No. 20862 -- Donald Akers v. The West Virginia Department of Highways

Neely, Justice, dissenting:

The majority's decision today twists the knife in the wound that this Court inflicted on the voters and the political process in Adkins v. Miller, ___ W.Va. ___, 421 S.E.2d 682 (1992). Today's decision makes it clear that the majority has decided that the Constitution of the United States requires the State of West Virginia to employ a civil service system for all of its employees.[1] In yesteryear, the average voter -- a person unable to make political campaign contributions, unable to entertain lavishly, and unable even to flatter convincingly -- had at least one weapon in his never ending battle to obtain a responsible, accountable government: his vote! After the opinion today, this Court is saying that no matter how dissatisfied the average voters of West Virginia are with their government, they can no longer demand change in the oldest democratic form; they can no longer vote the bastards out! The working class should be out in the streets because as accountability decreases, the only thing that matters in elections becomes MONEY and MORE MONEY. Today's decision drives home to all citizens of West Virginia that only people with money count in politics.

[1]Although it is not in my copy of the Constitution of the United States, the majority's copies apparently contain a heretofore undiscovered Amendment XXVII, "Thou shalt have a civil service system for all employees."

In Adkins, ___ W.Va. ___, 421 S.E.2d 682 (1992), this Court tragically took a giant step toward dirigist, permanent government by declaring that the Legislature does not have the power to limit the term of a deputy sheriff to the term of the sheriff who appoints him. Now today's decision denigrates the perogratives of the Governor and flies in the face of significant constitutional precedent to the effect that when the governor acts in accordance with a clear Legislative provision, such an action "should be 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" Adkins, ___ W.Va. at ___, 421 S.E.2d at 696 (1992) (Neely, J., dissenting) (quoting Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

Deference to the legislative determination of "policymaker" status is fully supported, indeed required, by Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445 U.S. 507 (1980), Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729 (1990), and their progeny. Although, in Elrod, the court allowed patronage dismissals of only "policy-making" or "confidential" employees[2], by Branti and Rutan, the test was broadened to "whether the hiring authority can demonstrate that party affiliation is an appropriate

[2]Elrod, 427 U.S. at 367 (plurality opinion).

requirement for effective performance of the public office involved." Branti, 445 U.S. at 518; Rutan, 497 U.S. at 71, 110 S.Ct. at 2734. The Elrod-Branti-Rutan test involves "striking a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 284 (1977) (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)); Connick v. Myers, 461 U.S. 138, 142 (1983).[3]

[3]Furthermore, the majority either chooses to ignore or fails to comprehend the entire rationale behind Elrod and its progeny. Elrod, et al. were designed to prevent an executive officer, such as a governor, from using political affiliation as a basis for unfavorable job actions where political affiliation was not at all necessary to the performance of the job. In this case, the legislature clearly defined the role of a County Maintenance Superintendent as one that requires political affiliation. This was not a broad statement that all state employees need be aligned politically with the governor, but a narrow, specifically considered list of jobs for which party affiliation is "essential . . . to the effective performance of and is an appropriate requirement for . . . county road supervisors or their successors." W. Va. Code 29-6-4(d) [1990]. The United States Supreme Court invited legislatures clearly to define for which government jobs party affiliation is an appropriate requirement with

Applying that test to the situation in the case before us leads to one inescapable conclusion: that the County Maintenance Superintendent (superintendent) position is one for which "party affiliation is an appropriate requirement for effective performance of the public office involved." Traditionally, superintendents have been changed whenever an administration changes. The Legislature has never covered the position under civil service statutes, and in W.Va. Code 29-6-4(d) [1990] the Legislature explicitly defined the position of superintendent as having significant policy-making responsibilities and 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 . . . county road supervisors or their successors.

The Legislature has determined that it is important to the effective administration of the highways that County Maintenance Superintendents be of the same political party as the Governor. A (..continued)

Elrod, Branti, and Rutan. The West Virginia Legislature accepted that challenge and created W. Va. Code 29-6-4(d) [1990]. By getting hung up on the term "policymaker" rather than looking to the actual meaning of the Elrod, Branti and Rutan opinions, this Court has appointed itself as the sole administrator of an allegedly constitutionally-mandated civil service system.

review of the job description underscores the correctness of that determination; to perform the job of County Maintenance Superintendent, one must exercise significant political judgment. Although the majority would like to bureaucratize the vast number of decisions required of a superintendent, it would take a dozen top professors at the Princeton Institute of Advanced Studies constantly to feed data into a Cray supercomputer in order to replicate the task. For example, a superintendent must respond "to maintenance complaints throughout the county on a 24-hour basis and [recommend] corrective actions"; a superintendent must "determine necessary preventative measures seasonally to decrease the likelihood of road accidents and [dispatch] the snow removal and ice control crews"; and a superintendent must do all of that while ensuring "that completed work remains within allocated budget limits."

To see what kind of challenge is faced by a superintendent, suppose one street in a county is heavily populated by doctors. The doctors all own expensive cars with great suspension systems such as a Mercedes Benz or BMW. The ride of their cars over uneven pavement makes them feel as if they are floating on air. However, the doctors are always on call and need to get out in emergencies. Doctors, then, prefer snow and ice removal to road maintenance. On another county street lives teachers and other state government employees that cannot afford anything better than used Ford Escorts. Their cars get destroyed by potholes and poor road maintenance. However, they have

no need to get anywhere when the weather deteriorates because the schools close and the government grinds to a halt. These government employees prefer road maintenance to snow and ice removal. The job of the County Maintenance Superintendent is inherently political: to allocate scarce resources in such a way that it benefits his constituents (the residents of the county). The weighing of the variable needs of these residents involves a political choice, one that reflects directly on the governor. Clearly the governor needs the ability to ensure that the person he appoints to make such choices is someone who will make the choices the same way that the governor would make them.

In the face of W.Va. Code 29-6-4(d) and the actual role of the County Maintenance Superintendent, the majority claims that such a provision (as applied to County Maintenance Superintendents) is unconstitutional. However, the majority supplies virtually no authority for its holding. They obviously did not apply the U.S. Supreme Court test to determine "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved." Branti, 445 U.S. at 518; Rutan, 497 U.S. at 71, 110 S.Ct. at 2734. Clearly that showing has been made. The sole (and wholly inadequate) basis for the majority's decision to overturn a clear legislative provision is a case from the Eastern District of Pennsylvania, Abraham v.

Pekarski, 537 F. Supp. 858 (E.D.Pa. 1982), affirmed in part and appeal dismissed in part 728 F.2d 167 (3d Cir. 1984), cert. denied 467 U.S. 1242 (1984). However, had anyone from the majority bothered to read Abraham, he or she would have learned that the U.S. District Court dismissed the Elrod-Branti claim on summary judgment:

> The defendants, without filing any affidavits, moved for summary judgment on [two] theories. The trial court granted their motion with respect to the Elrod-Branti ground, but held that Abraham did have a Pennsylvania law property interest in employment.

Abraham, 728 F.2d at 170. That court's only holding on the applicability of Elrod or Branti was:

> The short of it is that Elrod and Branti do not extend to Abraham's case. He has not been penalized for an exercise of freedom of association. Nor has he been penalized for preferring the course of nonassociation. We have not yet reached a point in the development of Elrod and Branti where public employees may override their superiors because they have a different view of what public policy should be.

Abraham, 537 F.Supp. at 866.[4]

Even if we were to adopt the view of the majority that we can derive some guidance from Abraham, that guidance is not very

[4]That court did speculate, in an extreme case of obiter dicta, that the "policy-maker" exception might not apply to Mr. Abraham. However, that issue was not even addressed by the defendants in that case and can hardly be viewed as applicable to the situation before us today.

persuasive. First, the action in Abraham was a naked exercise of executive power with no "legislative" determination that the job should be a political appointment. Such an action is in the "zone of twilight" where "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson, J., concurring) (quoted in Adkins, ___ W.Va. at ___, 421 S.E.2d at 694 (Neely, J., dissenting)). In the case before us, the legislature determined that certain positions, including County Maintenance Superintendent, require a political affiliation with the governor in order to be performed effectively. The governor's action pursuant to this statute must be presumed valid and the burden of persuasion rests "heavily upon any who might attack it." Youngstown Sheet & Tube, 343 U.S. at 637 (Jackson, J., concurring) (quoted in Adkins, ___ W.Va. at ___, 421 S.E.2d at 694 (1992) (Neely, J., dissenting)). Second, Pennsylvania is not West Virginia. As anyone who has spent any time in West Virginia politics should know, the two most important political issues in West Virginia over the past hundred years have been education and the decision of which roads get built or paved and which roads remain cow paths. The superintendent is the official who actually makes these crucial determinations for secondary roads in a county. In order to have a responsive government that puts roads where the people want them, the superintendent should not be an entrenched bureaucrat with his own political fiefdom, but should be an agent of the elected governor.

The majority's opinion would be comical were it not so tragic. Here the majority is substituting its own guess of whether a superintendent is a "policymaker" for a carefully considered legislative determination that party affiliation is, to quote Branti, "an appropriate requirement for effective performance of the public office involved." Branti, 445 U.S. at 518; Rutan, 497 U.S. at 71, 110 S.Ct. at 2734. By getting hung up on the term "policymaker" without actually looking at what the test is supposed to mean, the majority has created an error of the first order.