In The

Supreme Court of Virginia

RECORD NO. 140145

JULIETTE PAYNE,

Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Fairfax County School Board ("School Board") argues its power to suspend Ms. Payne derives from its constitutional and statutory power to manage its personnel, and not from Va. Code § 22.1-315(A) ("315(A)"). According to the School Board, 315(A) applies only when an employee is suspended (i) when the safety or welfare of the school division or of the students is threatened; or (ii) when the teacher or other employee has been charged with one of the criminal offenses specified in the statute. The School Board argues when an employee is suspended for any other reason (e.g., "disciplinary reasons"), the School Board is free to ignore 315(A). The School Board also argues that, if a suspended employee wishes to contest the suspension, she must follow the School Board's internal grievance process. The School Board is mistaken.

ARGUMENT

The primary issue raised in this case is whether Va. Code § 22.1-315(A) ("315(A)") sets forth the exclusive procedure that school boards must follow before suspending any employee without pay. Section 315 is just one of many statutes enacted by the General Assembly that prescribes procedures that school boards must follow when supervising their personnel. No other statute sets forth any grounds or procedure for

suspending a school employee. Moreover, in 2009, the General Assembly amended Va. Code § 22.1-79(6) to specifically remove and exclude suspensions from the grievance process used for adjusting disputes between a school board and its employees. In doing so, the General Assembly manifested its intent that school boards must follow the procedure set forth in § 315(A) when suspending any employee without pay—i.e., a prior School Board hearing.[1]

The next issue presented is whether 315(A) limits a school board's power to suspend employees to those instances where an employee (a) poses a threat to the safety or welfare of the school division or the students therein; or (b) has been charged with one of the criminal offenses specified in the statute. As the School Board concedes, the statute (i) "provides that an employee 'may be suspended' for good and just cause under the two circumstances then discussed[;]" and (ii) "does not state 'only' or 'solely,' or contain any language prohibiting or precluding

[1] If the School Board's argument—and the Trial Court's holding—were correct, then school employees would have no process by which to contest a "disciplinary suspension" without pay, except possibly by initiating what would likely be a cost-prohibitive lawsuit. That result is illogical in light of the General Assembly's stated objective of affording a timely and fair method of resolving disputes arising between the school board and its employees regarding dismissal and other disciplinary matters. See Va. Code § 22.1-79(6). The Trial Court failed to address this issue in its Opinion. J.A. 562-563 (Trial Court Order).

suspensions based on other grounds, including performance." (Br. of Appellee at 29.) Accordingly, 315(A) should be interpreted to cover all suspensions, including performance related suspensions.[2]

The final issue presented is whether 315(A) requires a school board to conduct a hearing prior to suspending an employee without pay for less than six days. This issue was resolved over 30 years ago when the Virginia Attorney General and the United States District Court for the Eastern District of Virginia in Wilkinson v. School Bd. of Henrico County, 566 F. Supp. 766, 772-73 (E.D. Va. 1983), both agreed that 315(A) requires school boards to 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. As a result, 315(A) requires a school board to conduct a hearing prior to suspending any employee without pay for any length of time.

[2] If this Court agrees that 315(A) sets forth the exclusive procedure that school boards must follow before suspending any employee without pay, then 315(A) should be interpreted as covering all types of suspensions in order to avoid any constitutional question. See Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 427-28 (2008) (the Virginia Supreme Court will "interpret statutes in a manner that avoids a constitutional question whenever possible.").

I. VA. CODE § 22.1-315(A) SETS FORTH THE EXCLUSIVE PROCEDURE THAT SCHOOL BOARDS MUST FOLLOW BEFORE SUSPENDING ANY EMPLOYEE WITHOUT PAY.

The School Board argues—and the Trial Court held—that 315(A) applies only when an employee is suspended (i) when the safety or welfare of the school division or of the students is threatened; or (ii) when the teacher or other employee has been charged with one of the criminal offenses specified in the statute.[3] (Br. of Appellee at 17-21.) The School Board represents that the Assistant Superintendent of Human Resources ("HR"), or her designee, suspended Ms. Payne without pay for disciplinary reasons.[4] (Br. of Appellee at 17-21.) During oral argument in the Trial Court, the School Board stated for the first time that, notwithstanding the allegations against her, the School Board did not consider Ms. Payne to be a threat to the safety or welfare of the school division or the students

[3] Ms. Payne disagrees with several representations made by the School Board in its brief including: (i) Ms. Payne is not an at-will employee. (See J.A. 450.); (ii) a School Board hearing prior to suspending an employee without pay is not more onerous than the process the School Board has established relating to the dismissal of non-teacher employees—further, if the School Board wishes to avoid conducting a hearing it could simply suspend an employee with pay. (See J.A. 450-12.); (iii) The grievance below was not limited to determining whether Ms. Payne's suspension was warranted under the School Board's policies and regulations. Instead, the grievance was to determine whether those policies and regulations violate 315(A). See J.A. 114-120 (Joint Facts ¶¶ 17, 25-27.)

[4] The School Board admits it was not informed of Ms. Payne's suspension, and never held a related hearing. See J.A. 114-120 (Joint Stipulation of Uncontested Facts and Authenticated Exhibits (hereafter, "Joint Facts") at 116 ¶ 12.)

therein.[5] J.A. 488 (October 18, 2013 Hearing, Tr. 19:9-13 (Argument by the School Board)). Consequently, the School Board argues 315(A) does not apply to Ms. Payne's suspension.

In effect, the School Board argues it did not have the authority to suspend Ms. Payne under 315(A). However, the School Board argues that 315(A) is not the sole authority by which school divisions may suspend employees. According to the School Board, its power to suspend Ms. Payne for poor work performance "derives from its constitutional and statutory powers to manage and supervise its personnel." (Br. of Appellee at 10-11.) The School Board is mistaken.[6]

Although the Constitution of Virginia and corresponding statutes vest the supervision of each school division in a school board, that divestiture,

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[5] The record does not reflect whether the Assistant Superintendent of HR, or her designee, based her decision to suspend Ms. Payne on her belief that Ms. Payne posed a threat to the safety or welfare of the school division or the students therein.

[6] The School Board represents "its constitutional and statutory powers to manage and supervise its personnel" pre-existed 315(A). (Br. of Appellee at 10-11.) That fact supports Ms. Payne's contention that 315(A) sets forth the exclusive process school boards must follow before suspending any employee without pay. Otherwise, the General Assembly had no reason to enact 315(A) because, as the School Board admits, it already had the discretionary power to suspend employees for the stated reasons. Further, it would be illogical to enact 315(A) for the purpose of providing employees who are suspended for the stated reasons with procedural safeguards that would otherwise not be available to employees who are suspended for less egregious reasons—e.g., "disciplinary reasons."

while broad, does not provide school boards with unlimited power. As the School Board concedes, the General Assembly has prescribed procedures a school board must follow in the supervision of its personnel. (Br. of Appellee at 11.) Indeed, Virginia Code Title 22.1 (EDUCATION), Chapter 15 (TEACHERS, OFFICERS AND EMPLOYEES), is replete with guidelines and procedures a school board must follow regarding hiring, retention, discipline, and termination of its personnel. See Va. Code §§ 22.1-295, 296.4, 302, 303, 304, 307, 308, 309, 311, and 315. Section 315—titled "Grounds and procedure for suspension"—falls within the statutes enacted by the General Assembly that prescribe procedures that school boards must follow when supervising their personnel.[7] Id.

Specifically, 315(A) sets forth the exclusive procedure that school boards must follow before suspending any employee without pay. Under Virginia law, "[e]very part of an act is presumed to be of some effect and is

[7] Tellingly, nearly 30 years ago, the School Board manifested its interpretation of Va. Code § 22.1-315(A) when it adopted Policy 4270, entitled "Suspension of Employees." See J.A. 182-83 (Joint Stipulation of Uncontested Facts and Authenticated Exhibits (hereinafter "Joint Facts"), Ex. 6, School Board Policy 4270.3). Pursuant to that Policy—a policy still in effect today—the School Board must provide a School Board 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. The sole legal authority cited by the School Board for its suspension policy is Va. Code § 22.1-315. J.A. 183 (Joint Facts, Ex. 6, School Board Policy 4270.3 at 2). At the time the School Board adopted this policy, 315(A) applied only to teachers.

not to be treated as meaningless unless absolutely necessary." Raven Red Ash Coal Corp. v. Absher, 153 Va. 332, 335 (Va. 1929). Accordingly, a statute's title "can aid in resolving an ambiguity in the legislation's text." INS v. National Ctr. For Immigrants' Rights, 502 U.S. 183, 189 (1991) (citations omitted); see Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 429-30 (2008) (construing statute by considering title). Section 22.1-315 is titled "Grounds and procedure for suspension" and falls under Article 4, which is titled "SUSPENSION." No other statute sets forth any grounds or procedure for suspending a school employee. Therefore, 315(A) sets forth the exclusive procedure that school boards must follow before suspending any employee without pay.

Moreover, in 2009, the General Assembly amended Va. Code § 22.1-79(6) to specifically remove and exclude suspensions from the grievance process used for adjusting disputes between a school board and its employees. See 2009 Va. Act 459; Va. Code § 22.1-79(6).[8] By specifically

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[8] 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,

removing and excluding suspensions from the grievance process, the General Assembly manifested its intent that school boards must follow the procedure set forth in § 315(A) when suspending any employee. The School Board's policies and regulations that use a grievance process for suspensions contravene both Va. Code Ann. §§ 22.1-79(6) and 315(A) and are therefore void and unenforceable.[9] City of Richmond v. Confrere Club,

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> 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).

[9] Va. Code § 22.1-313(A), titled "Decision of school board, generally[,]"—which falls under Article 3, titled "GRIEVANCES; DISMISSALS, ETC., OF TEACHERS"—provides that a "school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals and suspensions." Va. Code § 22.1-313(A). Va. Code § 22.1-313(D) provides that "[a] teacher may be dismissed or suspended by a majority of a quorum of the school board." Va. Code § 22.1-313(D). These statutes further evince the General Assembly's intent that school boards retain their exclusive final authority over dismissals and suspensions. The School Board's attempt to delegate its exclusive final authority to suspend Ms. Payne without pay to the Superintendent, Assistant Superintendent of HR, and/or her representative, is impermissible. See Va. Code Ann. §§ 22.1-315(A) and 22.1-79(6); see also School Board of the City of Richmond v. Parham, 218 Va. 950 (1978) (holding unconstitutional a State Board of Education procedure that divested school boards of final decisional authority over certain disputes by delegating such authority to a binding arbitration panel).

239 Va. 77, 79 (1990) (According to the Dillon Rule, school boards possess and can exercise only those powers granted by the General Assembly.).

II. SECTION 315(A) COVERS ALL TYPES OF SUSPENSIONS.

The School Board argues—and the Trial Court held—that 315(A) applies only when an employee is suspended (i) when the safety or welfare of the school division or of the students is threatened, or (ii) when the teacher or other employee has been charged with one of the criminal offenses specified in the statute. (Br. of Appellee at 17-21.) However, the School Board concedes the statute (i) "provides that an employee 'may be suspended' for good and just cause under the two circumstances then discussed[;]" and (ii) "does not state 'only' or 'solely,' or contain any language prohibiting or precluding suspensions based on other grounds, including performance." (Br. of Appellee at 29.) Accordingly, 315(A) should be interpreted to cover all suspensions, including performance related suspensions.

Nevertheless, the School Board argues its current interpretation of 315(A) is supported by the fact that the General Assembly amended 315(A) by adding "other school employee[s]" at the same time it amended two other statutes, specifically Va. Code §§ 19.2-83.1 and 22.1-296.1. (Br. of Appellee at 21-24.) Even if, as the School Board suggests, the General

Assembly added non-teacher employees to 315(A) "in an effort to better safeguard public schools against potentially dangerous or criminal employees," the addition of non-teacher employees to 315(A) provides, under any well-reasoned analysis, non-teacher employees with greater rights than they had before such amendment—specifically the right to a school board hearing prior to any suspension without pay.

III. THE TRIAL COURT ERRED IN ISSUING AN OPINION THAT IS AT ODDS WITH THE OPINIONS ISSUED BY THE (I) UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AND (II) VIRGINIA ATTORNEY GENERAL.

The School Board argues that the Trial Court was rightfully unpersuaded by the United States District Court's decision in Wilkinson. (Brief of Appellee at 24-25.) Specifically, the School Board argues that the threshold question of whether 315(A) even applies to disciplinary suspensions was not raised in, much less decided by, Wilkinson. (Id.) Although the Wilkinson Court did not expressly decide the issue, it specifically noted that Henrico County Public Schools suspended Ms. Wilkinson as a result of her alleged "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 Wilkinson Court never raised the issue of whether those allegations, if true, posed a threat to the safety or welfare of the school division or of the

students therein; something it would likely have done if it felt that fact were material. Instead, the Wilkinson Court analyzed 315(A) and determined that it required school boards to conduct a school board hearing prior to suspending a teacher without pay for any length of time. Thus, the Wilkinson Court, at least implicitly, determined that 315(A) applies to all disciplinary suspensions.

The School Board also argues that the Trial Court was rightfully unpersuaded by the 1983 Virginia Attorney General opinion that, like the Court in Wilkinson, held that 315(A) requires school boards to conduct a school board hearing prior to suspending a teacher without pay for any length of time. According to the School Board, "[t]he Generally Assembly can equally be assumed to have acquiesced" in the Attorney General's opinion that, in the School Board's words, "confirmed that local school boards' power to suspend non-teacher employees exists independent of § 22.1-315, and that 'a local school board may, as a disciplinary measure, suspend employees who are not teachers.'" (Br. of Appellee at 25.) The School Board is mistaken. Although the Attorney General's statements may have been accurate when he issued his opinion back in 1983, those statements are not accurate today. Section 315(A) did not apply to non-teachers in 1983, when the Attorney General issued his opinion. After the

Attorney General issued his opinion, the General Assembly amended 315(A) to cover all school employees. Thereafter, in 2009, the General Assembly specifically removed and excluded suspensions from the grievance process. As a result, 315(A) now prescribes the exclusive process by which school boards may suspend their employees.

IV. IN THE ALTERNATIVE, THE SCHOOL BOARD HAD NO AUTHORITY TO SUSPEND MS. PAYNE.

Assuming *arguendo* that 315(A) applies only when an employee is suspended (i) when the safety or welfare of the school division or of the students is threatened, or (ii) when the teacher or other employee has been charged with one of the criminal offenses specified in the statute, the School Board lacked the authority to suspend Ms. Payne. (Br. of Appellant at 31-34.) The School Board argues, among other things, that this argument is barred because it was not raised in the Trial Court. (Br. of Appellee at 29.) The School Board is mistaken. (See, e.g., J.A. 440-455 (Plaintiff's Juliette Payne's Opp'n to Defendant [School Board's] Motion for Summary Judgment and Rebuttal to Defendant's Memo. in Opp'n to Plaintiff's Motion for Summary Judgment at 2, 6-7.)

The School Board also argues that "such a divestiture of school boards' authority to manage their personnel would be unconstitutional." (Br. of Appellee at 31.) In an attempt to support that argument, the School

Board cites School Board of the City of Richmond v. Parham, 218 Va. 950, 957-58 (1978), Howard v. County School Board, 203 Va. 55, 59-60 (1961), and Harrison v. Day, 200 Va. 439, 452 (1959) (Br. of Appellee at 31). Those cases are inapposite because, unlike the statutes in those cases, 315(A) does not divest school boards of their authority to supervise their school divisions. On the contrary, 315(A) expressly vests school boards with the exclusive and final power to suspend employees without pay albeit, under Ms. Payne's alternative argument, only in the situations specifically mentioned in the statute.

Ironically, the School Board argues that 315(A) would be unconstitutional if it (i) sets forth the exclusive grounds and procedure for dismissal, and (ii) is interpreted as limiting a school board's power to suspend employees to only those instances where an employee (a) poses a threat to the safety or welfare of the school division or the students therein; or (b) has been charged with one of the criminal offenses specified in the statute. (Br. of Appellee at 31.) That argument—and indeed each of the School Board's arguments in response to Ms. Payne's alternative position—supports Ms. Payne's primary interpretation of 315(A).

Statutes should be interpreted in a manner that avoids a constitutional question whenever possible. Marshall v. Northern Virginia

Transp. Auth., 275 Va. 419, 427-28 (2008). The General Assembly's prescription of procedures school boards must follow could be unconstitutional where the General Assembly divests the school board of final decisional authority over its personnel and gives it to other parties such as (i) an arbitration panel (see Parham, 218 Va. at 958), (ii) an electorate (see Howard, 203 Va. at 59), or (iii) the Governor (Harrison, 200 Va. at 452). Ms. Payne has never advocated such a divestiture of authority. Rather, Ms. Payne has always requested that the School Board exercise its power per a statutorily defined procedure and provide a hearing before suspending a school employee for any length of time without pay. Under Ms. Payne's primary interpretation, 315(A) does not prohibit the School Board from suspending any employee; it simply defines the process that the School Board must follow when doing so. The School Board does not—nor could it in good faith—argue that Ms. Payne's primary interpretation of 315(A) would render that statute unconstitutional. See Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 427-28 (2008) ("We will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions;" "We also interpret statutes in a manner that avoids a constitutional question whenever possible.").

CONCLUSION

The Trial Court erroneously concluded that Ms. Payne was not entitled to a School Board hearing prior to her suspensions without pay. This Court should reverse the Trial Court's holding for three reasons. First, 315(A) sets forth the exclusive grounds and procedure for suspending employees. Second, 315(A) either applies to all types of suspensions or the School Board had no authority to suspend Ms. Payne. Third, 315(A) requires a school board hearing when an employee is suspended without pay for any length of time. Accordingly, this Court should reverse the decision of the Trial Court.

DATED: June 20, 2014

Respectfully submitted,
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CERTIFICATE PURSUANT TO RULE 5:26(h)

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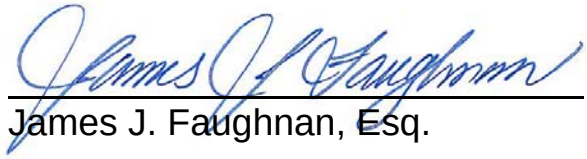
2. I hereby certify that fifteen copies of the foregoing Reply Brief, with one electronic copy on CD, were hand-filed with the Clerk of the Supreme Court of Virginia and three copies of the foregoing Reply Brief, with one electronic copy on CD, were served, via UPS Ground Transportation, this 20th day of June, 2014, to opposing counsel.



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