

Albright, Justice:

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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I must respectfully dissent from the majority opinion because well-established concepts of judicial review and deference have either been ignored or misapplied. Despite its recitation of the controlling law which governs judicial review of a legislative rule,<sup>1</sup> the majority nonetheless goes seriously astray by concluding, as an initial matter, that certain terms in West Virginia Code § 18-5-18b (1985) (Repl.Vol.1999) are subject to varying interpretations and therefore, provide the necessary ambiguity to permit clarification through the rule-making process. Both the majority, and the circuit court below, wrongly determined that they were required to give deference to the legislative rule promulgated by the state board of education. *See* 126 W.V.C.S.R. §§ 67-3, -4.

In syllabus point three of *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E 2d 424 (1995), this Court explained:

Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies

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<sup>1</sup>*See Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E 2d 424 (1995).

the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

195 W.Va. at 578-79, 466 S.E.2d at 429-30.

*Appalachian Power* makes clear that the obligation to accord deference to an agency's clarification of statutory language by legislative rule is only invoked when Legislative intent is clearly lacking. *See id.* The statutory language which the majority determined to be "subject to different meanings or interpretations and thus . . . ambiguous" was the phrase "direct counseling relationship with pupils." W.Va. Code § 18-5-18b. The statute is clear in its directive: school counselors are permitted to "devote no more than one fourth of the work day to administrative activities" and the remaining seventy-five percent of their day is to be spent "in a direct counseling relationship" with the students. W.Va. Code § 18-5-18b.

Common sense clearly dictates that the laundry list of counselor activities that qualify as "direct counseling" pursuant to legislative rule<sup>2</sup> simply does not pass the "smell"

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<sup>2</sup>Under title 126 of the Code of State Regulations, series 67, the following items are included within the requirement that a guidance counselor allot 75% of his/her school day to a "direct counseling relationship with pupils":

(continued...)

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<sup>2</sup>(...continued)

3.2.1. Orientation – A series of activities designed to help students who are in a new environment to become acquainted with the school, to know the staff and physical plant, to understand the structure of courses and requirements, to know school customs and activities, to become acquainted with one another, and to develop a sense of purpose and of belonging;

3.2.2. Assessment – The organizing, collecting and managing of cumulative records, testing information and other procedures and techniques of assessing individual growth and performance. This service includes interpretation of assessment data to be available for students, teachers, parents and administrators to assist them in decision-making;

3.2.3. Information – Collecting and disseminating accurate and current information that will assist students to make intelligent choices about school schedules, four-year plans, postsecondary education programs, and occupations;

3.2.4. Counseling – Individual or group interactions which employ techniques to assist students in working out solutions to academic, personal, and social problems;

3.2.5. Consultation – Interaction with parents, teachers, other educators and community agencies regarding strategies to help students;

3.2.6. Educational Planning – A process of providing students the assistance needed to select courses in the middle or junior high school years and to formulate their four-year educational plans that will enable them to make a successful transition from high school to postsecondary education or employment;

3.2.7. Placement – Organized procedures for locating appropriate employment or further training for students;

(continued...)

test. To argue otherwise is to deny the obvious. And, by failing to offer any reasoning in support of its conclusory statement that the term “direct counseling relationship” is ambiguous, the majority suggests that its determination was simply the one required to permit the necessary deference to be extended to the Board of Education which in turn would allow the legislative rule to be upheld.

In rushing to the wrong conclusion regarding the clarity of the statutory terms in issue, the majority demonstrates the danger of granting carte blanche deference to a legislative rule without sufficiently examining the need for such rule enactment in the first place. By “deferring” to the Board-created definition of the term “direct counseling,” the majority has enabled the Board to emasculate the clearly-stated intent of the Legislature. How much more patent could the Legislature have been than to announce its decision that school counselors should spend no more than one-fourth of their school day in tasks that are viewed as administrative and which do not typically involve person-to-person contact.

Through the rule-making process that is unique to the state board of education,<sup>3</sup> the provisions of West Virginia Code § 18-5-18b have simply been rewritten to better serve

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<sup>2</sup>(...continued)

3.2.8. Follow-up – A systematic plan for maintaining contact with former students and obtaining data for evaluating the effectiveness of the guidance program.

126 W.V.C.S.R. §§ 67-3.2.1 to -3.2.8.

<sup>3</sup>See W.Va. Code §§ 29A-3B-1 to -12 (1990) (Repl.Vol.1998); *cf.* W.Va. Code §§ 29A-3-1 to -17 (1982) (Repl.Vol.1998).

the supposed needs of the local boards of education to accomplish undeniably administrative tasks under the guise of complying with the Legislative directive to devote three-fourths of a guidance counselor's day to one-on-one contact with students. Because I do not approve of this flagrant abrogation of clearly announced Legislative intent and because deference to an agency's legislative rule should not have been extended in this case under well-established principles of review, I must dissent.

I am authorized to state that Justice McGraw joins in this dissent.