IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1992 Term

_____

No. 20862

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DONALD AKERS,
Plaintiff Below, Appellee,

v.

THE WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
Defendant Below, Appellant

_____

Appeal from the Circuit Court of Wayne County
Honorable Dan O'Hanlon, Circuit Judge
Civil Action No. 90-P-53

AFFIRMED

_____

Submitted: September 15, 1992
Filed: December 18, 1992

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JUSTICE WORKMAN delivered the Opinion of the Court.

NEELY, J., dissents and reserves the right to file a dissenting Opinion.

SYLLABUS BY THE COURT

1. The position of County Maintenance Superintendent does not require its holder to share the same political affiliation or association as the governor to effectively perform the duties attendant to such position.

2. West Virginia Code § 29-6-4(d) (Supp. 1992) is unconstitutional insofar as it applies to the position of County Maintenance Superintendent.

Workman, Justice:

The West Virginia Department of Highways ("Department") appeals from a June 28, 1991, order of the Circuit Court of Wayne County declaring West Virginia Code § 29-6-4(d) (Supp. 1992) unconstitutional and ordering that Donald Akers, Appellee, be reinstated to his former position as Wayne County Maintenance Superintendent (hereinafter sometimes referred to as "CMS" or "Superintendent"). After examining the applicable statute and precedent, we concur with the decision of the trial court that West Virginia Code § 29-6-4(d) is unconstitutional insofar as it applies to the position of CMS. Accordingly, this Court affirms the decision of the circuit court.

Mr. Akers was appointed to the Wayne County Superintendent's position in June 1985 during the administration of Governor Arch A. Moore, Jr. The parties have stipulated that Mr. Akers' employment as the CMS resulted from his political affiliation with the Republican party.[1] Mr. Akers testified that as CMS he had the responsibility of maintaining 860 miles of roads in Wayne County and that he supervised 50 department employees, 20 to 25 Community Work Employment Program employees, and work release inmates.

[1] At the time Mr. Akers was hired as the Wayne County Superintendent, the position was vacant because the individual who previously held that position had retired for health reasons.

During the hearings below, much of the testimony centered on the job duties and responsibilities associated with the position of CMS. The Department offered witnesses to support its contention that the Superintendent's position is that of a "policymaker" and accordingly requires the holder to share the same political affiliation as the governor of the State. Appellee, on the other hand, offered evidence that he was merely an employee and that his discretion was limited as he was required to seek the approval of the District Engineer with regard to a proposed weekly work schedule.

During the 1989 legislative session, a bill was passed amending West Virginia Code § 29-6-4 in part by adding a new subsection d. That subsection provides that:

> The Legislature finds that the holding of political beliefs and party commitments consistent or compatible with those of the governor contributes in an essential way to the effective performance of and is an appropriate requirement for occupying certain offices or positions in state government, such as the secretaries of departments and the employees within their offices, the heads of agencies appointed by the governor and, for each such head of agency, a private secretary and one principal assistant or deputy, all employees of the office of the governor including all employees assigned to the executive mansion, as well as any persons appointed by the governor to fill policy- making positions and county road supervisors or their successors, in that such offices or positions are confidential in character and/or require their holders to act as advisors to the governor or his appointees, to formulate and implement the policies and goals of the governor or his appointees, or to help the governor or his appointees communicate with and explain their

> policies and views to the public, the Legislature and the press.

West Virginia Code § 29-6-4(d) (eff. July 1, 1989). In November 1989, the Democratic candidate for governor, Gaston Caperton, won the election over the incumbent governor, Arch A. Moore, Jr. When Gaston Caperton took office as governor in January 1989, he appointed Kenneth M. Dunn as Secretary of the West Virginia Department of Transportation.

On July 20, 1989, Mr. Dunn issued a letter to the thirty-five Superintendents[2] which quoted newly-enacted West Virginia Code § 29-6-4(d) and advised the incumbent Superintendents that they had the option of transferring to "a position of Area Maintenance Manager in the local District Office" or remaining in their respective CMS position until a final determination was made regarding "the future characteristics and requirements of the County Maintenance Superintendent position." Mr. Akers responded to his letter from Mr. Dunn by issuing a reply letter dated July 31, 1989, rejecting the transfer and stating that

> [i]n my opinion, the above referenced Code section [W. Va. Code § 29-6-4(d)] attempts to define the position of County Maintenance Superintendent as a policymaking position, which it is not and has never been during the periods of time that I have occupied the position. . . . It is my opinion that the above referenced Code section

[2] Each of the incumbent Superintendents was a registered Republican.

> constituting a legislative finding that the County Maintenance Superintendent should have the same political affiliation as the Governor is an unconstitutional infringement by the Legislature upon the Executive Branch and is an attempt by the Legislature to get the Governor to return to politics of the past where County Maintenance Superintendents were fired with each change of administration.

By certified letter dated September 11, 1989, Mr. Akers was transferred effective October 1, 1989, from his position as Wayne County Maintenance Superintendent to Area Maintenance Manager position at the District Two Headquarters in Huntington, West Virginia. Although Appellee had no specific duties assigned to him in his new position, Mr. Akers continued to receive the same salary as he had received while holding the position of CMS. A Democrat was appointed to replace Mr. Akers as the new Wayne County Superintendent.

On September 21, 1989, Mr. Akers filed a grievance pursuant to West Virginia Code §§ 29-6A-1 to 29-6A-11 (Supp. 1992), alleging that his transfer from CMS to the position of Area Maintenance Manager "was taken solely as a result of my political beliefs and party affiliations." At the fourth and final level of the grievance procedure, the hearing examiner held that "[t]he West Virginia Education and State Employees Grievance Board is not empowered to determine the constitutionality of statutes" and that "W. Va. Code § 29-6-4(d) unambiguously allowed Secretary Dunn to remove Grievant

from the County Supervisor position because his party commitments were not consistent with that of Governor Caperton and therefore Grievant did not establish his transfer was illegal."

Mr. Akers appealed the denial of his grievance to the Circuit Court of Wayne County pursuant to West Virginia Code § 29-6A-7. The appeal was heard by Judge Dan O'Hanlon of the Cabell County Circuit Court upon the recusal of Judge Robert G. Chafin of the Wayne County Circuit Court. In its final order, the Circuit Court found that:

> 4. Plaintiff/Petitioner's transfer was done solely because of his membership in the Republican political party;
>
> . . .
>
> 6. The position of County Maintenance Superintendent (or County Road Supervisor, as the position is called in Code Section 29-6-4[d]) is not a policymaking position, is not confidential in character, does not require the employee holding such position to formulate or implement the policies and goals of the Governor or his appointees, does not communicate with or explain the Governor's policies or views to the public, legislature or the press, and the patronage transfer of the individual holding such position does not further a vital governmental interest justifying restraints upon the person who holds such position freedom of speech rights under the First and Fourteenth Amendments to the United States Constitution, nor is political affiliation or association a necessary requirement for the effective performance of the duties of the position of the County Maintenance Superintendent;
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> 7. The legislature enacted West Virginia Code § 29-6-4(d) insofar as the same applies to County Maintenance Superintendents solely as a ruse or ploy to enable the Governor to terminate or transfer County Maintenance Superintendents who were Republican office holdovers in

> contravention of the rights set forth in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); Rutan v. Republican Party of Illinois, 497 U.S. [62], 110 S.Ct. [2729], 111 L.Ed.2d 52 (1990); . . . .

Following these findings, the circuit court ruled that West Virginia Code § 29-6-4(d) was unconstitutional, ordered that Mr. Akers be reinstated to his position as CMS, and awarded him back pay, if any, attorney's fees, and costs. It is from this final order of the circuit court that the Department now appeals.

I.

Historically, Superintendents have been replaced whenever a new administration takes office. When former Governor Arch A. Moore, Jr., took office in 1985, all the incumbent Superintendents were replaced with individuals whose political affiliation was Republican. Appellee was one of those Republicans who gained a CMS position because of political partisanship in 1985. Superintendents are not afforded the protection of civil service statutes.[3] Accordingly, the numerous CMS positions throughout the State historically have been filled at least partially on the basis of political patronage.

[3]When the Legislature extended civil service protection to county employees in 1983, Superintendents were not included in the list of employees slated to receive such coverage.

We recently summarized the United States Supreme Court decisions on political patronage in Neely v. Mangum, 183 W. Va. 393, 396 S.E.2d 160 (1990), by noting that

> [t]he constitutionality of dismissing public employees for partisan reasons was first addressed in Elrod v. Burns, 427 U.S. 347 (1976), a case in which Republican non-civil service Sheriff's office employees were discharged when a Democratic sheriff was elected. The United States Supreme Court ruled that 'the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments . . . .' Id. at 373, 96 S. Ct. at 2689. There is one exception to the Elrod ruling against patronage dismissals. In the interest of promoting 'government efficiency and effectiveness' and implementing policies sanctioned by the electorate, an elected official is permitted to discharge those individuals in policymaking positions. 427 U.S. at 372, 96 S. Ct. at 2689. This exception was narrowed in Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), where the Supreme Court explained that the 'ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.' 445 U.S. at 518, 100 S. Ct. at 1295. A further narrowing of the policymaker exception may have been made in Rutan v. Republican Party of Illinois, [497] U.S. [62], 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) where the Supreme Court appears to suggest that only 'high-level employees' can come within the protected purview of the Elrod/Branti exception while holding that promotions, transfers, and recalls after layoffs based on political affiliation or support 'are an impermissible infringement on the First Amendment rights of public employees.' See Rutan, [497] U.S. at ___, 110 S.Ct. at 2736.

183 W. Va. at 396-97, 396 S.E.2d at 163-64; see also Adkins v. Miller, ___ W. Va. ___, 421 S.E.2d 682 (1992). (recognizing right of governmental employees to be free from employment decisions based solely on political grounds under certain circumstances).

The Elrod and Branti decisions, as well as their progeny, stand for the proposition that "political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance. . . ." Savage v. Gorski, 850 F.2d 64, 68 (2nd Cir. 1988). As an aid to determining whether shared political ideology is a legitimate prerequisite for holding a particular government position, this Court, like the Fourth Circuit Court of Appeals in Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990), adopts the following two-part test created by the First Circuit Court of Appeals for resolving cases that involve patronage dismissals:[4]

> A threshold inquiry, which derives from Branti, involves examining whether the position at issue, no

[4] The fact that Appellee was not discharged from government employment does not eliminate the Branti-Elrod analysis. Prior to Rutan, the principles that underlie the unconstitutionality of patronage dismissals were recognized by the Fourth Circuit Court of Appeals in Delong v. United States, 621 F.2d 618 (4th Cir. 1980), to apply similarly to practices "that can be determined to be the substantial equivalent of dismissal." Id. at 624. While the use of the "substantial equivalent of a dismissal" standard to determine the constitutionality of an alleged patronage practice is no longer valid after Rutan, the United States Supreme Court left no question that employment decisions such as promotions, transfers, and recalls after layoffs cannot be based on political affiliation or support. 497 U.S. at _____, 110 S. Ct. at 2737.

> matter how policy-influencing or confidential it may be, relates to 'partisan political interests . . . [or] concerns.' 445 U.S. at 519, 100 S.Ct. at 1295. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?
>
> If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement. We would note that in conducting this inquiry, courts focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office.

Stott, 916 F.2d at 141-42 (quoting Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-42 (1st Cir. 1986), cert. denied, 481 U.S. 1014 (1987)).

The United States Supreme Court in Rutan held that:

> our conclusions in Elrod, supra, and Branti, supra, are equally applicable to the patronage practices at issue here [promotions, transfers, and recalls]. A government's interest in securing effective employees can be met by discharging, demoting or transferring staffmembers whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.

497 U.S. at ___, 110 S. Ct. at 2737. Given the holding in Rutan, there is no question that employment decisions to transfer public employees that are based on party affiliation and support constitute

"an impermissible infringement on the First Amendment rights of public employees." 497 U.S. at ___, 110 S. Ct. at 2737. The only exception to this ruling are employment changes effectuated for the purpose of enabling the hiring of "certain high-level employees on the basis of their political views" necessary to "loyally implement . . . [an administration's] policies." Id. Accordingly, unless the CMS is a high-level position which properly requires shared political affiliation or philosophy for effective job performance, Appellee's transfer to the position of Area Maintenance Manager was an unconstitutional infringement on his First Amendment rights of belief and association.

The Department applies the two-part test adopted in Stott for identifying those positions for which party affiliation is appropriately a prerequisite and concludes that the position of CMS necessarily requires similar political ideology with that of the governor "because the position involves both political interest and concern." See 916 F.2d at 141-42. To bolster this conclusion, the Department states that "the maintenance of local and county roads is an issue on which state government and its governor is judged["] and that road maintenance "has, and will continue to be, a political issue in the gubernatorial campaigns." Having satisfied the first part of the First Circuit inquiry, the Department proceeds to address the second part of the test which requires an examination of "the particular responsibilities of the position to determine whether it

resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." Stott, 916 F.2d at 142. The Department claims that the second aspect of the test is easily met because the CMS was a communicator, the primary implementer of the governor's policies at the county level, and a policymaker. See id.

Appellee qualified as a "communicator," according to the Department, because he was the "front line man and representative of the Department in Wayne County" and as such was required to respond to the maintenance complaints of both county employees and citizens. The Department relies on witness testimony that Mr. Akers had the responsibility for determining which Wayne County roads would be maintained to support its position that Appellee was the primary implementer of the governor's policies at the local level. Concerning the policymaker element of the test, the Department conclusorily decides that the CMS position is a policymaking position by referring back to the Elrod definition of policymaker as "[a]n employee with responsibilities that are not well defined or are of a broad scope. . . ." 427 U.S. at 368.

A review of the evidence taken in the administrative hearings below refutes the Department's position that the CMS has "almost complete discretion and control over the routine maintenance

operations performed in the county by his organization." The job description on record with the Department at all times pertinent to this matter provides that the Superintendent "plans and directs all routine county maintenance operations in accordance with established department procedures and policies. . . . Work is performed under the general direction of an Engineer." The CMS is required to complete a weekly work schedule outlining his proposal for the coming week with regard to workers, materials, and specific jobs to be performed. This proposed work schedule is required to be submitted to the district engineer's office for review and possible changes. The final authority on the scheduled use of equipment and materials rests with the district engineer and not the CMS.

Notwithstanding the Department's attempts to present the CMS as a policymaker, we share the lower court's view that the evidence does not support the Department's position. The all-encompassing objective of the Superintendent's position is to maintain the county road system. Based on this Court's review of the record below, it appears that the duties of the CMS are "limited . . . [with] well-defined objectives." Elrod, 427 U.S. at 368. Furthermore, his duties are not of a broad scope, nor does he "act[] as an advisor or formulate[] plans for the implementation of broad goals." Id. Accordingly, we agree with the circuit court's conclusion that the position of CMS cannot be viewed as one involving policymaking. See Abraham v. Pekarski, 537 F. Supp. 858, 862 (E.D. Pa. 1982), judgment

aff'd in part and appeal dismissed in part, 728 F.2d 167 (3rd Cir. 1984), cert. denied, 467 U.S. 1242 (1984) ("[a]lthough he [Director of Roads and Public Property] was vested with some discretion in the execution of his duties, such as determining which potholes should be filled, plaintiff's position did not empower him to make policy decisions"). Finding no factual or legal error, we uphold the trial court's ruling that the position of CMS does not require its holder to share the same political affiliation or association as the governor to effectively perform the duties attendant to such position.

II.

Finally, we address the constitutionality of West Virginia Code § 29-6-4(d). Appellee has challenged this statutory provision as being violative of his First Amendment right of free speech. When such a challenge is made, the statute is presumptively invalid. Walker v. Dillard, 363 F. Supp. 921, 926 (W.D. Va. 1973), rev'd on other grounds, 523 F.2d 3 (4th Cir.), cert. denied, 423 U.S. 906 (1975). Because of this presumption, the Department had the burden of proving the statute's validity. See Elrod, 427 U.S. at 362. Recognizing that "the prohibition on encroachment of First Amendment protections is not an absolute[,]" the Supreme Court in Elrod ruled that an otherwise invalid statute could be enforced by demonstrating that a vital government interest is advanced through implementation of the statute. See id. at 360.

The Department clearly failed to meet the following test established in Elrod for the permissible encroachment on a public employee's First Amendment right:

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

427 U.S. at 363. In response to the Elrod test, we note that the record in this case contains no evidence that the Department demonstrated the existence of a vital government interest which was furthered by the Appellee's transfer. Certainly, the loss of the constitutionally protected rights at issue here is not outweighed by the articulation of any benefit the Department might claim to receive by having Superintendents whose political affiliation comports with that of the governor. Accordingly, we hold that West Virginia Code § 29-6-4(d) is unconstitutional insofar as it applies to the position of CMS. We do not rule that West Virginia Code § 29-6-4(d) is unconstitutional in toto because a factual inquiry must be performed with regard to each public employee listed therein to determine whether their respective position requires shared political ideology for effective job performance.

Based on the foregoing opinion, the decision of the Circuit Court of Wayne County is hereby affirmed.

Affirmed.