No. 29066 – *Jimmy Dale Adkins v. West Virginia Department of Education*

Albright, Justice, dissenting:

I respectfully dissent from the majority opinion because the recommendation of the department of education professional practice panel and the decision of the state superintendent to impose a two-year, rather than a one-year suspension on the Appellee, was not accompanied by findings of fact and conclusions of law on the issue of an appropriate punishment.

The record is clearly sufficient on the issue of Appellee's failure to honestly and fully complete his application for a teaching license by concealing the fact that he had previously been convicted of a serious crime. Neither that concealment nor the underlying criminal conduct may be condoned.

However, the record is essentially silent on the issue of why a two-year suspension was imposed by the state office in light of the fact that the county school board which employed and still employs Appellee was fully aware of the facts and circumstances of the matters Appellee omitted from his license application, and that the county board considers Appellee's service as a teacher to be exemplary despite the omission of important information from the application to the state for a teaching license.

As I understood from the oral argument before this Court, Appellant defends its imposition of a two-year suspension on the grounds that the professional practice panel *routinely* recommends and

the state superintendent *routinely* imposes two-year suspensions in cases of this type. Based upon a page-by-page review of that record, as submitted to the reviewing court below and to this Court, and after a careful re-reading of the briefs submitted, I can find no demonstration of how a two-year suspension was determined to be the appropriate penalty, how that decision was reached in this case, whether there have been similar penalties in similar cases or why the decision of the reviewing court below to reject the two-year suspension as arbitrary and capricious was inappropriate. In short, there is nothing before this Court, and apparently there was nothing before the lower reviewing court, which allowed for a reasoned analysis of the penalty decision by a reviewing court. Based on the record, the imposition of a two-year penalty was simply the exercise of uncontrolled, arbitrary and capricious discretion.

In addition to the fact that there has been no record made as to why the two-year penalty was chosen, an additional concern appears. The claimed *routine* recommendation of the professional practice panel and the *routine* imposition of a fixed penalty of two years by the state superintendent sounds like, looks like and works like a rule or regulation which has *not* been properly published, promulgated and put into effect as a rule or regulation of the professional practice panel or the state superintendent of schools under the provisions of the administrative procedures act of this state. W.Va. Code, Chapter 29A. As the saying goes, if it looks like a duck, walks like a duck and quacks like a duck, it *most probably is a duck*. Reliance upon such an unpublished, un-promulgated rule or regulation may not be the basis of a decision of an administrative body imposing a civil penalty on a person regulated by that administrative body, and reliance on such an un-promulgated regulation is therefore facially arbitrary and capricious, in keeping with the finding of the lower reviewing court.

Where the actions of an administrative body are found to be arbitrary or capricious, the circuit courts are vested with authority upon appeal to reverse, vacate or *modify* the action of the administrative body. The circuit court, faced with the bare record of the nature of the offense and the Appellee's teaching record, chose to modify the action of the administrative body in light of that body's arbitrary and capricious action. In my view, the lower court was clearly entitled to end the matter by *modifying* the administrative order, especially in light of that body's apparent reliance upon an unpublished, un-promulgated and ineffective rule or regulation. In light of the paltry record on the issue of an appropriate penalty, I cannot say that the circuit court was clearly wrong in view of the reliable, probative and substantial evidence on the record. Moreover, in light of the circumstances of this case, I cannot say that the court below was arbitrary or capricious or abused its discretion in devising a means of appropriately punishing Appellee without indirectly sanctioning the use of an unpublished, un-promulgated and ineffective rule or regulation.

I am authorized to state that Justice Starcher joins me in this dissenting opinion.