IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

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No. 24008

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KANAWHA COUNTY
BOARD OF EDUCATION,
Respondent below, Appellants,

v.

WILLIAM A. HAYES,
Grievant below, Appellee.

Appeal from the Circuit Court of Kanawha County
Hon. Charles E. King, Judge
Civil Action No. 95-AA-171

AFFIRMED

Submitted: October 8, 1997
Filed: December 16, 1997

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "A final order of the 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." Syllabus Point 1, *Randolph County Board of Education v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989).

Per Curiam:[1]

This appeal was filed following a final order of the Circuit Court of Kanawha County which affirmed the decision of the administrative law judge ("ALJ") of the West Virginia Education Employees Grievance Board. The circuit court affirmed the ALJ's decision that the appellant, the Kanawha County Board of Education ("Board"), failed to provide evidence sufficient to remove the appellee, William D. Hayes, from his teaching position. In this appeal the Board argues that the circuit court erred by not finding that the ALJ's decision was clearly wrong, and that the ALJ improperly used evidence presented at the pre-termination hearing.

I.

[1]We point out that a *per curiam* opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992) ("*Per curiam* opinions . . . are used to decide only the specific case before the Court; everything in a *per curiam* opinion beyond the syllabus point is merely *obiter dicta* . . . . Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published *per curiam* opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a *per curiam* opinion.")

William D. Hayes had been employed by the Kanawha County Board of Education as a mathematics teacher for 22 years, and during that time he was consistently evaluated as "excellent," or as a teacher who "exceeds expectations." During November of 1994 Mr. Hayes was working as a teacher at Sissonville Middle School and was serving as the teacher in charge of collecting money from students for lunch and snacks. The responsibility of collecting this money was performed on a rotational basis, and the teachers, who were assigned this responsibility, were also assisted by volunteer students. Mr. Hayes established a practice of allowing two students to assist him for each nine-week period so as to allow as many students to assist as possible. During November of 1994 Brittany B. and Nicky V.,[2] two seventh-grade students, were the volunteers for Mr. Hayes.

The responsibility consisted of collecting lunch money in the morning and being responsible each afternoon for the operation of the break room, a room where students were free to go during their break and purchase snacks. On the afternoon of November 14, 1994, Brittany B. and Nicky V. came to the break room to purchase snacks and were in the room with approximately six other students; an additional 115 other students were wandering the hallway. When Mr. Hayes observed Brittany B. and Nicky V. in the break room, he called them over to him and thanked them for their assistance

[2]As is our traditional practice, we avoid using the last names of minors in cases involving sensitive facts. *See State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731(1994); *State ex rel. Div. of Human Serv. by Mary C.M. v. Benjamin P.B.*, 183 W.Va. 220, 395 S.E.2d 220 (1990).

with the lunch money collection. While thanking them, he gave Brittany B. a pat with his hand and gave each girl a Jolly Rancher, a small piece of candy.

Three class periods after the break, Brittany B. reported to the school counselor that Mr. Hayes had patted her on her buttocks. The counselor reported this to the principal who in turn reported the incident to the superintendent. The following day Brittany B. and Rachel S.[3] were interviewed concerning what occurred in Mr. Hayes' break room. At the pre-termination hearing, Rachel S. testified that she saw Mr. Hayes touch Brittany B. "on the behind." However, at the Level IV hearing on both direct and cross-examination, Rachel S. demonstrated where she saw Mr. Hayes touch Brittany B.; she indicated on her side about waist level.[4]

A recommendation was made to the Board that Mr. Hayes be terminated following the pre-termination hearing for immorality under *W.Va. Code,* 18A-2-8 [1990].

[3]Rachel S. had been present in the classroom (break room) during the break period and observed Mr. Hayes' touching of Brittany B.

[4]The Board disputes that Rachel S. demonstrated during the Level IV hearing that the touch occurred on the side. On the record, for the transcript, the attorney for Mr. Hayes stated contemporaneous with the demonstration during the cross-examination, that Rachel S. is touching her side, which narrative was not objected to or corrected. The demonstration which occurred during the Board's direct examination was narrated by the ALJ who stated that Rachel S. placed her hand in the general vicinity "of the behind." However, in her written opinion, the ALJ stated that in her demonstration, Rachel S. ". . . placed her hand on her side, about waist level." The ALJ further stated that "[w]hen asked to demonstrate again on cross-examination, Rachel S. again put her hand on her side, at waist level. She then testified that Grievant [Hayes] did not touch Brittany B. squarely on her behind, but on her side."

Therefore, since the ALJ was present during both demonstrations and in her decision she states that Rachel S. touched her side during these demonstrations, we cannot determine that the demonstration was other than what the ALJ stated it was.

The Board followed this recommendation and terminated Mr. Hayes' employment on December 21, 1994. Following these events, Mr. Hayes requested a Level IV Grievance Hearing which was conducted on April 4, 1994. The ALJ rendered her decision of June 28, 1994, holding that the Board failed to meet its burden of proof and ordered Mr. Hayes be restored to his position with back pay. An appeal was filed with the circuit court which affirmed the ruling of the ALJ. This appeal followed.

II.

The Board appeals the decision of the circuit court which affirmed the findings of the ALJ. The authority of the circuit court is set forth in *W.Va. Code*, 18-29-7 [1985] which provides:

> The decision of the hearing examiner [administrative law judge] shall be final upon the parties and shall be enforceable in the circuit court: Provided, That either party may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reaching its decision, the circuit court relied upon *Board of Education of County of Mercer v. Wirt*, 192 W.Va. 568, 579, 453 S.E.2d 402, 413 (1994) which provides that an appellate court may not reverse a lower tribunal's conclusion under the clearly erroneous standard, if the conclusion is plausible when viewing the evidence in its

entirety.

The standard of review for this Court in these cases was set forth in Syllabus Point 1, *Randolph County Board of Education v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989) which states:

> A final order of the 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.

Upon reviewing the evidence in its entirety, we find that the ALJ's conclusions were plausible and not clearly wrong. The ALJ was present during all of the testimony and was able to perceive first-hand the demonstrations of all of the witnesses, including Rachel S., who had been presented as a witness favorable to the Board's position. Based on these demonstrations and testimony, the ALJ determined that Mr. Hayes did not touch Brittany B. on her buttocks but on her side, and that this action did not constitute immoral conduct. The evidence of this case does not show that the ALJ was clearly wrong and her decision should therefore stand.

For the foregoing reasons we affirm the order of the Circuit Court of Kanawha County.

Affirmed.