No. 23968 -- The Board of Education of the County of Wood, a West Virginia Statutory Corporation v. William Johnson

Workman, Chief Justice, dissenting:

Increasingly, the trend seems to be for courts to render decisions that reward wrong-doers. This is wrong and contributes to the falling level of respect for courts in this country.

This case is about a school bus driver who had previously been disciplined for smoking on the school bus, and who was charged once again with smoking on a school bus. Yet, the majority goes out of its way not only to reinstate the driver, but to give full back pay, which means the driver will get approximately two years of back pay with interest!

While I can agree that termination from employment was a rather harsh sanction in light of the Appellant's lengthy employment history with the Appellee, I cannot condone, as the majority does, the Appellant's repeated transgressions of smoking on the school bus in violation of the non-smoking

policies governing school personnel of both the State of West Virginia and Wood County[1] by rewarding him. While I am willing to reinstate the driver to employment, I cannot in good conscience give him a financial boondoggle, especially since perhaps in excess of $50,000 will come directly from funds collected from taxpayers for the education of Wood County children.

In this case, the lower court concluded that the decision of the administrative law judge ("ALJ") was "(1) clearly wrong 'in view of the reliable, probative and substantial evidence on the whole record. . . .'" That record consisted of the testimony and evidence introduced at the level IV hearing, wherein the ALJ heard the testimony of an eye witness, a motorist, who stated that she had observed the Appellant smoking a cigarette the morning of October 11, 1995, while the Appellant was transporting students to school. Further, the witness telephoned Blaine Auvil, the Assistant Transportation Director for the Appellee and relayed to him her observations. Mr. Auvil,

[1]It was undisputed that smoking on a school bus was in direct violation of both the State of West Virginia and Wood County's non-smoking policies applicable to school personnel. See West Virginia State Board of Education Policy No. 2422.5A and Wood County Board of Education Policy No. 5114.10.

While some may view this as a frivolous matter, parents of children

in turn, inspected the Appellant's bus only to discover cigarette ashes on the floor between the driver's window and the driver's seat. The Appellee also offered in evidence the former disciplinary action taken against the Appellant for a previus smoking violation.

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with respiratory problems would heatedly disagree.

The Appellant stated that the witness mistook a white ball point pen that he must have had in his mouth for a cigarette. Further, he acknowledged that the cigarette ashes must have come from when he was smoking a cigarette while cleaning the bus at his residence the preceding day, thus acknowledging that he smoked on the bus only a day before the incident giving rise to the charge. He stated that possibly he dropped the ashes at that time.[2] In addition, the Appellant offered the testimony of two elementary school students who were on the bus at the time the Appellant was alleged to have been smoking, but who testified that they had not witnessed the Appellant smoke on the bus. Ironically, the students the driver called to testify had been seated in the rear of the bus.

Based upon all this evidence, the ALJ ruled in favor of the Appellant, finding that the charge against the Appellant had not been proven. As we stated in syllabus point one of Randolph County Board of Education v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989), "[a] final order of the

[2]The majority makes much of the fact that this violation did not form the basis for the instant charge. They ignore, however, what powerful circumstantial evidence this was of the instant violation. See supra note 1.

hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to W. Va. Code, 18-29-1, et seq. (1985), and based upon findings of fact, should not be reversed unless clearly wrong." We have previously stated, however, that "[a] finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, in part, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996). Based upon the evidence in the record, the circuit court was correct in determining that the hearing examiner was clearly wrong.

Because of the driver's lengthy employment of approximately twenty years, however, I would be willing to go so far as to classify the sanction of dismissal for this violation as arbitrary and capricious and to support his reinstatement. However, I am totally unwilling to give the petitioner a financial boondoggle from the Wood County Board of Education's budget. In Rovello v. Lewis County Board of Education, 181 W.Va. 122, 381 S.E.2d 237 (1989), we considered the "lack of a clear policy [covering the

incident], the isolated nature of the appellant's offense, his otherwise [good] record, and the minimal harm to the school system, [and concluded] that the Board of Education acted arbitrarily and capriciously in dismissing the appellant." Id. at 126, 381 S.E.2d at 241. We further recognized in Rovello that while dismissal was too severe, a lesser sanction was not inappropriate. Id.; see Board of Education of County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990) (finding dismissal too severe and recommending one year suspension without pay appropriate).

Finally, the majority fails to address the significant issue of whether the Appellant was entitled to full back pay. In Mason County Board of Education v. State Superintendent of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982), we indicated that unless a dismissal is malicious, a discharged employee is not entitled to full back pay. Accord Rovello, 181 W. Va. at 126, 381 S.E.2d at 241. There is absolutely no evidence that the Board acted maliciously and, therefore, back pay is totally inappropriate.

Here we have a school bus driver who committed repeated violations of state and county policies designed to protect the health of the children in his charge, and he receives what essentially amounts to a two-year paid vacation.

Based upon the foregoing, I respectfully dissent to the per curiam decision. I am authorized to state that Justice Maynard joins in this dissent.