

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

FRANKLIN BRAGG,

Plaintiff

v.

CIVIL ACTION NO. 2:05-0355

JOYCE VESSEY SWANSON
in her official capacity as
principal of Hurricane High School and
THE BOARD OF EDUCATION
OF THE COUNTY OF PUTNAM,

Defendants

MEMORANDUM OPINION AND ORDER

Pending is plaintiff's motion for a preliminary injunction and temporary restraining order, filed May 3, 2005. Pursuant to Rule 65(a)(2), the court ordered the trial of this action advanced and consolidated with the hearing on plaintiff's motion. The parties consented to this action both prior to, and during, the bench trial conducted on May 9, 2005.

I. Introduction

This action involves a high school student who was disciplined for wearing a T-shirt that displayed the Confederate flag. He wore the shirt in observance of his southern heritage. For some, the mere mention of the emblem evokes strong feelings.

The focus of this opinion, however, is not alone on the Confederate flag. Rather, as observed by then-Chief Judge Wilkinson in another flag-inspired case, a much broader principle is at stake:

When a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated. And it is as a free speech case, not as a Confederate flag case, that this appeal must be resolved.

It is important to keep the issue here in some perspective. The vast majority of Virginians have no desire to display a Confederate logo on their license plates. The vast majority of Virginians seek venues other than a motor vehicle tag for the observance of their lineage, and do not view the Confederate flag as symbolically celebrating their line of descent. The vast majority of Virginians understand that one motorist's proclamation of heritage is another's reminder of the unspeakable cruelties of human bondage. The vast majority of Virginians recognize the sad paradox of Confederate history--namely, that individual southerners, so many good and decent in themselves, swore allegiance to a cause that thankfully was lost, and to practices that no society should have sought to defend.

But the First Amendment was not written for the vast majority of Virginians. It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree, or speech we know will meet with general approbation. Yet pleasing speech is not the kind that needs protection.

Sons of Confederate Veterans, Inc. v. Commissioner of Virginia

Dept. of Motor Vehicles, 305 F.3d 241, 242 (4th Cir. 2002)

(Wilkinson, C.J., concurring in denial of rehearing en banc).

With this in mind, the court proceeds to the analysis.

II. Findings of Fact

A. Prior Racial Incidents in Putnam County Schools

Hurricane High School ("school") is located in Putnam County. It has a student population of 1004, 14 of whom are African-American. Plaintiff Franklin Bragg is an eighteen (18) year-old senior at the school. While enrolled there, he has enjoyed a relatively unblemished disciplinary record.

Defendant Joyce Vessey Swanson was named the new principal ("principal") at the school for the 2004-2005 school year. She is employed in that capacity by the defendant Board of Education of the County of Putnam ("board"). The principal, who once served as a teacher at the school from 1975 to 1988, formerly served as assistant principal at Poca High School in the same county from 1988 to 1997. Later, she served as principal of Buffalo High School from 2000 to 2004, another secondary educational institution in the county. During her tenures at these schools, the principal had several negative experiences with the Confederate flag ("flag"):

1. Poca High School. In 1989, one of the first, if not the first, African-American student at the school joined the cheerleading squad. At the initial pep

rally, some fellow students greeted her from the stands by wearing flag attire and unfurling large flags between them. This caused the cheerleader to leave the floor. The principal confiscated the items.

2. Poca High School. In 1994, two students wearing flag attire referred to a male African-American student as a "nigger" and used other racial epithets when he exited the school bus.
3. Buffalo High School. In 2002, an incoming freshman was greeted outside the school by a group of students displaying the flag. The students were also wearing the flag on their clothing, exhibiting it on their vehicles, and generally creating a gauntlet-like environment calculated to intimidate the student. Some other students came to the young man's defense. The situation was subsequently defused by a combination of both disciplinary action and the movement of staff within the school. The principal stated the incident was very disruptive to the learning environment.

After arriving at the school, and implementing the dress code changes discussed infra, an incident occurred in September 2004. A new ninth grade African-American student left his spiral notebook in a classroom. When the student returned to retrieve it, he found someone had defaced it with a variety of racist language and symbols.¹ (Defs.' ex. 1.) The student was

¹Etched on the cardboard cover was written "Roger is a nigger" and "nigger lover." Near the bottom of one inside page was a small sketch of the flag just above which was written "rebel" and just below which was written "nigger hater." On another page was written "Shut up nigger" and "nigger's" with one undecipherable, struck-through word located below it, along with another unclear word appearing further below an intervening drawing of an eight-pointed star. The words and images are
(continued...)

understandably distraught and missed a day of school.

Unfortunately, the perpetrator(s) was never identified.

Despite this incident, Lisa Adkins indicated that there is a good racial environment at the school. This is significant because Ms. Adkins regards herself as an African-American, although her lineage is 1/3 each African-American, Caucasian, and Native American. She observed that people of both races mix freely at the school and are friendly with one another. She has not seen any disputes of a racial character involving flag paraphernalia during her time at the school. While recognizing that her testimony may possibly be influenced by a desire to maintain cordial relations with her fellow students at the school, which appears to be heavily Caucasian, the court credits her testimony which stands unimpeached.

B. The Dress Code

The board has promulgated a Policy Manual setting forth the rules and regulations applicable to the schools under its jurisdiction. The applicable provisions follow:

¹(...continued)
difficult to decipher in view of the fact that defendants were only able to tender a xerox copy of the notebook.

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