IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 140145

JULIETTE PAYNE,
Appellant,
v.

FAIRFAX COUNTY SCHOOL BOARD,
***Appellee*.**

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Constitution and the Code of Virginia vest local school boards, including the Fairfax County School Board (the "School Board"), with the authority and responsibility to supervise the schools within their division. That power of supervision includes the authority to formulate rules and standards for employees. It also includes the power to enforce such rules and standards. The rules and procedures adopted by this School Board permit short-term, unpaid suspensions as a form of progressive discipline for underperforming non-teacher employees. The short-term suspension is issued only after advance notice and an opportunity to be heard. The employee may also challenge the suspension through a grievance procedure that includes administrative hearings before the Division Superintendent's hearing officer and the Fairfax County Civil Service Commission.

Appellant Juliette Payne is employed by the School Board as non-teaching support personnel. As the trial court correctly held, Ms. Payne's disciplinary suspension arising from her unsatisfactory work performance was not governed by Va. Code Ann. § 22.1-315(A), and it did not require the entire *twelve-member School Board itself* to conduct its own "School Board Hearing" before Ms. Payne's three-day suspension. By its plain

language, the statute does not apply to disciplinary suspensions of underperforming employees. As the first sentence of § 22.1-315(A) makes clear, the statute applies in only two, limited situations, neither of which concerns poor work performance:

> A teacher or other public school employee . . . 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 misdemeanor involving (i) sexual assault . . . (ii) obscenity and related offenses . . . (iii) drugs . . . , (iv) moral turpitude, or (v) the physical or sexual abuse or neglect of a child; or an equivalent offense in another state*. Va. Code Ann. § 22.1-315(A) (emphasis added).

Non-teacher employees like Ms. Payne were added to this statute by a 1996 Act of the General Assembly that amended three statutes at once. That Act sought to *enhance* school boards' power to keep potentially dangerous or criminal employees out of their schools. It was not intended to curb school boards' pre-existing authority to enforce their personnel rules.

Not only is the trial court's ruling faithful to the plain language of § 22.1-315(A), it *benefits* employees like Ms. Payne. Support employees have no contractual or statutory rights to a School Board Hearing before

they can be discharged. If a hearing before the twelve-member School Board itself were required before every such performance-based suspension, the administrative burden and expense would be enormous. School systems would opt for outright dismissals as less costly and more efficient alternatives.

The trial court's decision promotes the use of progressive discipline to correct underperforming employees, while preserving the procedural protections already provided under the School Board's suspension procedures. The Court should, therefore, affirm the trial court's considered and correct judgment.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Ms. Payne is an at-will, non-teacher employee of the School Board. Following a written reprimand, Ms. Payne was given the progressive discipline of a three-day unpaid suspension based on her poor job performance. She received notice and an opportunity to respond before the suspension. She grieved her suspension through a five-step procedure, which included a hearing before the Division Superintendent's hearing officer who concluded that Ms. Payne's disciplinary suspension was supported by just cause and was appropriate. Ms. Payne was

scheduled for another hearing, before the Civil Service Commission, when she elected to withdraw her grievance.

Several months later, Ms. Payne filed suit in the Circuit Court of Fairfax County, seeking a declaratory judgment that, under Va. Code Ann. § 22.1-315(A), the twelve-member School Board itself must conduct a School Board Hearing prior to suspending any employee for any length of time without pay. (JA 1-5.) The parties filed a Joint Stipulation of Facts and submitted the case to the trial court for decision on cross-motions for summary judgment. (JA 7-468.) The trial court heard oral argument on the cross-motions over the course of an 80-minute hearing. (JA 470-546.)

By Order of October 21, 2013, the trial court ruled correctly that § 22.1-315(A) does not require a School Board Hearing before Ms. Payne can be suspended for poor work performance. (JA 562-64.) The trial court held that § 22.1-315(A), by its plain language, does not apply to suspensions based on work performance. (*Id.*) It applies only where a teacher or other employee is suspended because the safety or welfare of students or the schools is threatened, or because the teacher or other employee has been charged with a felony or another offense specified in the statute. (*Id.*)

As the trial court found, the plain reading of § 22.1-315(A) is confirmed by the 1996 Act of Assembly, which added non-teacher employees to the statute. (JA 99.) That Act amended three statutes at once—Va. Code §§ 19.2-83.1, 22.1-296.1, and 22.1-315(A)—all to better safeguard students and schools, not to give greater rights to non-teacher employees. (JA 99-100.)

The trial court was rightly unpersuaded by the federal district court's decision involving a teacher's suspension in *Wilkinson v. Sch. Bd. of Henrico County*, 566 F. Supp. 766 (E.D. Va. 1983). In *Wilkinson*, no one had raised the threshold issue of whether § 22.1-315(A) even applies to suspensions based on poor work performance, as opposed to threats to safety or welfare or criminal charges. Nor was that issue raised before, or considered by, the then-Attorney General in 1983, who had also opined that § 22.1-315(A) required school boards to provide *teachers* a hearing before suspending them without pay. 1982-83 Va. Op. Att'y Gen. 417, 1983 Va. AG LEXIS 225, at **5-7 (Jan. 11, 1983). The same Attorney General Opinion also recognized that school boards' power to supervise their schools includes the power to suspend underperforming employees. *Id.* at *6.

The trial court's decision was faithful to the plain language of § 22.1-315(A). Under its ruling, § 22.1-315(A) applies only when a suspension is issued based on the circumstances identified in the opening sentence of the statute—when an employee has been charged with a serious crime or when the safety or welfare of the school division or its students is threatened; it does not apply to performance-based disciplinary suspensions, which are nowhere mentioned in the statute. Specifically:

- Section 22.1-315(A) applies in those highly unusual circumstances where a school board employee is suspended because "the safety or welfare of the school division or the students therein is threatened" or because the employee has been charged with a felony or one of the serious misdemeanor offenses enumerated in § 22.1-315(A).

- If the suspension is based on a threat to the safety or welfare of the school division or the students, the employee may not be suspended without pay for a period in excess of five days without a School Board Hearing.

(JA 562-63.) Contrary to Ms. Payne's assertions, sound logic and fairness support greater procedural protections for the employee facing a

suspension that is not based on poor work performance but, rather, because of a potentially nebulous threat to "safety or welfare."

Ms. Payne, who is not a teacher, did not assert any claim about teachers' rights in her Complaint. (JA 1-5.) Nor does she have standing to complain about how the trial court's decision may affect teachers' rights. Moreover, the trial court did not even address under what circumstances teachers can be suspended. It held only that *this* statute—Va. Code § 22.1-315(A)—does not apply to work performance-based suspensions of school employees. Moreover, even if Ms. Payne had standing to challenge the impact of the trial court's ruling on teachers, the trial court's ruling simply does not "eliminate teachers' constitutionally protected property interests in their jobs," as she charges. (Appellant's Br. at 9.) Teachers, unlike Ms. Payne, have contractual and property interests in their employment. Even though 22.1-315(A) does not apply, suspension of a teacher must still comply with her contract and with the Due Process Clause of the federal Constitution.

The trial court's ruling is perfectly logical and fully constitutional, and it benefits school employees like Ms. Payne herself by giving supervisors the flexibility to impose short-term suspensions rather than outright dismissals. This Court should affirm the trial court's judgment.

STATEMENT OF FACTS

Ms. Payne is employed by the School Board as a Food and Nutrition Services Manager at Twain Middle School. (Joint Stipulation of Facts ("Joint Stip.") ¶ 1 (JA 114). In October 2011, she was given a written reprimand based on her conduct at work. (Joint Stip. ¶ 3 & Exs. 1 & 2 thereto (JA 114, 121, 144).) In November 2011, her supervisor met with her again regarding her work performance. (Joint Stip. ¶ 5 (JA 115).) She was informed in writing in December 2011, that she was being recommended for suspension without pay for three days, based on her performance, and that she had a right to reply in writing or in person. (Joint Stip. ¶ 6 & Ex. 4 thereto. (JA 115, 169).)

Ms. Payne disputed the grounds for the suspension in writing. (Joint Stip. ¶ 8 & Ex. 7 thereto (JA 116, 184).) Her supervisor advised her that he felt that the recommendation for suspension was appropriate, and forwarded the recommendation to the Department of Human Resources. (Joint Stip. ¶ 9 & Ex. 8 thereto (JA 116, 187).) Human Resources confirmed the recommendation, and informed Ms. Payne in writing that she would be suspended without pay on February 2, March 1, and March 20, 2012. (Joint Stip. ¶ 10 & Ex. 9 thereto (JA 116, 189).) It also advised Ms.

Payne of her right to appeal the decision using the grievance procedures in Regulation 4462.1. (Joint Stip. ¶ 11 & Ex. 10 thereto (JA 116, 192).)[1]

Ms. Payne filed a grievance, which included the following five steps:

(1) an informal meeting with her supervisor, followed by a written decision from him (Joint Stip. ¶¶ 14, 15 & Ex. 11 thereto (JA 117, 209));

(2) a meeting among Ms. Payne, her representative, her supervisor, two representatives from Human Resources, and the Director of Food and Nutrition Services (Joint Stip. ¶ 18 (JA 118));

(3) a written decision from the Director of Food and Nutrition Services, finding "that a three day suspension is warranted and appropriate disciplinary action that is taken for the purpose of correcting unsatisfactory performance" (Joint Stip. ¶ 20 (JA 118));

(4) a hearing before the Division Superintendent's hearing officer that lasted nearly three hours, that included testimony from Ms. Payne and her supervisor, and that yielded a certified transcript that was 200 pages in length. (Joint Stip., Ex. 16.) The hearing officer thereafter issued a five single-spaced-page written decision finding the discipline justified and appropriate (Joint Stip., Ex. 17 (JA 425));

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[1] Regulation 4462.1 was amended and adopted as Regulation 4462.2, effective January 31, 2012. (JA 193) (*See* Joint Stip., Ex. 10 (JA 192).)

(5) an appeal to the Civil Service Commission, which Ms. Payne herself elected to withdraw after the Commission ruled that its role was not to determine whether the suspension procedures violate the Code of Virginia, and that it would instead address whether the suspension was warranted (Joint Stip. ¶¶ 25-27 & Ex. 19 thereto (JA 119-20, 434).)

Six months later, Ms. Payne filed a petition for a declaratory judgment that, under § 22.1-315(A), the School Board itself must conduct a hearing before suspending any employee without pay. While the case was pending, Ms. Payne was recommended for another unpaid suspension based on her poor job performance. (JA 507-08, 547-48.)

AUTHORITIES AND ARGUMENT

I. Standard of Review (Assignments of Error 1, 2, and 3)

The School Board agrees with Ms. Payne that the trial court's interpretation of § 22.1-315(A) is reviewed *de novo*. (Appellant's Br. at 11.)

II. The School Board's Power to Suspend Ms. Payne for Poor Work Performance Derives From its Constitutional and Statutory Power of Supervision (Assignments of Error 1 and 2).

Ms. Payne bases her arguments on a false premise: she incorrectly assumes that Va. Code Ann. § 22.1-315(A) is the sole authority by which local school boards may suspend underperforming employees. But the School Board's power to suspend employees for poor work performance derives from its constitutional and statutory powers to manage and

supervise its personnel. This power pre-existed both § 22.1-315(A), which applies only to a very narrow set of circumstances and the 1996 Act of Assembly that added non-teacher employees like Ms. Payne to that statute.

A. School Boards Are Empowered to Formulate Rules Governing the Conduct of Their Personnel, and to Enforce Those Rules, Including Through Disciplinary Suspensions.

Local school boards are vested by the Constitution of Virginia and the Code of Virginia with the authority to supervise the schools within their respective divisions. Va. Const. art. VIII, § 7; Va. Code Ann. § 22.1-28. This constitutional mandate necessarily includes the "power to discharge employees." *Russell Cnty. Sch. Bd. v. Anderson*, 238 Va. 372, 383, 384 S.E.2d 598, 604 (1989). The power to formulate and enforce local policies, rules, and regulations for the management of staff is essential and indispensable to the exercise of a school board's power of supervision. *Sch. Bd. v. Parham*, 218 Va. 950, 957-58, 243 S.E.2d 468, 472-73 (1978).

Moreover, while the Code of Virginia in some instances prescribes the procedures to be followed by a school board in the supervision of its personnel, it also expressly confirms that "[t]he school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals and suspensions." Va.

Code Ann. § 22.1-313(A) (pertaining to dismissal hearings for tenured teachers); *see* Va. Code Ann. § 22.1-306 (including within the definition of "grievance" the assurance that "[e]ach school board shall have the exclusive right to manage the affairs and operations of the school division").

Indeed, even the Attorney General Opinion cited by Ms. Payne itself recognized in 1983—long before non-teacher employees were added to § 22.1-315(A)—that school boards have the "exclusive right to manage the affairs and operations of the school division," which includes the power to issue disciplinary suspensions to poorly performing employees. 1982-83 Va. Op. Att'y Gen. 417, 1983 Va. AG LEXIS 225, at *8 (citing Va. Const. art. VIII, § 7 & Va. Code Ann. § 22.1-306).

B. School Board's Policies and Regulations Allow Ms. Payne to Be Suspended Based on Poor Work Performance.

Pursuant to its constitutional and statutory powers to supervise its schools, the School Board has adopted policies and regulations for the supervision of its teaching and non-teaching staff. Policy 4270.3 allows any employee to be suspended without pay if: (1) the safety or welfare of the school division or its students is threatened; (2) 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 (3)

the employee's conduct requires disciplinary action or constitutes just cause for suspension. (Joint Stip., Ex. 6. (JA 181).)

Policy 4270.3 separately addresses teaching employees and those employees whose work is not covered by a contract for the school year, as there is a significant legal distinction between teachers and non-teachers. (Joint Stip., Ex. 6, at 1, § IV (JA 182).) The Code requires school boards to have written contracts with teachers. Va. Code Ann. § 22.1-302. It also prescribes the procedures to be followed in the dismissal of a teacher, which includes the opportunity for a School Board Hearing. Va. Code Ann. §§ 22.1-309-313.

By contrast, written contracts with non-teacher employees are not required by the Code, so their employment remains subject to Virginia's strong presumption of at-will employment. *See Cnty. of Giles v. Wines*, 262 Va. 68, 72, 546 S.E.2d 721, 723 (2001) ("Virginia strongly adheres to the common law employment-at-will doctrine" which means that "an employment relationship is presumed to be at-will, [and] that the employment term extends for an indefinite period and may be terminated by the employer or employee for any reason upon reasonable notice."). Non-teacher, or support service, employees of the School Board, like Ms.

Payne, do not have employment contracts. Nor are they guaranteed continued employment by any statute or regulation.[2]

Under Policy 4270.3, employees without contracts may be suspended from employment by the Division Superintendent, or her designee, after notice and an opportunity to respond. (Joint Stip., Ex. 6 (JA 181).) Regulation 4429.4 establishes standards of conduct for non-teacher employees,[3] and it authorizes progressive discipline as a tool to correct unsatisfactory job performance. (Joint Stip., Ex. 5 (JA 172).) Progressive discipline under the Regulation increases in severity: oral warning, written reprimand, suspension, disciplinary demotion, and dismissal. (*Id.*) The employee is given "notice and an opportunity to respond" before a suspension. (*Id.*) An advance notice letter is issued at least ten working

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[2] In *County of Giles*, the Court held that a county's personnel policy that enumerated grounds for which an employee "may be discharged" was insufficient as a matter of law to rebut the presumption of at-will employment. 262 Va. at 73, 546 S.E.2d at 723. It pointed out that the policy did not state an employee "*shall only* be discharged" for the enumerated reasons, nor did it state that an employee will not be discharged without just cause. *Id*. Likewise, Regulation 4293.6 also lists a number of reasons why an employee may be discharged, but does not state that a support employee shall only be dismissed for just cause. (*See* Joint Stip., Ex. 1 at Reg. 4293.6 (JA 132-134).)

[3] Support service, or non-teacher, employees are defined in Regulation 4429.4 as "noncertified administrators; custodians; assistants and attendants; technical, office, trades, and transportation personnel; bus attendants; and food service personnel." (Joint Stip., Ex. 5 (JA 172).)

days before the contemplated suspension, and the employee is allowed an opportunity to respond within three working days from receipt of the letter. (Joint Stip., Ex. 5, at 5, § VII (JA 177).) The assistant superintendent for Human Resources, or her designee, makes the final decision after consideration of the advance notice letter and the employee's reply. (*Id.* at 5, § VI.D (JA 177).)

Neither Policy 4270.3 nor Regulation 4429.4 requires a School Board Hearing before imposition of a disciplinary suspension. (Joint Stip., Exs. 5 & 6 (JA 172, 181).) The support employee is advised pursuant to Regulation 4429.4, however, by the advance notice letter that she has the right to file a grievance if the final decision of the Department of Human Resources results in a suspension, demotion, or dismissal. (Joint Stip. Ex. 5, at 5, § VII.G. (JA 177).)

Regulation 4462.2, which sets forth the grievance procedure for support service employees, also does not require a School Board Hearing before a disciplinary suspension is imposed. (Joint Stip., Ex. 10 (JA 192).) Regulation 4462.2 provides a five-step procedure. (Joint Stip., Ex. 10 at 3-6, § V (JA 195-198).) Step 4 entails a meeting with the Division Superintendent's hearing officer, and Step 5 provides a hearing before the

Civil Service Commission, whose decision is advisory to the Division Superintendent. (Joint Stip. Ex. 10, at 6 (JA 198).)

Ms. Payne's disciplinary suspension followed each of the steps prescribed in Regulation 4429.4. (*See* Joint Stip. ¶¶ 7-11 & Ex. 5 thereto (JA 115-16, 172).) Ms. Payne was able to avail herself of each step of the grievance procedure provided by Regulation 4462.2. (*See* Joint Stip. ¶¶ 14-25 (JA 117-20).) Morevoer, Regulations 4429.4 and 4462.2 undisputedly did not entitle Ms. Payne to a School Board Hearing before her suspension.[4]

The School Board, therefore, had the power to formulate and enforce rules governing the conduct of its personnel independent of Va. Code Ann. § 22.1-315(A). Moreover, Ms. Payne's suspension fully complied with the policies and regulations implemented in exercise of that power.

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[4] With no argument in support of its legal significance, Ms. Payne goes to lengths to point out that the School Board's Human Resources representative who defended Ms. Payne's suspension during the grievance process did not make the same statutory construction arguments that the School Board made in defending against her lawsuit in the trial court. (*See* Appellant's Br. at 3-4, 25-28.) The grievance process, however, was only to determine whether Ms. Payne's suspension was warranted under the School Board's policies and regulations. (*See* Joint Stip., Exs. 17 & 19 (JA 425, 434).) Ms. Payne's declaratory judgment suit was not an extension of or appeal from the grievance process—as Ms. Payne suggests—but an independent legal proceeding. (*See* Am. Compl., ¶ 3 (alleging that the trial court's jurisdiction arises under Va. Code Ann. § 8.01-184) (JA 2.)

III. Section 22.1-315(A) Does Not Apply To Ms. Payne's Disciplinary Suspension Arising from Her Unsatisfactory Work Performance (Assignments of Errors 1 and 2).

The meaning of a statute is determined from the words used by the General Assembly. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001). When a statute's language is clear and unambiguous, courts are bound by the plain meaning of that language. *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002). As the trial court correctly held, § 22.1-315(A), by its plain language, does not apply to disciplinary suspensions of employees.

A. By its Plain Language, Section 22.1-315 (A) Does Not Apply to Disciplinary Suspensions.

Section 22.1-315(A) provides, in relevant part:

> **[Sentence 1]** 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 misdemeanor involving (i) sexual assault . . . (ii) obscenity and related offenses . . . (iii) drugs . . ., (iv) moral turpitude, or (v) the physical or sexual abuse or neglect of a child; or an equivalent offense in another state.
>
> **[Sentence 2]** Except when a teacher or school employee is suspended because of being charged by summons, warrant, indictment or

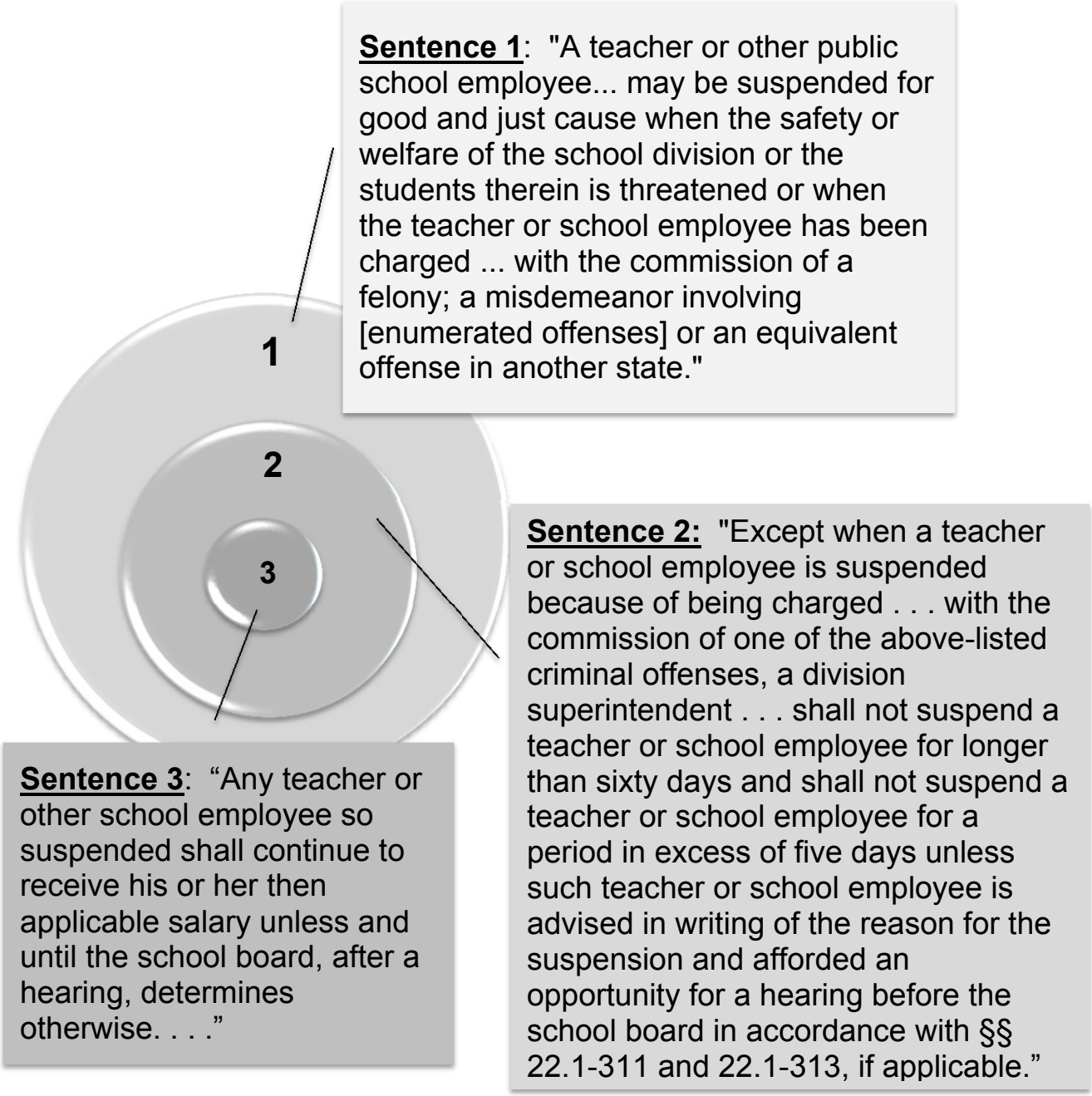
> information with the commission of one of the above-listed criminal offenses, a division superintendent or appropriate central office designee shall not suspend a teacher or school employee for longer than sixty days and shall not suspend a teacher or school employee for a period in excess of five 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.
>
> **[Sentence 3]** 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 Ann. § 22.1-315(A) (emphasis added).

Sentence 1 allows an employee to be suspended (a) when the safety or welfare of the school division or of the students is threatened; or (b) when the teacher or other employee has been charged with one of the criminal offenses specified in the statute. Neither of these pertains to work performance. Nor does this sentence restrict suspensions to these two situations exclusively. **Sentence 2** provides procedural safeguards and limits where an employee is suspended based on a perceived threat to safety or welfare, and no criminal charges have been filed. **Sentence 3** requires that safety-or-welfare-based suspensions exceeding five days

must be with pay, unless the school board after a hearing determines otherwise.

All three sentences of § 22.1-315(A) must be read together. *See, e.g., Dep't of Med. Assistance Servs. v. Beverly Healthcare of Fredericksburg*, 268 Va. 278, 285, 601 S.E.2d 604, 607-08 (2004) ("[A] statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute.").

The relationship among these sentences can also be graphically depicted as shown below:



Principles of statutory construction and logic both refute Ms. Payne's claim that **Sentence 2** is broader than the opening **Sentence 1** and applies to suspensions that are not discussed in **Sentence 1**. The General Assembly's intent in § 22.1-315(A) cannot be discerned by plucking a

sentence out of the middle of a paragraph and reading it in isolation. The "Except" clause that begins **Sentence 2** necessarily refers back to and modifies **Sentence 1.** Logic also dictates that the "Except" clause in **Sentence 2** cannot apply to a universe of suspensions that are nowhere mentioned in the statute. Indeed, even Ms. Payne links **Sentence 2** and **Sentence 3** together—claiming that **Sentence 3** "explicitly modifies" **Sentence 2** (Appellant's Br. at 15); yet, she can offer no cogent explanation why these may be read in isolation from the first sentence of the same paragraph.

B. The General Assembly's Intent Is Evident in the Act of Assembly that Added Non-Teachers to § 22.1-315.

The plain meaning of § 22.1-315(A) is also confirmed by chapter 960 of the 1996 Acts of Assembly (the "1996 Act") by which "other public school employee[s]" were added to the statute.[5] The 1996 Act amended three statutes at once: Va. Code (1) § 19.2-83.1, (2) § 22.1-296.1, and (3)

[5] Consideration of the 1996 Act is appropriate to discern the General Assembly's intent in § 22.1-315(A). As the Court in *Eberhardt v. Fairfax County Employees' Retirement Board of Trustees* explained, the Code of Virginia is a mere codification of certain Acts of Assembly that the General Assembly authorizes the Code Commission to publish; the actual legislative enactments are found in the Acts of Assembly. 283 Va. 190, 194, 721 S.E.2d 524, 526 (2012). "[T]he language of the Acts of Assembly *is* the plain language of the statute." *Id.* Moreover, the court considers "the entire statute—i.e., the entirety of a single legislative enactment as it appears in the Acts of Assembly as a whole—to place its terms in context to ascertain their plain meaning." *Id.* at 194-95, 721 S.E.2d at 526.

§ 22.1-315(A). As shown below, the Act simultaneously expanded (i) the types of offenses about which school boards were legally entitled to know and (ii) the classes of school employees as to which these laws applied. 1996 Va. Acts, ch. 960.

Section	**Before 1996 Act**	**After 1996 Act**
§ 19.2-83.1	Law enforcement authorities must notify schools if a teacher employee is arrested for any offense involving child rape, molestation, or abuse	Law enforcement authorities must notify schools if a teacher ***or any other employee*** *is arrested* ***for a felony, crime of moral turpitude***, or any offense involving child rape, molestation, or abuse
§ 22.1-296.1	School boards must require all applicants for employment to certify that they have not been convicted of any offense involving child rape, molestation, or abuse	School boards must require all applicants for employment to certify that they have not been convicted of ***a felony, a crime of moral turpitude***, or any offense involving child rape, molestation, or abuse
§ 22.1-315	School boards may suspend a teacher where the safety or welfare of students or school division is threatened, or where the teacher is charged with a felony, a crime of moral turpitude, or any offense involving child rape, molestation, or abuse	School boards may suspend a teacher ***or other employee*** where the safety or welfare of students or school division is threatened, or where the teacher is charged with a felony, a crime of moral turpitude, or any offense involving child rape, molestation, or abuse

The 1996 Act thus confirms—as the trial court found—that support employees were added to § 22.1-315(A) in an effort to better safeguard

public schools against potentially dangerous or criminal employees, not to give non-teachers greater procedural rights. The legislative draft file associated with the 1996 Act also confirms that the General Assembly did not intend to enhance the procedural rights of support employees by adding them to § 22.1-315(A). (*See* FCSB's Summ. J. Br., Ex. B (JA 101).)[6] Indeed, the General Assembly did not believe it was enlarging the procedural rights of non-teachers. (*See id.*) Instead, it amended § 22.1-315(A) to allow school boards to be notified when any employee is charged with a serious crime so that a dangerous or potentially criminal employee can be quickly removed from the school environment, regardless of how the employee is performing in her job. (*See id.*)

Ms. Payne misunderstands the 1996 Act when she claims that, under the intent discerned by the trial court, this change "arguably has a negative impact on the safety and welfare of the school division." (Appellant's Br. at 22.) She ignores that, before the 1996 Act, law enforcement authorities did not have to notify school boards if *a non-teacher employee* was arrested for a felony, a child abuse offense, or any other serious crime. They only had

[6] Ms. Payne told the trial court that she had no objection to admission of the authenticated copy of the legislative draft file. (Tr. of Oct. 18, 2013 Hrg. at 23 (JA 492).) So she may not now complain that the trial court "should not have relied" on it, (Appellant's Br. at 23). Rule 5:25.

to notify school boards if *a teacher* was so arrested. But the 1996 Act changed that.

Ms. Payne also ignores the text of the statutes in claiming that amendment of the notification statute, § 19.2-83.1, alone would have sufficed for the statutory purpose discerned by the trial court. Section 19.2-83.1 was textually linked directly to § 22.1-315. It expressly stated that "[t]he contents of the report required pursuant to this section shall be utilized by the local school division solely to implement the provisions of § 22.1-315." 1996 Va. Acts, ch. 960. The General Assembly thus necessarily had to amend § 22.1-315 consistently with the notification statute, § 19.2-83.1.

C. The Trial Court Was Rightly Unpersuaded by an Attorney General Opinion and a Federal District Court Decision that Did Not Address the Same Issue and Were Not Binding.

The trial court was correct to adhere to the plain language of § 22.1-315(A) and the 1996 Act, instead of reflexively adopting the views of a federal district court and an attorney general made 30 years ago, under different circumstances. Indeed, the threshold question of whether § 22.1-315(A) even applies to disciplinary suspensions was not raised in, much

less decided by, *Wilkinson* or the 1983 Attorney General Opinion.[7] These opinions were neither apposite nor binding upon the trial court.

The General Assembly also cannot be presumed to have endorsed a reading of § 22.1-315(A) that would require a School Board Hearing before any unpaid suspension of a non-teacher. The statute did not apply to non-teachers in 1983, when the only Attorney General's opinion on the statute was written. That Opinion also 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." 1982-83 Op. Att'y Gen. 417, 1983 Va. AG LEXIS 225, at **1, 7, 9 (citing Va. Const., art. VIII, § 7). The General Assembly can equally be assumed to have acquiesced in that view as well.

D. The Trial Court's Reading of § 22.1-315(A) Is Logical and Constitutional.

Ms. Payne's attempts to conjure defects in the trial court's reading of § 22.1-315(A) as applied to *teachers* are unavailing, for four reasons.

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[7] *Wilkinson* was not reviewed by the Fourth Circuit. Its interpretation of § 22.1-315(A) has not been cited in any decision published by an appellate, or even a circuit, court in Virginia. It also applied only to teachers and concluded that every unpaid suspension should be preceded by a School Board Hearing because it made "eminently more sense" to "add[] levels of procedural protection as the severity of discipline is increased." 556 F. Supp. at 773. That reasoning falls apart, of course, when applied to suspensions of non-teacher employees who have no right to a School Board Hearing before dismissal.

First, Ms. Payne lacks standing to complain about the potential impact of the trial court's ruling on teachers. Ms. Payne is not a teacher. She did not and could not have raised any claim on behalf of any teacher in her Complaint. As such, she cannot complain how the trial court's reading of § 22.1-315(A) may affect teachers. *Harbor Cruises, Inc. v. State Corp. Comm'n*, 219 Va. 675, 676, 250 S.E.2d 347, 348 (1979) (a party must "show that he has been aggrieved by the judgment or decree appealed from . . . and *has standing only to seek the correction of errors injuriously affecting him.*") (emphasis added).

Second, even if Ms. Payne did have standing to challenge how the statute applies to teachers, she failed to raise these arguments in the trial court. So they are barred. Rule 5:25.

Third, the trial court's ruling will not negatively impact teachers' constitutional rights. The trial court held only that § 22.1-315(A) does not apply to disciplinary suspensions; it did not hold that a teacher with an employment contract may be suspended without pay without *any* due process.

The Supreme Court has held that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quotation omitted) (holding

that tenured public employee charged with a felony had no due process right to hearing before unpaid suspension). Even where an employee is facing termination, due process does not necessarily require a formal pre-deprivation hearing, but requires only "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Linton v. Frederick Cnty. Bd. of Cnty. Comm'rs*, 964 F.2d 1436, 1439 (4th Cir. 1992) ("When post-termination administrative procedures are afforded, such pretermination procedure functions only as an initial check against mistaken decisions . . . The pretermination process need not resolve the propriety of the discharge.") (internal quotations omitted). "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

The stipulated facts and evidence that were before the trial court demonstrated that teachers and non-teachers alike are given due process before any unpaid suspension. Teachers and non-teachers alike receive notice and an opportunity to be heard before any unpaid suspension. (Joint Stip., Ex. 6 (JA 181).) Moreover, teachers, who unlike non-teachers

do have contracts of employment, are given additional procedural safeguards before an unpaid suspension. (*Id*.) Nonetheless, Ms. Payne cannot show any constitutional infirmity in the trial court's ruling because due process does not even require a formal pre-suspension hearing, much less a twelve-member School Board Hearing, before an unpaid suspension of any length of non-teacher employees.

Fourth, contrary to Ms. Payne's assertions, the trial court's decision effects a perfectly logical result. It requires a School Board Hearing only where an employee is suspended without pay for more than five days because of a threat to the safety or welfare of students or the school division. Because such suspensions are not based on work performance and may even involve conduct wholly unrelated to the employee's job duties, the procedural safeguard of a School Board Hearing makes good sense. Such hearing is not necessary when the employee has been formally charged with one of the offenses specified in § 22.1-315(A) because, as in *Gilbert*, the criminal charges themselves provide a check against a mistaken decision. Indeed, Ms. Payne herself agrees that § 22.1-315(A) does not require a hearing in that circumstance. Safety-or-welfare suspensions also will be rare, so a School Board Hearing for such suspensions will not administratively burden school boards. There is also

no logical inconsistency between requiring a School Board Hearing for such unusual, non-work-based suspensions, and allowing ordinary, work-based suspensions to be addressed through the normal grievance process.

IV. Section 22.1-315(A) Does Not Strip School Boards' Authority to Suspend Employees Based on Poor Work Performance (Assignment of Error 3).

Ms. Payne's alternative assignment of error—claiming that school boards may only suspend an employee when the safety or welfare of students or the schools is threatened or when the employee has been charged with an offense specified in § 22.1-315—fails for multiple reasons.

First, this argument was not raised below, so it is barred. Rule 5:25.

Second, it reads a limitation into § 22.1-315(A) that is not supported by the plain language of the statute. The statute provides that an employee "may be suspended" for good and just cause under the two circumstances then discussed. Va. Code Ann. § 22.1-315(A). It does not state "only" or "solely," or contain any language prohibiting or precluding suspensions based on other grounds, including performance.

Nor may the Court read such a limitation into the statute. The legislature is presumed to have chosen with care the words used in a statute. *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005). "Courts cannot add language to the statute the General

Assembly has not seen fit to include," or to accomplish the same result under the guise of judicial interpretation. *Id.* (internal quotation omitted). Had the General Assembly intended to make threats to safety or welfare, and criminal charges the exclusive grounds for which all school employees can be suspended, it easily could have added such words of exclusivity to the statute. But it did not.

Third, Ms. Payne's reading of § 22.1-315(A) as the exclusive grounds for suspension would abrogate the common law of at-will employment, as well as school boards' plenary powers to discipline employees. An abrogation of common law, however, must be plainly manifest in the statute and cannot be implied. *E.g., Jenkins v. Mehra*, 281 Va. 37, 44-45, 704 S.E.2d 577, 581 (2011). Yet, § 22.1-315(A) contains no language expressly abrogating the common law.

Fourth, Ms. Payne's reading would effect an illogical result. The General Assembly has not limited school boards' ability to dismiss non-teacher employees. Were Ms. Payne correct, however, a school board may not give a support employee a short-term suspension based on her poor work performance but is free to dismiss her entirely for the very same reason. Plainly, the General Assembly could not have intended such a perverse and illogical result. *See Va. Beach Beautif. Comm'n v. Bd. of*

Zoning Appeals, 231 Va. 415, 418, 344 S.E.2d 899, 902 (1986) (declining to adopt a statutory construction that would attribute to legislature an intention to create an "illogical and inconsistent" system).

Fifth, such a divestiture of school boards' authority to manage their personnel would be unconstitutional. *See, e.g., Parham,* 218 Va. at 957-58, 243 S.E.2d at 472-73 (unconstitutional to subject local school boards to binding arbitration in disputes between local school boards and non-supervisory employees); *Howard v. Cnty. Sch. Bd.*, 203 Va. 55, 59-60, 122 S.E.2d 891, 895 (1961) (unconstitutional to divest school board of authority to decide when school property could be put up for sale); *Harrison v. Day*, 200 Va. 439, 452, 106 S.E.2d 636, 646 (1959) (unconstitutional to attempt, by statute, to divest local school board of authority to run schools).

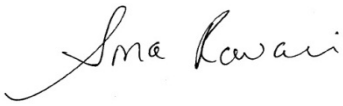
Section 22.1-315(A), therefore, cannot be construed as stripping school boards of their authority to use disciplinary suspensions as a tool for management of underperforming employees.

CONCLUSION AND RELIEF REQUESTED

The trial court read the plain language of § 22.1-315(A) correctly. The statute does not apply to performance-based suspensions, and it does not require a School Board Hearing to precede such a suspension. Accordingly, the Court should affirm the trial court's judgment.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

By: 

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(h)

The undersigned certifies that, on the 6th day of June, 2014, one electronic version on CD and 15 printed copies of the foregoing Brief of Appellee were filed by hand in the office of the Clerk of the Supreme Court of Virginia, and one electronic copy and three printed copies were mailed to:

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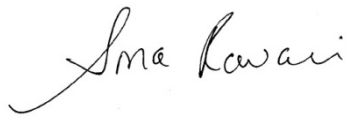

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