No. 25323—*William Harmon and Thomas Chiles, Sr. v. Fayette County Board of Education*

McGraw, J., dissenting:

Even if I agreed with the majority's assessment that appellants failed to demonstrate that their work was primarily devoted to counseling students so as to put them under the rubric of "classroom teacher" as defined in W. Va. Code § 18A-1-1(c)(1)—which I do not—the absence of such proof in this isolated case does not form a sufficient factual basis upon which to broadly hold that *all* attendance personnel fall outside such designation, and should therefore be denied the salary supplement in question.

The majority recognizes that "the degree to which a professional educator directly works with students, regardless of the location of such work," is one of the primary criteria determining whether a school employee meets the definition of "classroom teacher." Majority slip op. at 7-8 (citing *Putnam County Bd. of Educ. v. Andrews*, 198 W. Va. 403, 481 S.E.2d 498 (1996) (per curiam)).[1] I cannot see how,

[1] *Andrews* was, of course, rendered *per curiam*. I note this otherwise unremarkable fact only because reliance upon such authority appears to conflict with this Court's recent admonitions that *per curiam* opinions are "not legal precedent," *e.g.*,

Elizabeth A.D. v. Hammack, 201 W. Va. 158, 159 n.1, 494 S.E.2d 925, 926 n.1 (1997), and are "not to be cited as authority to this Court," *State ex rel. State v. Reed*, ―W. Va.―, 514 S.E.2d 171, 173 n.4 (1999). Given the apparent confusion that these statements have caused among the bar and lower courts, *see* George Castelle, *Reversals, Per Curiams, and the Common Law*, W. Va. Lawyer, August 1998, at 26, as well as the fact that such a position raises serious constitutional concerns, I am compelled to take this opportunity to clarify my view regarding the significance of these opinions in the common law of our jurisdiction.

Although this Court at times, for whatever reasons, employs *per curiam* opinions to address issues of first impression, *see, e.g., Central West Virginia Reg'l Airport Auth. v. West Virginia Pub. Port Auth.*, ―W. Va.―, 513 S.E.2d 921 (1999), such opinions are customarily used only for disposition of cases involving issues that, at least upon initial review, turn exclusively upon well-settled principles of law. In light of the more cursory treatment afforded cases disposed of by *per curiam* opinion, they do not have the same precedential effect vis-à-vis the principle of *stare decisis* as do full-blown opinions authored by specific members of the Court. In other words, a *per curiam* opinion does not impose a significant impediment to the Court subsequently taking a different position on a particular issue. But, of course, this fact does not strip such opinions of all precedential value; rather, it simply means that in proceedings before this Court they are entitled to less weight than other fully-articulated opinions. This is the point that should be drawn from the Court's statement in *Lieving v. Hadley*, 188 W. Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992), that "[a] *per curiam* opinion that appears to deviate from generally accepted rules of law . . . should be relied upon only with great caution."

That said, while *per curiam* opinions are not necessarily definitive statements regarding the law of this jurisdiction, they are nevertheless part of the common law, and are certainly binding upon all of the lower courts absent a conflict with other controlling authority, or until expressly modified or overruled by this Court. Article VIII, § 4, ¶ 2 of the West Virginia Constitution states:

> No decision rendered by the court [of appeals] shall be considered as binding authority upon any court, except in the particular case decided, unless a majority of the justices of the court concur in such decision.

Implicit in this provision is the assumption that, where concurred in by at least three justices, the opinions of this Court are binding upon the lower courts. By mandating the reporting of any decision of this Court that reverses, modifies or affirms a judgment of an inferior court, *see* W. Va. Const. art. VIII, § 4, ¶ 3, the Constitution effectively

given this touchstone and the fact that attendance personnel are statutorily charged with duties that manifestly entail direct counseling of students, the Court can paint with such a broad brush.

Attendance directors and their assistants are charged by law with the fundamental duty of "ascertain[ing] reasons for inexcusable absences from school," and "tak[ing] such steps as are, in their discretion, best calculated to correct attitudes of parents and pupils which results in absences from school." W. Va. Code § 18-8-4 (1997). In accordance with this mandate, such personnel are also required to make home visits to students identified as having excessive unexcused absences, and are given the primary role in assisting homeless students. W. Va. Code § 18-8-4(h), (i). One simply cannot imagine a more important "counseling" function than encouraging children to remain in school. I have no doubt that many of the people who are responsible for

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incorporates all of our substantive rulings into West Virginia's common law. Any other conclusion would effectively negate one of the fundamental purposes of this provision: namely, to prevent the Court from deciding cases by caprice. Thus, the statement in *Lieving* to the effect that "[*p*]*er 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*," 188 W. Va. at 201 n.4, 423 S.E.2d at 604 n.4, simply does not withstand constitutional scrutiny.

A case decided *per curiam* is, notwithstanding the limitations discussed above, as much a part of the common law of this jurisdiction as any other opinion rendered by this Court. Consequently, I simply fail to see any mischief in citing *per curiam* opinions as authority to this or any other court. Even where there is a conflict with other well-ensconced precedent, these cases are at the very least persuasive authority.

regulating attendance spend the majority of their time in direct contact with the most vulnerable and troubled of our youth. The State Superintendent of Schools clearly recognized this fact in his February 6, 1990 letter.

At the very least, this Court should refrain from concluding that no attendance personnel qualify as classroom teachers for purposes of receiving a salary supplement under W. Va. Code § 18A-4-2(b). As the majority tacitly recognizes, there is certainly nothing in Chapters 18 and 18A that expressly prohibits classifying these persons as classroom teachers. (I agree with the majority that attendance directors and their assistants are "school personnel" subject to Chapter 18A.) It is at least conceivable (if not highly probable) that many attendance directors and their assistants devote the majority of their work to counseling students.

Because I find that appellants sufficiently demonstrated that they are classroom teachers as defined by § 18A-1-1(c)(1), and, moreover, because there is no factual or legal basis upon which to conclude that all attendance personnel are precluded from falling under such classification, I respectfully dissent.