepdaughter, Mara, is AJ's sister or perhaps her half sister.

variety of ways. Having conceived the suspicion of an illicit relationship between AJ and Appellant, is it not possible that the two could have invented details to insure that "justice" was done? Ms. Jarvis' admission (or boast) that she was good at snooping is very suggestive.

The two crucial witnesses in this case were AJ and Mr. Darby. AJ did not testify until the level III hearing. We will discuss her testimony at level III later in this document. However, the transcript of AJ's interview with the state trooper was introduced at the predisciplinary hearing. It is, as far as the undersigned can tell, unsworn. In the interview, AJ at one point denied a sexual relationship with Appellant and at another point admitted to a sexual relationship with Appellant. It is interesting to note, that on p. 15 of the transcript of the interview, AJ indicates that she and Appellant went back into the woods to have sex. This is at odds with her later testimony.

We should also note that when assessing AJ's interview with the police officer and her later testimony at level III, that AJ seems to have been under enormous pressure to admit, or at least to claim a sexual relationship with Mr. Darby. This is apparent from the testimony of Ms. Webb and Ms. Jarvis.

At the predisciplinary hearing, Mr. Darby denied a romantic, much less sexual, relationship with AJ. He admitted to long telephone conversations with AJ, but testified that the conversations were: (a) not related to sex; (b) were initiated by AJ; and (c) were tolerated by Mr. Darby on altruistic grounds, i.e. he thought he could help by just listening. Appellant's testimony at level III was consistent with his testimony on September 22, 2008.

Let us now move to the evidence introduced at level III. At level III, AJ testified,

albeit very reluctantly. Her testimony painted a much different picture than had emerged at the previous hearing. For one thing she hardly mentioned the cell phone conversations and did not mention seeing Appellant at her school or at her home. She indicated that she spent time with Appellant mostly at her place of employment.⁵ She indicated that they would talk while she was on her break. Appellant admits to stopping at this store, as it was the closest one to his place of work, i.e. the bus garage. However, he denied doing so for the purpose of seeing AJ.

It seems astounding that AJ had little recollection of or attached little importance to the extensive phone conversations with Appellant. We know the calls took place as Appellant admits to them and the phone records were been introduced into the record. In fact, these phone records were the centerpieces of Appellee's case.

At level III AJ claimed that she was living with her grandmother when her alleged sexual encounter with Appellant happened. From the evidence adduced at the predisciplinary hearing, it appeared that AJ was living with Ms. Webb and Mara when the carnal encounter with Appellant allegedly occurred. Otherwise, how could the event have been "recorded" in her journal, which she apparently left behind when she moved out? Of course, no one has been particularly precise as to when the event was supposed to have occurred. AJ couldn't remember the date. This inability of AJ to pinpoint of date ought to result in her claims being set aside completely. The administrative law judge was correct to hold that this failure severely undercut AJ's credibility.

The failure to specify a date or time when an alleged "event" took place eliminates an important defense in the arsenal of the accused, i.e. the alibi. By AJ being vague about the date when the "event" is alleged to have occurred, Appellant is

⁵ The notes of the undersigned indicate that the establishment in Elkview, West Virginia was named

prevented from establishing an alibi. It is impossible for establish an alibi for a time period of a month or more. It is simply not fair to deprive the accused of this opportunity.

It is clear that the evidence produced by Appellee at the predisciplinary hearing and that which it produced at level III creates two different and, in general, contradictory "story lines". What are we to make of the radically different pictures presented on September 22, 2008 and March 2, 2009? For example, if we take as true Aj's testimony we would have to conclude that the alleged courtship was conducted face to face at "Smith's" and done so at record speed, too, unless the length of breaks for minimum wage employees has greatly increased in the last thirty years. On the contrary, if we take as true Appellee's "story line" from the predisciplinary hearing, the romance was conducted in a more modern fashion by cell phone. Appellant asserts that neither picture is true, the one being a concoction of Aj and the other a tale spun by the Webb/Jarvis duo. For the party with the burden of proof, i.e., Appellee, the existence of two competing story lines should spell doom in this present case.

Finally, Aj's testimony not only set up a general picture contrary to the one drawn by Appellee and its accomplices⁶ at the predisciplinary hearing, it also contradicted certain specific aspects of the evidence introduced at the predisciplinary hearing. First, Aj told the police officer in the interview that she and Appellant had went into the woods and had sex. At level III, Aj said that they had sex in Appellant's truck. Given Aj's inability to tell us where "it" happened and when "it" happened, how can we credit her testimony regarding whether "it" happened?

It is true that, in retrospect, Mr. Darby should have tried to gently terminate the

"Smith's".

conversations with Aj and steer the girl to counseling. (The traditional advice of directing a child to talk with his/her parents about his/her concerns seems to have been problematic at best for Aj. It is unclear to the undersigned whom among the possibilities (Aj's birth mother, her absent father or her stepmother) best fits the description of parent.

Mr. Darby's conduct was probably unwise. However, before we judge Appellant too harshly on this count, we need to step into his shoes. Suppose he had brushed Aj off when she first spoke to him of her problems. In such a case there was always the possibility that when he opened his newspaper the next day, he would learn to his horror that Aj had run away from home or taken a handful of sleeping pills or hanged herself. Perhaps we exaggerate, but one can never know exactly how a teenager will react. One can see how Mr. Darby might conclude that the best course was just to listen to Aj and hope that her difficulties and her dependence on him as a listening post would gradually fade away. Actually, that is just what happened and it is all that would have happened had not Aj's stepmother and Ms. Webb intervened, apparently against Aj's will. As to what motivated Ms. Webb and Ms. Jarvis to press the claim on Aj's behalf, we can only speculate. At this point, the undersigned declines to do so.

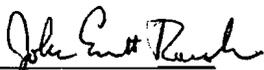
In reality, Appellee's case hangs on a pair unsupported prejudices. The first is that every man over the age of twenty-five must find every seventeen year old girl irresistible. Secondly, as a result of this irresistible attraction, any kindness or attention bestowed by such a man on a seventeen-year old girl must be in the service of procuring a sexual relationship with said teenager. (As the circuit court did not explain its reasoning it impossible to know if it adopted these prejudices.) If you throw out the assumption that

⁶ Chiefly, we here refer to Ms. Webb and Ms. Jarvis.

Mr. Darby had to have been attracted to AJ and that every action he took had to be designed to draw her into an intimate relationship, Appellee's case disintegrates.

If Mr. Darby's actions merit anything, it should be an admonishment to consider how one's conduct may appear to others with lively and sensual imaginations. This should be accompanied by inservice training concerning: (a) the necessity of maintaining a professional distance from students, even if you have known them all your life; and (b) judging when a student is suffering the normal *angst* of growing up and can be ignored or is in serious trouble requiring a report to the appropriate authorities. Of course, such training would be useful to all of Appellee's employees.

JONATHAN DARBY, Appellant
By counsel,


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CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for the Appellant, hereby certify that I have filed the original and nine copies of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals Filed on Behalf of Appellant Jonathan Darby" on the following by hand delivery, this the 19th day of August 2010 to:

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

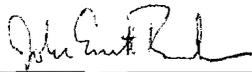
CATHY S. GATSON, CLERK
KANAWHA COUNTY JUDICIAL ANNEX

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Further, I John Everett Roush, Esq., counsel for Appellant, certify that I have served a true copy of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals Filed on Behalf of Appellant Jonathan Darby" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 19th day of August 2010, to:

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