

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

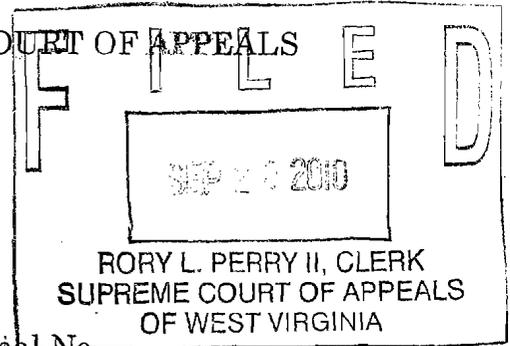
JONATHAN DARBY,

Petitioner,

v.

BOARD OF EDUCATION OF THE  
COUNTY OF KANAWHA,

Respondent.



Appeal No. \_\_\_\_\_  
Civil Action No. 09-AA-87

RESPONSE TO PETITION FOR APPEAL

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### Procedural Background

The petitioner has filed this appeal of a order of the Circuit Court of Kanawha County, West Virginia, which order reversed a decision of the West Virginia Public Employees Grievance Board. The petitioner filed a grievance directly at Level III grieving his dismissal as a school bus operator for Kanawha County Schools on December 9, 2008. The Administrative Law Judge for the West Virginia Public Employees Grievance Board issued a decision on April 9, 2009, determining there was insufficient definitive evidence for the petitioner to be dismissed from his employment.

The respondent then appealed the decision to the Circuit Court of Kanawha County, which issued an order on April 20, 2010, finding that the decision of the ALJ for the Grievance Board incorrectly applied the wrong standard in the evaluation of the evidence and reversed the decision. The Circuit Court found that “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.” It is from this order that the petitioner has filed his appeal.

### Facts

The Administrative Law Judge made the following findings of fact:

1. Grievant<sup>1</sup> was employed by Respondent as a Bus Operator.
2. During the 2007-2008 school year, Grievant's bus route served Herbert Hoover High School.

3. In the spring of 2008, A.J.<sup>2</sup>, a 17 year old female student at Herbert Hoover High School, began riding Grievant's bus. Grievant knew A.J. and her family and considered himself a family friend.

4. On several occasions, Grievant has allowed students on his bus to use his cell phone.

5. A.J. acquired Grievant's cell phone number and began contacting him frequently. The two participated in a number of lengthy telephone calls, discussing A.J.'s problems with her mother, step-mother, and boyfriend.

6. Grievant would also speak with A.J at Herbert Hoover High School prior to his evening run. He would enter the building for various reasons, and A.J. would come and speak to him. On one occasion, she boarded his bus to speak with him.

7. Grievant talked to A.J. in an attempt to help her deal with her personal issues.

8. Grievant did not feel as if he could refer her to an adult in her family, given A.J.'s family history.<sup>3</sup>

9. Grievant did not have any counseling experience, and did not refer A.J. to a school counselor.

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<sup>1</sup> In the Level III decision the respondent is referred to as "grievant."

<sup>2</sup> A. J. is the KCS student with whom the petitioner believes the respondent had a romantic and sexual relationship.

<sup>3</sup> A.J. was sexually abused by her mother's live-in boyfriend. This resulted in both her mother and the boyfriend being incarcerated. Grievant lived with her father and step-mother, but from the testimony it appears as if she also lived with friends and other relatives throughout this time period.

10. The contact between A.J. and Grievant ended sometime in or before early May, 2008, when A.J. and her boyfriend reconciled.

11. In June, 2008, Marcie Webb, a parent whose daughter rode Grievant's bus, complained to George Beckett, Director of Pupil Transportation, that Grievant was having an inappropriate relationship with A.J.

12. Respondent investigated the matter, and also reported it to the West Virginia State Police.<sup>4</sup>

13. By letter dated December 2, 2008, Grievant was notified that he had been terminated by Respondent.

So far as these findings go, they are generally accurate. However, there are many facts that the ALJ neglected to recite, including the fact that the respondent had numerous and lengthy telephone conversations with the student, the student maintained a diary of her feelings for and interactions with the respondent and the student testified that she had sexual relations with the respondent on one occasion.

#### Standard of Review

The Court reviews appeals from the West Virginia Public Employees Grievance Board under West Virginia Code §6C-2-5. This Code section provides, in part:

The decision of the administrative law judge shall be final upon the parties and shall be enforceable in the Circuit Court of Kanawha County.

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<sup>4</sup> The West Virginia State Police took a statement from A.J., and referred the case to the Kanawha County Prosecuting Attorney's Office which declined to prosecute the case.

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or lawfully adopted rule, regulation or written policy of the employer;
- (2) Exceeds the administrative judge's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

A decision of a hearing examiner for the West Virginia Education and State Employees Grievance Board, based upon findings of fact, should not be reversed unless it is clearly wrong. *Parham v. Raleigh County Board of Education*, 192 W. Va. 540, 387 S. E. 2d 374 (1994); *Putnam County Board of Education v. Andrews*, 198 W. Va. 403, 481 S. E. 2d 498 (1996); and *Keatley v. Mercer County Board of Education*, 200 W. Va. 487, 490 S. E. 2d 306 (1997). The standard of review is narrow, and the Court is not to substitute its judgment for that of the hearing examiner. *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S. E. 2d 399 (1995).

#### Question Presented

The petitioner has framed the issue in this manner:

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

More simply stated the petitioner's primary complaint appears to be that the Circuit Court acted in an arbitrary and capricious manner. As set forth below, the Circuit Court's decision is not arbitrary or capricious because, once the Court determined that the ALJ had applied the wrong standard in reviewing the evidence, the ALJ's decision was contrary to law and clearly wrong.

#### Discussion

The petitioner's complaints concerning the decision of the Circuit Court are unwarranted.

156 CSR 1 §3 provides:

#### **§156-1-3. Burden of Proof**

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.

As stated above the burden of proof in any grievance case is preponderance of the evidence. 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). As is often informally stated preponderance of the evidence means that it is "more likely than not" that the fact to be proven is true. In this case, 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.” The Circuit Court found that was a “more stringent standard of proof than the preponderance of evidence standard required”, and further ruled that “[B]ecause 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.

Even the definition of definitive contained in the petition for appeal states that definitive means "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). A simple reading of this language leads to the conclusion that the term definitive implies more than merely “more likely than not.” Without attempting to get too bogged down in definitions, another source describes definitive as “most reliable or complete.” Random House Unabridged Dictionary (2010). Furthermore synonyms for “definitive” include the terms “absolute, actual, categorical, clear-cut, conclusive, decisive, exhaustive, flat out, nailed down, perfect, precise, ultimate and unambiguous.” These synonyms certainly imply that definitive means more than just “more probable than not.”

As shown above, the standard of requiring definitive proof is a more stringent standard than a preponderance of the evidence. Definitive proof appears to be closer to one of “clear and convincing evidence.” To require an employer to have

definitive or clear and convincing evidence of misconduct prior to taking disciplinary action against an employee would place the board of education in an untenable situation. In many cases the only evidence the board has is the statement of a student who has been harassed or assaulted by a teacher or other employee. While the respondent does not take lightly the rights of its employees, the protection of students under our care is the most important duty we have. In most instances employees do not abuse students in the presence of other individuals. The board of education must rely on the statements of victims in order to determine if a violation has occurred. Alleged perpetrators rarely agree to be interviewed or admit that they have engaged in misconduct. Therefore, in most instances, obtaining definitive proof that an employee has committed an inappropriate act is difficult, if not impossible.

If the requirement of definitive proof is utilized, it would put the board in a vulnerable position in civil litigation which may be instituted by students claiming harassment or abuse. In civil litigation the standard is preponderance of evidence. If the board were unable to act to protect a student without "definitive" proof, and later a jury determined that the alleged act had occurred using a preponderance of evidence standard, the board could be subject to liability and damages for failing to take appropriate action.

When allegations of improper conduct are made against an employee, school districts struggle to determine the appropriate course of action. Balancing the rights of employees with the rights of students is a difficult task. Creating a higher

burden in order to reach that conclusion makes that job more difficult and could mean that more students will be subject maltreatment.

Based on the foregoing, it was not arbitrary or capricious for the Court to determine that requiring "definitive" proof of wrongdoing by a school employee held the respondent to a higher standard than required, and the Court did not act in an arbitrary or capricious manner in reversing the decision of the ALJ.

Having determined the ALJ utilized the incorrect standard of proof in weighing the evidence in the case, the Circuit Court concluded that the respondent had, indeed, met its burden of proof. Since the ALJ used the wrong standard in weighing the evidence, the ALJ's decision is not entitled to or afforded any deferential treatment or consideration. The Circuit Court's had to determine if the respondent had met its burden in order to terminate the petitioner's employment. The Court had the entire record of the previous proceedings before it. All of the testimony, exhibits and other evidence adduced at the petitioner's pretermination hearing and the Level III grievance hearing were available to the Court. Having reviewed this information, the Court concluded that the evidence presented against the petitioner was sufficient to justify his dismissal. Again the Court did not act in an arbitrary or capricious manner in making this decision.

The petitioner expends considerable amount of effort in the petition for appeal attacking the testimony and credibility of A. J. This is no doubt because A. J.'s testimony is the only direct evidence against him. A. J., whose father would not

permit her to come the pretermination hearing,<sup>5</sup> was subpoenaed to testify at the Level III hearing. A. J., while seemingly very reluctant and hesitant to testify, stated unequivocally that she and the petitioner had a romantic relationship, and they had sexual relations on one occasion.

The petitioner faults the student for not being able to provide a specific time the sexual activity occurred. The student testified that it occurred one evening in the woods near Cooper's Creek and that she was driven there by the respondent in his truck. It is true that the student could give not a specific date that this occurred; however, this is not surprising given the age and immaturity of the student. Teenagers are notoriously hazy about specifics of things that have happened in the past. In this case A. J.'s testimony was given over a year after her last contact with the petitioner. Given the fact that A. J. had moved on with her life, was married and expecting a baby, it is not unreasonable to believe that she could not remember the exact date that she and the petitioner had engaged in sexual activity.

Moreover, A. J. had no reason to fabricate a story about the petitioner. Their relationship was over, and she was involved with another man. She simply could have come to the hearing and said that nothing had happened between the two of them, and the hearing would have been over. She had not provided incriminating testimony concerning the petitioner previously, so she was not emotionally invested in maintaining a story that was not true.

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<sup>5</sup> A. J.'s father believed that she had been traumatized enough by her mother's boyfriend and the petitioner and did not think she should be subjected to more distress.

Teenagers are almost always focused on looking to the future. What happened in the past is over and forgotten almost as quickly as it occurred. To find the student not to be credible because she could not state the exact date, time and place that the encounter occurred is placing too much burden on a young female student who was obviously infatuated with the respondent.

There was also additional evidence corroborating the relationship between A. J. and the petitioner. Just one example is during the months of April and May, 2008, the student maintained a journal or diary in which she documented her feelings and the relationship with the petitioner. This diary was presented at the petitioner's pre-disciplinary hearing. At the Level III hearing, A. J. identified the diary as hers and testified that all references to male romantic interests contained in the journal were directed at the petitioner. In this diary A. J. makes numerous statements about being touched by Mr. Darby (April 14, 15, 23 and May 3), kissing and hugging Mr. Darby (April 23, 24 and May 3) about Mr. Darby telling A. J. that he loves her (April 15 and 23) and about their plans to be together in the future.

This is very compelling, incriminating and contemporaneous evidence of the petitioner's wrongdoing. The testimony of A. J., the presence of her journal and the other circumstantial evidence presented constitute a sufficient basis for the Circuit Court to determine that it was "more probable than not" that an inappropriate relationship existed between the petitioner and A. J.

#### Conclusion

Based on all of the foregoing, the respondent, Kanawha County Board of Education, respectfully requests that the Court determine that the decision of the Circuit Court was clearly correct on its face and refuse the petition for appeal filed by the petitioner herein.

Respectfully submitted  
KANAWHA COUNTY BOARD  
OF EDUCATION  
By Counsel



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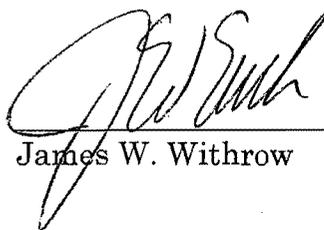
BOARD OF EDUCATION OF THE  
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CERTIFICATE OF SERVICE

The undersigned, James W. Withrow, Counsel for the Board of Education of the County of Kanawha, hereby certifies that on the 17<sup>th</sup> day of September, 2010, I served the foregoing RESPONSE TO PETITION FOR APPEAL by mailing a true and correct copy thereof, postage prepaid to the following individual:

John E. Roush  
West Virginia School Service  
Personnel Association  
1610 Washington Street East  
Charleston, WV 25311



James W. Withrow