In The

Supreme Court of Virginia

RECORD NO. 140145

JULIETTE PAYNE,

Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE AND MATERIAL PROCEEDINGS IN TRIAL COURT

The Constitution of Virginia and corresponding statutes vest the supervision of each school division in a school board. See Va. Const. art. VIII, § 7; Va. Code § 22.1-28; Bristol Virginia School Br. v. Quarles, 235 Va. 108, 119 (1988). This divestiture, while broad, does not provide school boards with unlimited power. Rather, school boards "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensible." City of Richmond v. Confrere Club, 239 Va. 77, 79 (1990); see also Va. Code § 22.1-78.

At issue in this matter is whether the Fairfax County School Board (the "School Board") violated Va. Code § 22.1-315(A) (hereinafter "315(A)") when it suspended Ms. Juliette Payne for "disciplinary reasons" for three days without pay without a prior school board hearing. That code section states, in relevant part:

> A teacher or other public school employee, whether full-time or part-time, permanent, or temporary, may be suspended for good and just cause when the safety or welfare of the school division or the students therein is threatened or when the teacher or school employee has been charged by summons, warrant, indictment or information with the commission of a felony; a [specified] misdemeanor …; or an equivalent offense in

> another state. Except when a teacher or school employee is suspended because of being charged by summons, warrant, indictment or information with the commission of one of the above-listed criminal offenses, a division superintendent or appropriate central office designee shall not suspend a teacher or school employee for longer than sixty days and shall not suspend a teacher or school employee for a period in excess of five days unless such teacher or school employee is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313, if applicable. Any teacher or other school employee so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise.

Va. Code § 22.1-315(A) (list of specified misdemeanors omitted).

While this will be the first binding interpretation of this iteration of 315(A), this is not the first relevant interpretation of this code section. More than 30 years ago, the Virginia Attorney General opined that 315(A) requires school boards to provide a school board hearing before suspending a teacher without pay regardless of the length of the teacher's suspension (except when a teacher is suspended for being charged with a crime). 1982-1983 Op. Att'y Gen. (Jan. 11, 1983) § 2. Later that same year, the United States District Court for the Eastern District of Virginia held that "under Va. Code § 22.1-315(A), a school board must provide a hearing before suspending a teacher for any length of time without pay." Wilkinson v. School Bd. of Henrico County, 566 F. Supp. 766, 772-73 (E.D. Va.

1983).[1] Approximately three years after the District Court's decision in Wilkinson, the School Board itself adopted a policy that requires it to conduct a School Board hearing before suspending a teacher without pay regardless of the length of the teacher's suspension (except when a teacher is suspended after being charged with a crime). See J.A. 182-83 (Joint Stipulation of Uncontested Facts and Authenticated Exhibits (hereinafter "Joint Facts"), Ex. 6, School Board Policy 4270.3). Policy 4270, entitled "Suspension of Employees states:

> In all cases not involving criminal charges, a teacher who is suspended will be provided an opportunity for a hearing before the School Board, consistent with the requirements of the Virginia Code.[2]

See id. at IV.A.

During the administrative appeal of this matter, Fairfax County Public Schools' ("FCPS'") designee admitted that School Board Policy 4270.3 requires that the School Board provide a hearing before suspending any teacher without pay for any length of time. However, FCPS' designee

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[1] The Wilkinson decision and the referenced Attorney General Opinion are the only two relevant published opinions interpreting 315(A) located by undersigned counsel. At the time of those decisions, 315(A) applied only to teachers. As discussed later, the General Assembly amended 315(A) in 1996 to cover all school employees.

[2] The legal authority cited by the School Board for its suspension policy is 315. J.A. 183 (Joint Facts, Ex. 6, School Board Policy 4270.3 at 2).

explained that the School Board does not follow Policy 4270.3 for support employees, and argued that the pre-suspension procedure set forth in Policy 4270.3 and 315(A) does not apply to support employees such as Ms. Payne. As stated by FCPS' designee:

> FCPS strongly disagrees that Wilkinson applies to support employees . . . That decision was rendered in 1983, and . . . at that time, Section 22.1-315 did not apply to school employees, other than teachers.
> * * * * * * * * * *
> And clearly, the School Board, in 1986, . . . which was three years following the decision, made a distinction between suspension procedures for teachers and suspension procedures for support employees.
>
> **The School Board does follow the provisions of Wilkinson regarding a hearing for teaching employees**, but does not follow that procedure for support employees.
>
> And the distinction is in the policy that's been in effect since 1986.

J.A. 250-51 (Joint Facts, Ex. 16, Step 4 Hearing, Tr. 26:5-27:8 (FCPS' Designee) (emphasis added); see also J.A. 220 (Joint Facts, Ex. 14, Penny McConnell's Step 2 Decision, February 29, 2012)[3]; see also J.A. 182-183 (Joint Facts, Ex. 6, School Board Policy 4270.3). Thus, under the

[3] During an earlier step in the administrative process, Ms. Payne's supervisor opined that 315(A) does not apply to Ms. Payne's suspension because her suspension was not in excess of five days. See J.A. 220 (Joint Facts, Ex. 14, Penny McConnell's Step 2 Decision, February 29, 2012). Ms. Payne's supervisor never suggested that 315(A) did not apply because Ms. Payne's suspension was "disciplinary" in nature.

School Board's own policy—a policy that has been in effect for nearly 30 years—the School Board must provide a hearing before suspending a teacher for any length of time without pay, and regardless of the nature of the suspension (except for suspensions involving criminal charges). See id.

Although the School Board is statutorily required to ensure that "school laws are properly explained, enforced and observed" (Va. Code § 22.1-79(1)), the School Board's neglect of this obligation has resulted in this matter. For instance, in 1996, the General Assembly amended 315(A) to expand the employees the section covers from only "teacher[s]" to all "public school employee[s]." 1996 Va. Acts 960. The School Board never amended its suspension policy to reflect that change in the law. As another example, in 2009, the General Assembly amended Va. Code § 22.1-79(6) to expressly exclude disputes relating to employee suspensions from the grievance process. 2009 Va. Acts 459. Again, the School Board never amended its suspension policy to reflect that change and continues to use a grievance procedure for suspensions of non-teachers. Other than those amendments, the Virginia General Assembly has never contradicted or otherwise modified the Wilkinson holding or Virginia Attorney General's Opinion. Still, even while the Virginia Code has entitled every school board

employee to a pre-suspension school board hearing for suspensions without pay for any length of time and for any reason since at least 1996, the School Board has failed to extend that right to non-teachers.

In early 2012, the School Board's failure to follow the mandates of the Virginia Code resulted in Ms. Payne's suspension without pay for three days without a pre-suspension School Board hearing. J.A. 116-17 (Joint Facts ¶ 10 and 12). After exhausting the administrative appeal process, Ms. Payne sought a declaration from the Fairfax County Circuit Court regarding the illegality of her suspension without pay without a school board hearing. See J.A. 1-6 (Amended Complaint); J.A. 120 (Joint Facts ¶ 27). Thereafter, the parties filed with the Circuit Court a Joint Stipulation of Uncontested Facts and Authenticated Exhibits (J.A. 114-439). Each party also filed with the Circuit Court its own Motion for Summary Judgment and Opposition to the other party's Motion for Summary Judgment (J.A. 7-17; 18-97; and 98-113). Nevertheless, it was not until the hearing on the parties' Motions for Summary Judgment on October 18, 2013, that the School Board articulated an interpretation of 315(A) that contradicts all of the prior relevant interpretations of 315(A) including its own nearly 30-year-old Policy:

> Ms. Rewari: . . . The statute doesn't apply to work performance related to disciplinary suspensions. It applies to the suspensions that are in the statute, but not the type of suspensions for the reason that Ms. Payne was suspended.
>
> The Court: You mean if a teacher had work performance issues, a teacher could not be suspended under this statute?
>
> Ms. Rewari: Well, Ms. Payne is not a teacher.
>
> The Court: I know, but I'm asking the teacher.
>
> Ms. Rewari: Yes, it wouldn't be under this – it's our position it wouldn't be under the statute because the statute only addresses two limited situations.

J.A. 478-479 (October 18, 2013, Tr. 9:7-10:9). Unfortunately, on October 21, 2013, the Honorable John M. Tran issued a two page Order agreeing with this newly articulated interpretation. It appears Judge Tran opined that 315(A) requires the School Board to provide a pre-suspension hearing *only* where the suspension is (1) for a period of more than five days *and* (2) based on *either* (a) threats to the safety or welfare of the students or school division or (b) charges for a criminal offense. See J.A. 562-63 (Circuit Court Order 1-2). Accordingly, the Circuit Court found that 315(A) "does not apply to [Ms. Payne] as [her] suspension was due to work performance." Id.

The Circuit Court's interpretation is problematic for several reasons. For instance, the Circuit Court explicitly rejected the only two persuasive authorities that had considered 315(A). See J.A. 563 (Circuit Court Order 2). Further, the Circuit Court ignored the General Assembly's choice not to contract either of those opinions during 315(A)'s six amendments but instead to expand the employees 315(A) covers. The Circuit Court failed to even address the General Assembly's 2009 amendment of Va. Code § 22.1-79(1), which expressly excludes from the grievance process disputes relating to employee suspensions. The Circuit Court's opinion is even at odds with the School Board's own interpretation of 315(A) as manifested in School Board Policy 4270.3, at least with regard to the suspension of teachers.

While each of these issues is problematic, the most significant problem with the Circuit Court's new interpretation of 315(A) is its illogical evisceration of long-standing, constitutionally protected rights of school board employees throughout the Commonwealth of Virginia. Specifically, under the Circuit Court's interpretation of 315(A), school employees who are threats to the safety or welfare of the school division or who commit a crime have greater procedural rights than school employees who perform poorly. In fact, under the Circuit Court's interpretation of 315(A), school

boards may indefinitely suspend a teacher without pay based on unsatisfactory performance. This result unintentionally eliminates teachers' constitutionally protected property interests in their jobs.

In sum, the Circuit Court's new interpretation of 315(A) is inequitable, illogical, and unconstitutional. Consequently, Ms. Payne respectfully requests that this Court overturn the Circuit Court's Order and find that Va. Code § 22.1-315(A) requires school boards to provide a hearing to an employee before suspending that employee for any length of time without pay unless the school board is suspending that employee because that employee has been charged by summons, warrant, indictment or information with the commission of one of the criminal offenses specified in Va. Code § 22.1-315(A).

STATEMENT OF FACTS

The School Board employs Ms. Payne as a Food and Nutrition Services Manager. J.A. 114 (Joint Facts ¶ 1). On or about January 25, 2012, the FCPS Human Resources Department ("HR Department") notified Ms. Payne that it intended to suspend her without pay for three days in the future. J.A. 116 (Joint Facts ¶ 10). The School Board failed and refused to provide Ms. Payne with a School Board hearing relating to that suspension decision. J.A. 116-17 (Joint Facts ¶ 12). Thereafter, the HR Department

suspended Ms. Payne without pay for three days. J.A. 117 (Joint Facts ¶ 13). On or about May 13, 2013, Ms. Payne's supervisor recommended that the HR Department suspend Ms. Payne without pay for five additional, future days. J.A. 508-509 (October 18, 2013 Hearing, Tr. 39:19-40:22). Again, the School Board refused to hold a hearing relating to that suspension. See id.

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in holding that Va. Code § 22.1-315(A) applies only to suspensions based on (1) threats to the safety or welfare of the students or school division and (2) charges for a criminal offense. See J.A. 562-564 (Circuit Court Order 1-3 (Circuit Court waived endorsements of its Order)); J.A. 9-14 (Plaintiff's Memorandum in Support of Motion for Summary Judgment 3-8); J.A. 445-449 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Rebuttal to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment 6-10). See also Va. Sup. Ct. R. 5:25.

II. The Circuit Court erred in holding that Va. Code § 22.1-315(A) does not require a school board to provide a school board hearing prior to suspending a teacher or other school employee without pay for less than five days. See J.A. 563-64 (Circuit Court Order 2-3 (Circuit Court waived endorsements of its Order)); J.A. 9-14 (Plaintiff's Memorandum in Support of Motion for Summary Judgment 3-8); J.A. 452-454 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Rebuttal to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment 13-15). See also Va. Sup. Ct. R. 5:25.

III. In the alternative, the Circuit Court erred in holding that a school division may suspend a teacher or other school employee when (1) there is no threat to the safety or welfare of the students or school division and (2) when that teacher or other school employee has not been charged with a criminal offense. See J.A. 562-64 (Circuit Court Order 1-3 (Circuit Court waived endorsements of its Order)); J.A. 445-446 (Plaintiff's

Opposition to Defendant's Motion for Summary Judgment and Rebuttal to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment 6-7). See also Va. Sup. Ct. R. 5:25.

STANDARD OF REVIEW

The circuit court's interpretation of statutes is reviewed *de novo*. Jones v. Williams, 280 Va. 635, 638 (2010).

ARGUMENT

I. VA. CODE § 22.1-315(A) ENCOMPASSES ALL TYPES OF SUSPENSIONS FOR ANY LENGTH OF TIME, INCLUDING SUSPENSIONS RELATED TO WORK PERFORMANCE.

The Circuit Court held that 315(A) applies only to suspensions based on (1) threats to the safety or welfare of the students or school division and (2) charges for a criminal offense. J.A. 563-64 (Circuit Court Order 1-2). The Circuit Court cited two factors in support of its opinion: (i) a "plain reading of the statute" and (ii) its interpretation of the General Assembly's intent when it amended 315(A) in 1996. Id. Neither factor supports the Circuit Court's holding. On the contrary, those factors, among others, demonstrate that 315(A) relates to all types of suspensions, including suspensions related to work performance. That conclusion is supported by: (a) the entirety of the plain language of 315(A); (b) the prior opinion of the United States District Court for the Eastern District of Virginia; (c) the prior opinion of the Virginia Attorney General and the General Assembly's

subsequent, informed amendments of the statute; (d) the School Board's prior interpretations of the statute; and (e) the illogical and potentially unconstitutional consequences of such an interpretation.

A. The plain language of the totality of 315(A) belies the Circuit Court's interpretation of the statute.

The Circuit Court made two findings related to the language of 315(A), entitled "Grounds and Procedure for Suspension":

> . . . [T]he Court finds that Va. Code § 22.1-315 does not require the School Board to provide Plaintiff with a hearing. The statute only applies to suspensions based on (1) threats of [sic] safety or welfare of the students or school division and (2) charge(s) for a criminal offense. Va. Code § 22.1-315 does not apply to the Plaintiff as the suspension was due to work performance.
>
> * * * * * * * * * *
>
> Based on a plain reading of the statute, only suspensions as they relate to the safety and [sic] welfare of the school for more than five days [sic] apply to Va. Code § 22.1-315.

J.A. 562-63 (Circuit Court Order 1-2). The Circuit Court's interpretation of 315(A) is incorrect.[4]

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[4] The Circuit Court's statement that the statute covers only suspensions as they relate to the safety and welfare of the school division is contrary to the Court's prior finding that the statute applies to both threats to the safety or welfare of the school division and criminal charges. J.A. 562 (Circuit Court Order 1). This appears to be an inadvertent oversight by the Circuit Court. Similarly, it appears the Court also mistakenly wrote that "only suspensions as they relate to the safety or welfare of the school for more than five days apply to Va. Code § 22.1-315." Id.

When read in its entirety, the plain language of 315(A) includes all types of suspensions. The first sentence of 315(A) states a teacher or other school employee may be suspended for good and just cause (i) when there is a threat to the safety or welfare of the school division or students therein, or (ii) for specified criminal behavior. See Va. Code § 22.1-315(A). Alone, this sentence could support the Circuit Court's finding. However, it is a well-settled rule of statutory construction that the Court should give effect to every part of a statute and read each sentence in conjunction with the others. See Buonocore v. Chesapeake & Potomac Tel. Co., 254 Va. 469, 472 (1997) ("We will not construe a statute by singling out a particular term or phrase, but will construe the words and terms at issue in the context of the other language used in the statute."); Raven Red Ash Coal Corp. v. Absher, 153 Va. 332, 335 (1929) ("Every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary."). Read in context with the first sentence, the language of the second sentence of 315(A) demonstrates that the General Assembly did not intend for the first sentence to have such a narrow interpretation. Rather, the second sentence plainly applies to all suspensions not based on criminal behavior:

> Except when a teacher or school employee is suspended because of being charged by summons, warrant, indictment or information with the commission of one of the above-listed criminal offenses, a division superintendent or appropriate central office designee shall not suspend a teacher or school employee for longer than sixty days and shall not suspend a teacher or school employee for a period in excess of five days unless such teacher or school employee is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313, if applicable.

Va. Code § 22.1-315(A).[5] Thus, the second sentence means:

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[5] Under the Circuit Court's narrow interpretation of the statute, 315(A) relates only to the two types of suspensions specifically identified in the first sentence. If those were the entire universe of applicable suspensions, the General Assembly would likely not have excluded one type of suspension from the second sentence but instead would likely have included the type of suspension to which the second sentence applies. The fact that the General Assembly chose to use exclusive language evinces its intent to include suspensions not specifically identified in the first sentence. Otherwise, the simpler, and more appropriate, wording of the second sentence would be:

> ~~Except when a teacher or school employee is suspended because of being charged by summons, warrant, indictment or information with the commission of one of the above-listed criminal offenses~~ *When a teacher or other school employee is suspended because the teacher or other school employee is a threat to the safety or welfare of the school division*, a division superintendent or appropriate central office designee shall not suspend a teacher or school employee …

- for suspensions based on criminal behavior, school boards may suspend a school employee (i) for longer than 60 days, (ii) without advanced notice, and (iii) without a school board hearing; and

- for all other suspensions (*i.e.*, suspensions based on reasons other than criminal behavior), school boards shall not suspend a school employee (i) for longer than 60 days, or (ii) for longer than five days without advance notice and a school board hearing.

See Va. Code § 22.1-315(A). The third sentence of 315(A) explicitly modifies the second sentence and provides additional procedural safeguards for suspensions *without pay*:

> Any teacher or other school employee so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise.

Va. Code § 22.1-315(A). Consequently, the second sentence read in conjunction with the third means that for all suspensions *without pay*—regardless of the type or length of the suspension—a school employee continues to receive her pay until the school board, after a hearing, determines otherwise (except when a teacher is suspended after being charged with a crime). As a result, and contrary to the Circuit Court's narrow interpretation of 315(A)'s first sentence, the entirety of 315(A) includes all types of suspensions.

B. The Eastern District of Virginia held more than 30 years ago that a school board must provide a hearing before suspending a teacher without pay for any length of time.

On matters of Virginia law, opinions of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit are persuasive but not controlling. See, e.g., Maxey v. Am. Cas. Co. of Reading, Pa., 180 Va. 285, 287 (1942). Nevertheless, in reaching its opinion, the Circuit Court considered and explicitly disregarded the interpretation of 315(A) by the Eastern District of Virginia in Wilkinson, a decision rendered after considering circumstances nearly identical to those here. See J.A. 563 (Circuit Court Order 2). The Circuit Court's rejection of the Wilkinson Court's interpretation of 315(A) is unwarranted.

In Wilkinson, Henrico County Public Schools ("HCPS") failed to hold a hearing before the school board prior to suspending a teacher, Ruth Wilkinson, without pay for five days for disciplinary reasons. See Wilkinson, 566 F. Supp. at 767-68.[6] Like Ms. Payne, Ms. Wilkinson contended that suspending her in that manner violated 315(A). Id. at 768. HCPS contended that because it did not suspend Ms. Wilkinson in excess of five days without pay, failure to provide a pre-suspension hearing before

[6] HCPS suspended Ms. Wilkinson as a result of her "insubordination, noncompliance with school policies, and lack of cooperation in dealing with parental concerns during the past week." Wilkinson, 566 F. Supp. at 767-68 n.1.

the school board did not violate 315(A). See id. The Court summarized the parties dispute as determining "whether 'so suspended' refers to teachers suspended five days or less such as plaintiff, in addition to whatever other group or subgroup it may be intended to cover." Id. The Court concluded that it was the "intent of the Virginia General Assembly" that "under Va. Code § 22.1-315(A), a school board must provide a hearing before suspending a teacher for any length of time without pay. If the school administrators wish to avoid putting the School Board to the effort of holding a hearing for a minor infraction, as they contend, they may simply suspend a teacher *with* pay for five days or less." Id. at 772-73 (emphasis in original).[7] Consequently, and contrary to the Circuit Court's interpretation of 315(A), the Wilkinson Court concluded that

[7] In 1983, Va. Code § 22.1-315(A) stated, in relevant part:

> Except when a teacher is suspended because of being charged by summons, warrant, indictment or information with the commission of a felony or a crime of moral turpitude, a division superintendent or appropriate central office designee shall not suspend a teacher for longer than sixty days and shall not suspend a teacher for a period in excess of five days unless such teacher is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313. Any teacher so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise.

315(A) encompasses all types of suspensions—including disciplinary suspensions—and that Ms. Wilkinson was entitled to a school board hearing before HCPS suspended her without pay.

C. Pursuant to the Attorney General's 1983 Opinion, and the presumed intent of the Virginia General Assembly, 315(A) requires a school board to provide a hearing before suspending any employee without pay for any length of time.

The Circuit Court also considered and explicitly rejected the Attorney General's 1983 Opinion. See J.A. 563 (Circuit Court Order 2). With complete disregard to the Attorney General's 1983 Opinion, the Circuit Court determined the General Assembly's 1996 amendment of 315(A) to include "other public school employee[s]" was "intended to safeguard threats to the safety and welfare of schools, and not to enhance the protections of public school employees." Id. The Circuit Court's reasoning is untenable for two reasons.

First, the Circuit Court should not have bifurcated the Attorney General's Opinion and the General Assembly's amendments of 315(A). "The legislature is presumed to have knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." Beck v. Shelton, 267 Va. 482, 492 (2004). Relevant here, the Attorney General

issued an opinion in 1983 that states 315(A) includes disciplinary suspensions:

> 1. Sections 22.1-313 and 22.1-315 authorize local school systems to suspend teachers; Section 22.1-317 authorizes a range of disciplinary actions in regard to teachers. Do these sections, or any other sections of the Virginia Code, permit a local school system to suspend a teacher as a disciplinary measure?
>
> * * * * * * * * * *
>
> Section 22.1-315 by its terms limits the circumstances in which suspension of a teacher may occur. The statute does not prohibit the school board from using suspension as a disciplinary measure. Under the statute, suspension may be used by a school board as a disciplinary or a precautionary measure, so long as the suspension is: "for good and just cause when the safety or welfare of the school division or the students therein is threatened or when the teacher has been charged by summons, warrant, indictment or information with the commission of a felony or crime of moral turpitude."
>
> * * * * * * * * * *
>
> Your first question is, therefore, answered in the affirmative. A local school board may suspend a teacher as a disciplinary measure within the limits prescribed by law.

1982-1983 Op. Att'y Gen. § 1. The Attorney General also opined that the requirement of providing a school board hearing before suspending a teacher without pay applies regardless of the length of the teacher's suspension (except when a teacher is suspended for being charged with a crime):

> 3. Assuming the local school system has the authority to suspend a teacher as a disciplinary measure, may it suspend without pay? Assuming the answer is yes, what notice or hearing requirements, if any, are required for suspensions of five or fewer days?
>
> * * * * * * * * * *
>
> Section 22.1-315(A) provides generally that a teacher who is suspended "shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise." See § 22.1-315(A) This means that the school system has the authority in an appropriate case to suspend without pay provided there is first a hearing before the school board. The exception is in the case where a teacher is suspended because of being charged by summons, warrant, information or indictment with a felony or crime of moral turpitude. In such a case, the teacher may be suspended without pay prior to a hearing before the board. See 22.1-315(B).

1982-1983 Op. Att'y Gen. § 3.

It has been more than 30 years since both the Wilkinson decision and the Attorney General's Opinion. The General Assembly has amended 315 six times over that time period. See 1987 Va. Acts 559; 1993 Va. Acts 498; 1996 Va. Acts 960; 1997 Va. Acts 721; 2001 Va. Acts 430; 2001 Va. Acts 450. The Circuit Court did not find that the General Assembly has ever limited the Attorney General's interpretation of 315(A), nor could it. Instead, the Circuit Court simply stated it found the Attorney General's opinion "unpersuasive." J.A. 563 (Circuit Court Order 2). Without finding

that the General Assembly has countermanded the opinion of the Attorney General, the Circuit Court should have adopted the Attorney General's 1983 Opinion when analyzing the General Assembly's intent and the statute's legislative history.

Second, the Circuit Court's interpretation of the purpose of the 1996 amendment of 315(A) is illogical. In 1996, the General Assembly amended 315(A) as follows:

> Except when a teacher *or school employee* is suspended because of being charged by summons, warrant, indictment or information with the commission of a felony or a crime of moral turpitude, a division superintendent or appropriate central office designee shall not suspend a teacher *or school employee* for longer than sixty days and shall not suspend a teacher *or school employee* for a period in excess of five days unless such teacher *or school employee* is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313, *if applicable*. Any teacher *or other school employee* so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise.

1996 Va. Acts 960 (italics connote additions to statute). The Circuit Court opined that this amendment did not enhance school employee's rights:

> Furthermore, the Court finds that the legislative history of Va. Code § 22.1-315 demonstrates that the 1996 amendment to include 'other public school employee' was intended to safeguard threats to the

> safety and welfare of schools, not to enhance the protections of public school employees. This change in conjunction with amendments to Va. Code § 19.2-831.1 and Va. Code § 22.1-296.1 where the General Assembly broadened the reportable offenses committed by school employees illustrates that the purpose of the statutes is to protect safety and welfare.

J.A. 562 (Circuit Court Order 1). This rationale is incorrect.

First, contrary to the Circuit Court's analysis, adding non-teachers to 315(A) arguably has a negative impact on the safety and welfare of the school division. Prior to the 1996 amendment, a school division could freely suspend non-teachers without pay and then use any appropriate method of due process it desired—including a grievance process that occurs after the suspension. By adding "other public school employee" to § 315(A), the General Assembly explicitly *expanded* the school board hearing rights from teachers to all school employees. Therefore, after the 1996 Act, if a school division sought to suspend a non-teacher without pay who was a threat to the school division's safety or welfare, the school division must provide that non-teacher with notice and opportunity to be heard by the school board prior to her suspension, a procedural hurdle not mandated before the 1996 amendment.

Second, if the sole purpose of the 1996 Act was to provide notice of arrest or enhance the safety and welfare of the school division, then

315(A)'s amendment was superfluous. The General Assembly needed to amend only two statutes to achieve that purpose: (i) Va. Code § 19.2-83.1 (Report of arrest of school employees for certain offenses) and (ii) Va. Code § 22.1-296.1 (Data on convictions for certain crimes, required; penalty). Although the General Assembly amended those statutes and 315(A) through the 1996 Act, that fact alone does not demonstrate the intent of the General Assembly. Even if the Court were to consider the fact that all three statutes were amended by the same 1996 Act, the fact that the General Assembly added "or other school employee" to 315(A) leads to the inescapable conclusion that the General Assembly intended to, and in fact did, enhance the protection of non-teaching employees.

In any event, the Circuit Court should not have relied on a Legislative Draft File to discern the intent of the General Assembly. As stated by the General Assembly's Legislative Reference Center in its information regarding Legislative Draft Files:

> **Please remember throughout this process: Virginia does not collect or maintain legislative history.** Looking for a "needle in a haystack" in the legislative draft files is as close as researchers can come to determining intent. However, it must be clearly understood that anything found in the LD files provides only an indication of the intent of the person who requested that the bill be drafted. By the time the bill is enacted, it has gone through the complex legislative process, often incorporating

> many changes from [the] time the original version was drafted. **The intent of the General Assembly in passing the bill is generally not recorded, and if it is, it is printed on the face of the bill or referenced in the Code of Virginia.**

Virginia Division of Legislative Services, Legislative Reference Center, II. Legislative Draft Files, http://dls.virginia.gov/lrc/leghist.htm (December 5, 2013) (emphasis in original). Instead, the Circuit Court should have discerned the intent of the General Assembly by considering that it has not countermanded the Attorney General's Opinion during the past 30 years (except by expanding the covered employees from only teachers to all employees). Under well-settled law, the Circuit Court should have concluded that the General Assembly acquiesced and continues to acquiesce to the Attorney General's interpretation of 315(A) as including all types of suspensions. See Beck, 267 Va. at 492.

D. The Circuit Court's Order contradicts many of the School Board's interpretations of 315(A).

Notably, the Circuit Court's opinion contradicts several different interpretations of 315(A) offered by the School Board, including a School Board policy that has been in place for almost 30 years. School Board Policy 4270.3, which explicitly references Va. Code § 22.1-315 for its legal support, defines the term "Suspension" as:

> Suspension is a period of enforced leave without pay. Employees may be suspended when the safety and/or welfare of the school division or its students are threatened; when the employee has been charged with a felony, a crime of moral turpitude, or any offense involving the sexual molestation, physical or sexual abuse, or rape of a child; or *when the employee's conduct requires disciplinary action or constitutes just cause for suspension*.

J.A. 182 (Joint Facts, Ex. 6, School Board Policy 4270.3.III) (emphasis added). The School Board provides two different suspension procedures for teaching and non-teaching employees. See Id. at IV. Regarding teachers, the policy states:

> *Teachers may be suspended in accordance with procedures outlined in Virginia Code, Section 22.1-315.* The Division Superintendant or his or her designee is authorized to suspend any teacher who is charged with a felony, or crime of moral turpitude, or any offense involving sexual molestation, physical or sexual abuse, or rape of a child. The teacher will be provided notice of such suspension and will be given an opportunity to respond. *In all cases not involving criminal charges, a teacher who is suspended will be provided an opportunity for a hearing before the School Board, consistent with requirements of the Virginia Code.*

Id. at IV.A (emphasis added). Regarding non-teachers, the policy states:

> The Division Superintendent or his or her designee may suspend a nonteaching employee or a teaching employee whose work is not covered by a regular annual or continuing classroom teaching contract for the school year, for any of the reasons

> described in section III. In no case will an employee be suspended without first being provided notice and an opportunity to respond.

Id. at IV.B. Consequently, and contrary to the Circuit Court's Order, the School Board's policy for nearly 30 years has been that 315(A) requires the School Board to conduct a School Board hearing when suspending a teacher *for any reason* without pay for any length of time, but not a non-teaching school employee.

The School Board provided another interpretation of 315(A) during Step 2 of the Grievance Process. The Program Manager's rationale for not providing Ms. Payne with a pre-suspension hearing was as follows:

> Ms. Payne has been suspended without pay for three days. Therefore, I find that the provisions of Section 22.1-315 of the Code of Virginia requiring that an employee be afforded an opportunity for a hearing before the school board do not apply to this action.

See J.A. 220 (Joint Facts, Ex. 14, Penny McConnell's Step 2 Decision 2). Consequently, and again contrary to the Circuit Court's Order, the Program Manager interpreted 315(A) as requiring a School Board hearing prior to suspending a teacher or other school employee *for any reason* without pay but only where that suspension is for more than five days.

Upon review of the Program Manager's decision, FCPS' Designee also admitted that 315(A) requires a School Board hearing prior to

suspending a teacher *for any reason* without pay. Contrary to the Program Manager's decision, FCPS' Designee acknowledged that 315(A) requires a School Board hearing prior to suspending a teacher without pay for any length of time. However, FCPS' Designee argued that Ms. Payne was not entitled to a School Board hearing solely because she is not a teacher. In so holding, FCPS' designee relied on the School Board's nearly 30-year-old policy. While trying to justify the School Board's rationale for not providing Ms. Payne with a pre-suspension hearing, FCPS' designee stated:

> The School Board does follow the provisions of Wilkinson regarding a hearing for teaching employees, but does not follow that procedure for support employees.

J.A. 250-51 (Joint Facts, Ex. 16, Step 4 Hearing Transcript, Tr. 26:5-27:6 (FCPS' Designee)). Therefore, the Circuit Court's Order contradicts the applicable School Board policy.

The first time the School Board raised its argument that 315(A) does not cover disciplinary suspensions of non-teachers was in its Motion for Summary Judgment. To the extent the School Board argues that 315(A) does not cover disciplinary suspensions of teachers, that argument is

contradicted by its own nearly 30-year-old policy.[8] See J.A. 82-183 (Joint Facts, Ex. 6, Policy 4270.3); J.A. 250-51 (Joint Facts, Ex. 16, Step 4 Hearing Transcript, Tr. 26:5-27:6 (The School Board follows Wilkinson for the suspension of teachers)). That argument also evidences the varying, and sometimes conflicting, interpretations of 315(A) taken by the School Board throughout this matter—the majority of which contradict the Circuit Court's Order. In any event, all of the School Board's interpretations are wrong.

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[8] The School Board spent a considerable amount of its argument before the Circuit Court attempting to distinguish the rights of teachers and non-teachers making it unclear whether it believed 315(A) applies to teacher's disciplinary suspensions. For example, the School Board summarized its interpretation of 315(A) by saying, "By the plain language of this statute, § 22.1-315 does not apply to disciplinary suspensions of *non-teaching employees* that are given to correct unsatisfactory work performance." See J.A. 32 (School Board's Motion for Summary Judgment 11) (emphasis added). The first time the School Board clearly stated that 315(A) does not apply to disciplinary suspensions for both teachers and non-teachers came when the Circuit Court requested that the School Board address that ambiguity:

> Ms. Rewari: . . . The statute doesn't apply to work performance related to disciplinary suspensions. It applies to the suspensions that are in the statute, but not the type of suspensions for the reason that Ms. Payne was suspended.
> The Court: You mean if a teacher had work performance issues, a teacher could not be suspended under this statute?
> Ms. Rewari: Well, Ms. Payne is not a teacher.
> The Court: I know, but I'm asking the teacher.
> Ms. Rewari: Yes, it wouldn't be under this – it's our position it wouldn't be under the statute because the statute only addresses two limited situations.

J.A. pp. 478-479 (October 18, 2013, Tr. 9:7-10:9).

E. The Circuit Court's interpretation of 315(A) has an illogical and potentially unconstitutional result.

Beyond being contrary to the interpretations of 315(A) by the Eastern District of Virginia and by the Attorney General, the presumed intent of the General Assembly, and the School Board's prior interpretations of 315(A), the Circuit Court's Order is untenable because it has an illogical and potentially unconstitutional result. It is well-settled that teachers have a constitutionally protected property interest in their continued employment. See Va. Code § 22.1-307; Wilkinson, 566 F. Supp. at 768. It is also well-settled that a teacher's property interest in continued employment includes a right not to have such employment interrupted by a suspension. See Va. Code § 22.1-317; Wilkinson, 566 F. Supp. at 769 (citing Goss v. Lopez, 419 U.S. 565 (1975)). The Circuit Court's Order illogically and potentially unconstitutionally infringes upon these constitutionally protected property interests.

A hypothetical scenario involving two teachers illustrates the logical and constitutional issues with the Circuit Court's Order. Assume an administrator believes a teacher is a threat to the safety or welfare of the school division. Pursuant to the Circuit Court's Order, 315(A) entitles a teacher to a School Board hearing prior to any suspension without pay for longer than five days. Assume an administrator believes a second teacher

is insubordinate. Pursuant to the Circuit Court's Order, 315(A) does not entitle the second teacher to a School Board hearing prior to any suspension without pay, even if that suspension were longer than 5 days. Such a result is illogical.

Moreover, in 2009, the General Assembly's amended Va. Code § 22.1-79(6) to exclude suspensions from the procedure for adjusting disputes between a school board and its employees. See 2009 Va. Act 459; Va. Code § 22.1-79(6).[9] As a result, 315(A) sets forth the only process by which an employee can dispute a suspension. Consequently, the Circuit Court's Order requires a school division to provide procedural

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[9] The General Assembly amended Va. Code § 22.1-79(6) as follows, in relevant part:

> The grievance procedure shall afford a timely and fair method of the resolution of disputes arising between the school board and such employees regarding dismissal~~, suspension,~~ or other disciplinary actions, *excluding suspensions*, and shall be consistent with the provisions of the Board of Education's procedures for adjusting grievances, except that there shall be no right to a hearing before a fact-finding panel. *Except in the case of dismissal, suspension, or other disciplinary action, the grievance procedure prescribed by the Board of Education pursuant to § 22.1-308 shall apply to all full-time employees of a school board, except supervisory employees.*

2009 Va. Acts 459 (text in italics are additions to the statute; struck-through text was removed from the statute).

safeguards to a school employee who it considers a threat to the safety or welfare of the school division while affording no rights to a school employee who it suspends for minor infractions. This result is illogical and violates teachers' constitutionally protected interests. See Wilkinson, 566 F. Supp. at 768. For this and the aforementioned reasons, Ms. Payne respectfully requests that this Honorable Court find that the Circuit Court erred in holding that: (1) Va. Code § 22.1-315(A) applies only to suspensions based on threats to the safety or welfare of the students of school division and charges for a criminal offense; and (2) Va. Code § 22.1-315(A) does not require a school board to provide a school board hearing prior to suspending a teacher or other school employee without pay for less than five days.

II. IN THE ALTERNATIVE, A SCHOOL DIVISION MAY NOT SUSPEND A TEACHER OR OTHER SCHOOL EMPLOYEE WHEN (1) THERE IS NO THREAT TO THE SAFETY OR WELFARE OF THE STUDENTS OR SCHOOL DIVISION AND (2) WHEN A TEACHER OR OTHER SCHOOL EMPLOYEE HAS NOT BEEN CHARGED WITH A CRIMINAL OFFENSE.

Assuming *arguendo* that the Circuit Court correctly interpreted 315(A) as applying only to suspensions based on (1) threats to the safety or welfare of the students or school division or (2) criminal charges, the School Board lacked the authority to suspend Ms. Payne. According to the Dillon Rule, school boards "possess and can exercise only those powers

expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensible." City of Richmond v. Confrere Club, 239 Va. 77, 79 (1990). Where a school board does not strictly adhere to the mandates of the Virginia Code, its actions are void and unenforceable. School Bd. v. Burley, 225 Va. 376, 378-79 (1983).

During oral argument before the Circuit Court, the School Board stated for the first time that it did not consider Ms. Payne to be a threat to the safety or welfare of FCPS or the students therein. J.A. 488 (October 18, 2013 Hearing, Tr. 19:9-13 (Argument by the School Board)). The School Board did not base its suspension of Ms. Payne on a criminal charge. Consequently, if 315(A) applies only to the two types of suspensions specifically identified in the first sentence of 315(A), the School Board lacked the authority to suspend Ms. Payne and its actions are void and unenforceable.

Significantly, the General Assembly excluded suspensions from the procedures for adjusting disputes between a school division and its employees. See *supra* I.E (relating to Va. Code § 22.1-79(6). Consequently, Va. Code § 22.1-315 – entitled "Grounds and procedure for suspension" – sets forth the only grounds and procedure for suspending a

teacher or other school employee. Therefore, if 315(A) applies only to suspensions based on threats to the safety or welfare of the students or school division or criminal charges, then school boards have the power to suspend school employees *only* under those two circumstances. As a result, the School Board's suspension of Ms. Payne would be *ultra vires* and the suspension without pay would be void *ab initio*. Consequently, and in the alternative, Ms. Payne respectfully requests that this Honorable Court find that the Circuit Court erred in holding that a school division may suspend a teacher or other school employee when there is no threat to the safety or welfare of the students or the school division and when that teacher or other school employee has not been charged with a criminal offense.

CONCLUSION

The Circuit Court erroneously concluded that Ms. Payne was not entitled to a School Board hearing prior to her suspensions without pay. The Virginia Attorney General and the Eastern District Virginia in Wilkinson both agreed that a school board must provide a hearing before suspending a teacher for any length of time without pay. In 1996, the Virginia General Assembly amended 315(A) to provide all school employees with the rights previously granted only to teachers. In 2009, the Virginia General

Assembly amended Va. Code § 22.1-79(6) to exclude suspensions from the grievance process. Therefore, the exclusive procedure prescribed by the Virginia General Assembly for the suspension of school employees is set forth in 315(A)—a School Board hearing. As a result, the School Board was required to provide Ms. Payne with a School Board hearing prior to suspending her without pay. It did not. The Circuit Court not only allowed this result to stand but compounded that error by rendering an interpretation of 315(A) that eviscerates long-standing rights of school board employees throughout the Commonwealth of Virginia. Ms. Payne respectfully requests this Court's assistance in correcting this inequitable, illogical, and unconstitutional result. Specifically, Ms. Payne requests that this Court overturn the Circuit Court's Order and find that Va. Code § 22.1-315(A) requires school boards to provide a hearing to an employee before suspending that employee for any length of time without pay unless the school board is suspending that employee because that employee has been charged by summons, warrant, indictment or information with the commission of one of the criminal offenses specified in Va. Code §22.1-315(A).

DATED: May 13, 2014

Respectfully submitted,
JULIETTE PAYNE

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CERTIFICATE PURSUANT TO RULE 5:26(h)

1. The name of the Appellant is Juliette Payne. Counsel for Appellant is as follows:

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2. I hereby certify that fifteen copies of the foregoing Opening Brief and ten copies of the Appendix, with ten electronic copies on CDs, were hand-filed with the Clerk of the Supreme Court of Virginia and three copies of the foregoing Opening Brief with one copy of the Appendix, and one electronic copy on CD, was served, via UPS Ground Transportation, this 13th day of May, 2014, to opposing counsel.

Thomas M. O'Connell, Esq.