No. 26110 - Eva Diane Maikotter v. University of West Virginia Board of Trustees/West Virginia University

FILED
December 14, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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December 15, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring in part and dissenting in part:

This case presents rather straightforward issues of statutory construction. The majority has correctly concluded that the interpretation WVU seeks to impose on the meaning of "a job opening," as is set forth in W. Va. Code § 18B-7-1(d), does not comport with the manner in which the Legislature used the phrase. No qualifying language was attached to the phrase, therefore, it would be an abuse of our authority to add qualifying language. I therefore concur in the resolution of the substantive issue properly raised by the parties in this case. However, I must depart from the majority opinion with respect to footnote 6 of the opinion. In my judgment this footnote violates state and federal due process guarantees. Therefore, I am compelled to dissent from its insertion in the opinion.

A. Neither Party Raised or Briefed the Issue of Attorney Fees

In footnote 6 of the opinion, the majority writes: "[W]e feel that Ms. Maikotter has substantially prevailed in this action, and should be entitled to the recovery of her attorney fees, pursuant to W. Va. Code § 18-29-8 (1992)." This statement might be legally sound, *if the issue of attorney fees was raised by the parties before this Court.* I have thoroughly examined the record in this case. That issue was not raised by either party. For

the majority to *sua sponte* order the trial court to award attorney fees, when neither notice nor opportunity to be heard was afforded to WVU on the issue, is a fundamental violation of state and federal due process guarantees. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) ("[T]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."); *Norfolk and Western R. Co. v. Sharp*, 183 W. Va. 283, 285, 395 S.E.2d 527, 529 (1990) ("The most fundamental due process protections are notice and an opportunity to be heard.").[1]

It has been repeatedly and unequivocally stated that "'[t]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below[.]' Syl. pt. 6, in part, *Parker v. Knowlton Const. Co., Inc.*, 158 W. Va. 314, 210 S.E.2d 918 (1975)". Syl. pt. 2, in part, *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996). *See Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("facts underlying ... [an] issue will not have been developed in such a way so that a disposition can be made on

[1]Due process has been generally expressed as follows: "[T]he court which undertakes to determine the rights of the parties must have jurisdiction of the proceeding, that the parties to the proceeding must have due notice, and that they must be afforded a reasonable opportunity to be heard before their rights are adjudicated or determined." *Walter Butler Building Co. v. Soto*, 142 W. Va. 616, 636, 97 S.E.2d 275, 287 (1957). See also *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S.E.2d 765 (1978); *State ex rel. Payne v. Walden*, 156 W. Va. 60, 190 S.E.2d 770 (1972); *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971).

appeal"); *In re Katie S.*, 198 W. Va. 79, 90, 479 S.E.2d 589, 600 (1996) ("Because of the lack of factual development below, we decline to address this ... issue"); Syl. pt. 4, *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973) ("This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court."); Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.").

The text of W. Va. Code § 18-29-8 provides in relevant part: "In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer." Obviously, this statute contemplates the award of reasonable attorney fees to an employee substantially prevailing on appeal.

In only two previous opinions has this Court has addressed W. Va. Code § 18-29-8. Both prior opinions were per curiam opinions. In *University of West Virginia Bd. of Trustees on Behalf of West Virginia University v. Graf*, ___ W. Va. ___, 516 S.E.2d 741(1998) and in *Putnam County Bd. of Educ. v. Andrews*, 198 W. Va. 403, 481 S.E.2d 498 (1996), we denied the appellant's specific request for attorney fees under the statute.

However, in both *Graf* and *Andrews* notice and an opportunity to be heard was afforded to each defendant before this Court made any ruling relating to an award of attorney fees under W. Va. Code § 18-29-8.

In the instant proceeding, the majority has forced the lower court to award attorney fees. In the final analysis, Ms. Maikotter may very well be entitled to attorney fees under the statute. However, the majority should not make such a determination without any analysis, *i.e.*, without affording both parties an opportunity to address the matter. The record is void of any evidence which may or may not militate against such an attorney fee award. Did Ms. Maikotter engage in sanctionable conduct below that would permit the circuit court to deny attorney fees? The majority cannot answer that question. Nor can the majority answer any of a myriad of defenses WVU may have had to an award of attorney fees, because WVU was not afforded notice and an opportunity to address the issue.

Due process is not a new principle. Due process is an old and faithful doctrine embedded in the constitution of this state. Additionally, its aged protection reaches back to the ratification of the nation's constitution. *See State ex rel. Zirkle v. Fox*, 203 W. Va. 668, 510 S.E.2d 502, 506 (1998), ("The most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are notice and the opportunity to be heard, which are essential to the jurisdiction of the court in any pending proceeding."); *State ex rel. United Mine Workers of America, Local Union 1938 v. Waters*,

200 W. Va. 289, 297, 489 S.E.2d 266, 274 (1997) ("[T]he petitioners were denied their fundamental constitutional rights by the issuance of an ex parte preliminary injunction against them without notice or an opportunity to be heard"); *Eastern Associated Coal Corp. v. John Doe*, 159 W. Va. 200, 207 n.2, 220 S.E.2d 672, 678 n.2 (1975) ("Failure to give notice and opportunity to defend may deprive court of jurisdiction."). Due process is one of the cornerstone legal principles that separates Anglo-American jurisprudence from many foreign third world legal systems that pay lip service to the idea of notice and an opportunity to be heard. *See* Syl. pt. 2, *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937) ("The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard."). Unfortunately, in this opinion the majority has chosen to disregard an aged and deeply rooted principle in our legal system.

I fail to understand the urgency in denying WVU an opportunity to show why attorney fees may not be appropriate in this case. Ms. Maikotter's failure to raise the issue before this Court could have been fully argued and brief on remand before the circuit court. Additionally, consistent with due process, WVU could have mounted any objection it had to an award of attorney fees. However, with its decision, the majority has denied WVU this basic right. The role and authority of this Court is not to take sides and favor one party over the other. Our constitutional obligation is to decide issues properly raised, based upon the

merits of those issues properly presented to this Court.[2] The issue of attorney fees was not raised in this appeal. Therefore, I believe that constitutional due process principles prohibited this Court from ordering the trial court to grant attorney fees.

For the reasons stated, I concur in part and respectfully dissent in part.

[2]Justice Cleckley eloquently observed in *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996):

> Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights.... When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must [raise the issue] then and there or forfeit any right to complain at a later time.