No. 24008 -- Kanawha County Board of Education v. William A. Hayes

Workman, Chief Justice, dissenting:

Ye gads again! In 1994, this Court upheld an ALJ decision putting back into the elementary school a janitor who was determined by the ALJ to have touched a child's breast and buttocks on the zany reasoning that the Board of Education had not proven that the touching was sexual in nature! In their zeal to protect the teacher's job in the instant case, the majority once again departs from all common sense and once again rewards the wrong-doer. Like the janitor who enjoyed fondling little girls,this teacher is sent by the majority back to school with a nice fat reward of backpay.

The evidence presented on the issue of whether the teacher committed an act of immorality within the meaning of West Virginia Code § 18A-2-8 (1993) included the testimony of Brittany B. that Mr. Hayes put his hand squarely on her buttock after calling her to "come . . . closer"

to his desk. She came to the school counselor the same day in tears. The counselor testified that Brittany B. had in fact reported to her that Mr. Hayes had touched her on the buttocks and that Brittany B. was "most upset, she was tearful, she was shaking, she was very unnerved" when she related the incident. The counselor indicated in response to a question during the Level IV proceeding regarding the possibility that Brittany B. was fabricating the incident, that "[s]he seemed very sincere, very truthful." Even the ALJ found Brittany B. to be "forthright" in her testimony. There was not a shred of evidence, or even an argument made, that ascribed any motive on the part of this child to lie.

A classmate of Brittany B.'s, Rachel S., testified consistently that Mr. Hayes had in fact placed his hand on Brittany B.'s buttocks.[1] The ALJ found Brittany to be "forthright," yet disregarded both Brittany B.'s testimony regarding the location of the touching and Rachel S.'s

[1]However, during cross-examination at the Level IV hearing, Mr. Hayes' attorney got her to demonstrate the positioning of Mr. Hayes' hand and to agree that it was "sort of on the side of the hip." The ALJ seized on this slight variance to sanitize the episode.

testimony, and concluded, consistent with Mr. Hayes' description that the location of his hand was on Brittany B.'s back.[2]

[2]He testified that he placed his hand on Brittany B.'s back above the waist.

Other evidence was presented at the Level IV regarding Mr. Hayes touching another student in an inappropriate fashion. That student, Tracy J., testified that Mr. Hayes put his hand under her jacket and "rubbed" her side. Another student corroborated that Mr. Hayes had put his arm around Tracy J. and that the student appeared upset afterwards. There was also evidence that he initiated personal discussions with students about their dating practices. In addition to the Tracy J. incident, there was also evidence presented that two years prior to the Brittany B. incident, Mr. Hayes had been warned to refrain from having inappropriate contact with students.[3] Thus, the blemish-free picture that the majority attempts to paint of Mr. Hayes' record is not an accurate one. He in fact had a history of inappropriate conduct with regard to students.[4]

[3]A parent in 1993 called the school counselor complaining that Mr. Hayes had made inappropriate comments to her daughter. Although Mr. Hayes denied the allegations, the Board issued a memorandum instructing "Mr. Tidquist [the principal] . . . [to] direct Mr. Hayes to avoid inappropriate personal contact to students by phone and to be professional at all times in his relationships with students."

[4]The majority does not even discuss the fact that this additional evidence was introduced against Mr. Hayes in connection with the grievance proceedings.

The reasoning employed by the majority in the Wirt decision was almost laughable (were it not for the sensitive and serious nature of the allegations). There, although the janitor was found to have touched the student on the breasts and buttocks, the ALJ nonetheless concluded the Board failed to prove that these touching incidents were sexual or immoral in nature. As I said in my dissent to Board of Education v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994):

> The majority goes on ad nauseam about the rights of Mr. Wirt--but what about the rights of children . . .? Not a word. Children ought to be entitled to a safe environment in our public schools. Parents ought to have the right to send their children to school with peace of mind that they will not be harmed. We have plenty of decent, hard-working people in this State who would happily work as a school custodian, but the majority's opinion places significant restraints on the ability of boards of education of this State to get rid of the bad apples and fill their positions with decent, hard-working people.[5]
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> The majority opinion is a good example of why more and more people in this country are fed up with the judicial system. When we treat cases that require a little common horse sense like some kind

[5]Frankly, I think most teachers and other school personnel are really intelligent, moral, hardworking people who also want rid of the bad apples who sully the reputation of their profession.

> of esoteric exercise in legal gymnastics, we short-change those who look to us for justice.

192 W. Va. at 581, 453 S.E.2D at 415 (J. Workman, dissenting) (footnote added).

The ALJ transformed this case into one in which the Board is required to prove the nature of the conduct, i.e. whether in fact the individual conducted the improper touching with or for any improper motivation.[6] As I said in my dissent to Wirt, there is a real legal (not just factual) issue before us: "whether the Board actually has to prove the intent of the act in a school disciplinary context." Id. at 580, 453 S.E.2D at 414. This really likens the burden of proof to one commensurate with a criminal case. See id. This Court's implicit resolution of that issue in Wirt has set a dangerous precedent which is already permitting individuals like Mr. Hayes to get away with improper conduct. The ALJ relied heavily on Wirt, in her decision, stating that: "It can be concluded that Grievant [Mr. Hayes] touched Brittany B. on November 14, 1994. It cannot be

[6]By the way, can anybody in the majority think of any appropriate reason for an adult male instructor to be touching intimate areas of a teen-aged

concluded, however that the testimony portrays with certainty that the nature of that touching was 'immoral.'" One must to ask when is the case to be presented that will irrefutably establish the nature of the unwanted touching as immoral sufficient to permit a school Board's action to be upheld. Frankly, these decisions create open season on children.

Even if this case is viewed strictly in the legal context of overturning the factual findings of an ALJ, as Justice Cleckley stated in syllabus point one in In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), "[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." (In other words, if it walks like a duck, looks like a duck, and quacks like a duck, it is a duck.) I have reached that requisite "definite and firm conviction that a mistake has been committed." Id. No grown man, but most especially a school teacher in whose charge and supervision we place our children, has any business touching the bodies of these children

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student's body?

or making personal conversation about their dating practices. It is hard enough for a twelve-year-old child to muster the courage to make accusations against a teacher. When we disregard the complaining witnesses' testimony, although deemed forthright by the fact-finder, and verified by an eyewitness and supported by additional circumstantial evidence, we send out a clear message to current and future victims that they need not bother complaining as no one will believe them over an adult.

Based on the foregoing, I respectfully dissent. I am authorized to say that Justice Maynard enthusiastically joins me in this dissent.