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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 11-0243
Civil Action No. 10-C-327 (Circuit Court of Kanawha County)

BOARDS OF EDUCATION OF THE COUNTIES OF:
BARBOUR, BERKELEY, BOONE, BRAXTON, BROOKE,
CABELL, CALHOUN, CLAY, DODDRIDGE, FAYETTE,
GILMER, GREENBRIER, HAMPSHIRE, HANCOCK,
HARDY, HARRISON, JACKSON, JEFFERSON, KANAWHA,
LEWIS, LINCOLN, LOGAN, MARION, MARSHALL, MASON,
McDOWELL, MERCER, MINERAL, MONROE, MORGAN,
NICHOLAS, PENDLETON, PLEASANTS, POCAHONTAS,
PUTNAM, RALEIGH, RANDOLPH, RITCHIE, ROANE,
SUMMERS, TAYLOR, TUCKER, TYLER, UPSHUR,
WEBSTER, WETZEL, WIRT, WOOD, and WYOMING,
Petitioners,

v.

PUBLIC EMPLOYEES INSURANCE AGENCY, PUBLIC
EMPLOYEES INSURANCE AGENCY FINANCE BOARD, and
WEST VIRGINIA STATE AUDITOR,
Respondents

AMICUS CURIAE BRIEF FILED ON BEHALF OF THE WEST VIRGINIA SCHOOL SERVICE PERSONNEL ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS – WEST VIRGINIA

THE AMICUS CURIAE BRIEF IS FILED IN SUPPORT THE PETITIONERS AND SEEKS REVERSAL OF THE DECISION OF THE CIRCUIT COURT

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE

The West Virginia School Service Personnel Association, hereinafter referenced as WVSSPA, is an employees' association which represents non-professional employees of county boards of education in West Virginia. The WVSSPA has members who are employees of every county board of education in West Virginia, including members who are employees of each of Petitioners. The WVSSPA is affiliated with the American Federation of Teachers- West Virginia, hereinafter referenced as AFT-WV.

The AFT West Virginia represents over 16,000 education employees in West Virginia and is the largest union in the state. Nationally, the AFT represents 1.5 million pre-K through 12th-grade teachers, paraprofessionals and other school support

employees, higher education faculty, nurses and other healthcare workers, and state and local government employees.

ARGUMENT

The statement of the case set out in the Petition of Appeal to the West Virginia Supreme Court of Appeals provides a more than adequate identification of the parties and the back drop of the current controversy.[1] The amicus curiae can add little if anything to this presentation and will not burden the court with a mere restatement of the facts of the case.

Similarly, the Petitioners have done an excellent job of presenting their legal arguments to this court. However, Amicus Curiae would like to address several points of law.

Standard of Review

In the Petition of Appeal, Petitioners correctly argued that legal issues are reviewed *de novo* and factual issues are reviewed on the clearly wrong standard of review. Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996). Petitioners also correctly identified the issue concerning the Circuit Court's conclusion that the Petitioners' complaint raised a nonjusticiable question as a legal issue and the question of the

[1] The undersigned, counsel for the West Virginia School Service Personnel Association and the American Federation of Teachers – West Virginia, is the sole author of this brief. Counsel for a party did not author this brief in whole or in part. No monetary contribution was made by a party or any group or individual other than the amicus curiae to fund, in whole or in part the preparation of this brief.

circuit court's finding that the complaint raised issues of funding with respect to OPEB as a factual issue.

These assertions are clearly accurate representations of the law and the nature of the issues involved. We would like to note that the standard of clearly wrong as applied to factual questions is more searching than meets the eye. This court 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 [finder of facts'] factual findings that are supported by substantial evidence, and ... owe substantial deference to inferences drawn from these facts. Further, the [finder of facts'] credibility determinations are binding unless patently without basis in the record." The reviewing body would nonetheless be obligated to "determine whether the [finder of facts'] 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."

The Petitioners assert that the appropriate standard of review applicable to the circuit court's refusal to entertain the declaratory judgment action should be an "independent review", a sort of middle ground between a *de novo* review and an abuse of discretion review. WVSSPA & AFT-WV would agree that the standard of review in this case ought to be more rigorous than a review based upon the abuse of discretion standard. However, we would urge the court conduct a *de novo* review on this issue. In support of this assertion, we cite the following language from Randolph County Board of Education v. Adams, 467 S.E.2d 150, 164 (W.Va. 1995):

> This appeal arises from the circuit court's granting of a pretrial motion to dismiss in a declaratory judgment action. Accordingly, our review of the issue arising from this dismissal is plenary. As we recently noted in Syllabus Point 3 of Cox v. Amick, ___ W. Va. ___, ___ S.E.2d ___ (No. 22799 12/11/95):
>
> "A circuit court's entry of a declaratory judgment is reviewed de novo."
>
> Similarly, in Syllabus Point 2 of State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., ___ W. Va. ___, 461 S.E.2d 516 (1995), we stated:
>
> "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo."
>
> Most importantly, the issue presented in this appeal is a matter of construction of our Constitution and mandates de novo review by this Court.

We do not wish to blur the subtle but real distinction between the legal issues in controversy in this case and the discretion enjoyed by the circuit court in determining whether to entertain a declaratory judgment action. However, the similarities of the procedural history of Adams and the current case are obvious. Further, the present case, like Adams, involves the construction of our constitution. These similarities between the cases all point to application of the same standard of review, i.e., a *de novo* standard of review.

A. The Circuit Court erred in concluding that Petitioners' complaint raised a nonjusticiable question.

WVSSPA & AFT-WV whole heartedly endorse the positions taken by the Petitioner that the issue presented in this case is not how OPEB will be funded, but

whether the liability may be imposed upon Petitioners. However, we would assert that the present case presents a justiciable issue even conceding, *arguendo,* the circuit court's conclusion that the real issue is how the OPEB will be funded and that granting the relief to Petitioners would result in prioritizing various budget concerns for the people of West Virginia.

The concern of the Circuit Court is not ridiculous. In a vacuum, the question whether priority should be given to quality education or quality roads, for example, would be a political question. However, we are not operating in a vacuum.

One may be familiar with the phrase, "*Roma locuta est, causa finita est*".[2] A similar principle may be applied to questions settled by the state constitution. In the present controversy, the state constitution settles the question of whether priority is given to quality education or some other concern. The constitution clearly indicates that priority is given to providing a high quality education for the children of the state. The framers of our constitution decided that investment in human capital was of the prime importance and guaranteed the people of West Virginia a thorough and efficient education. West Virginia Constitution Article XII, Section 1. Education must be given priority ahead of *every* other state function. Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979)

Accordingly, the question is not whether or not priority should be given top priority. The question is rather whether the action taken by the executive and legislative branches seeks to alter the constitutional mandate that provision of a quality education is given first priority. By its very refusal to enforce the constitutional mandate, the circuit court questioned the wisdom of that self-same constutional mandate. The Circuit Court

[2]" Rome has spoken, the case is closed."

essentially concluded that the legislature should not have its discretion to decide as to the funding priority for education fettered by the constitutional requirement that education receive top priority.

Courts should not be concerned with the wisdom of a constitutional provision. Rather courts should seek enforcement of such provisions. Randolph County Board of Education v. Adams, 467 S.E.2d 150, 157 (W.Va. 1995): By refusal to even consider requiring state government to comply with requirements of our constitution, the Circuit Court failed to fulfill a crucial responsibility.

B. The Circuit Court erred in concluding that the complaint did not satisfy the factors relevant to determining whether a court should entertain a declaratory judgment action.

WVSSPA and AFT-WV concur and endorse the arguments of Petitioner in the Peititon of Appeal on this point of and do not desire to simply restate Petitioners' arguments. However, we would like to emphasis certain points,

The Circuit Court erred in concluding that the controversy at issue involves uncertain and contingent events.

Even if Petitioners are never required to pay the full OPEB liability, their budgetary decisions will still be significantly impacted by the billing of the total OPEB liability. Consequently, the controversy at issue does not involve uncertain and contingent events

Petitioners are presently required to report the OPEB liability as a current liability. If not paid, this total liability will accumulate from year to year. (We will stay out of the

question as to whether this growth will be exponential or not.) Petitioners simply cannot ignore a liability that continues to accumulate.

County boards of education are required to maintain a balanced budget. West Virginia Code §11-8-26. While it is true that a board of education cannot be penalized for a casual deficit, the OPEB liability would probably not meet the definition of a causual deficit.

West Virginia Code §18-1-1(o) defines a casual deficit as, "a deficit of not more than three per cent of the approved levy estimate or a deficit that is nonrecurring from year to year." The OPEB liability,as it accumulates from year to year, would ultimately exceed three per cent of Petitioners' budgets and the liability would recur from year to year *ab initio*. Failure to maintain a balanced budget or a budget with only a casual deficit would have dire consequences for Petitioners, up to and including loss of local control of the school system. West Virginia Code §18-2E-5(p)(4)(B) & (C).

The Circuit Court erred in concluding that there does not exist a substantial controversy among adverse parties.

WVSSPA and AFT-WV endorse the arguments presented by the Petitioners and have nothing further to add.

The Circuit Court erred in concluding that allowing the case to proceed would not serve a useful purpose and would not settle the underlying controversy.

Again, WVSSPA and AFT-WV agree whole heartedly agree with position of the Petitioners on this point. Removing the total OPEB liability from Petitioners would free

them from the necessity of dealing with a financial burden that they cannot in good conscience ignore. It is clear that Petitioners are unable to bear the burden of the total OPEB liability. This court has already determined that "...if the local government cannot carry the burden, the State must itself meet its continuing burden." Randolph County Board of Education v. Adams, 467 S.E.2d 150, 157 (W.Va. 1995):

WVSSPA and AFT-WV would like to make one final observation. In State ex rel Board of Education , etc., v. Rockefeller, 281 S.E.2d 131, 135 (W.Va. 1981), this court held:

> ... we place an affirmative burden on the State to factually demonstrate the financial necessity of cutting back on the expenditures for public education which has been accorded a constitutional preference.

In the present case the imposition of the total OPEB liability on Petitioners is not a cut back in funding. However, it has *exactly* the same effect, i.e., reduction of the funds available to Petitioners to provide a quality education to the children of this state.

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WEST VIRGINIA STATE AUDITOR,
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CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association and American Federation of Teachers- West Virginia, hereby certify that I have served a the original and ten true copies of the foregoing "Amicus Curiae Brief Filed On Behalf Of The West Virginia School Service Personnel Association And The American Federation Of Teachers – West Virginia" on the following by hand delivery on this the 20th day of July 2011, to:

Rory L. Perry, II, Clerk of the Court
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State Capitol, Room E-317
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Further I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association and American Federation of Teachers- West Virginia, hereby

certify that I have served a true copy of the foregoing "Amicus Curiae Brief Filedon Behalf Of The West Virginia School Service Personnel Association And The American Federation Of Teachers – West Virginia" on the following by placing the same in a correctly addressed envelope, First Class postage prepaid, in the United States Mails, on this the 20th day of July 2011, to:

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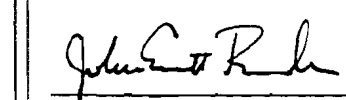

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