IN THE

Supreme Court of Virginia

RECORD NO. 160813

ROBERT F. HALE, JR.,

Appellant,

v.

TOWN OF WARRENTON OF FAUQUIER COUNTY, VIRGINIA, *et al.*

Appellees.

BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

STANDARD OF REVIEW, ARGUMENT, AND AUTHORITIES 4

Hale Was Never Permanently Appointed as the Town's Building Official. Accordingly, He Was Not Entitled to Due Process Protection Statutorily Reserved Only for Permanently Appointed Officials, and the Trial Court Properly Sustained the Respondents/Appellees' Demurrer. . . . 5

CONCLUSION AND STATEMENT OF RELIEF SOUGHT 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

CASES

Ames v. American National Bank, 163 Va. 1, 37-38,
176 S.E. 204, 215-16 (1934) 5

Baker v. Commonwealth, 284 Va. 572, 576,
733 S.E.2d 642, 644 (2012) 7

Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006) 7

Compton v. Town of Pulaski, 88 Va. Cir. 41,
2014 Va. Cir. LEXIS 4 (Va. Cir. Ct. 2014) 6

Harris v. Kreutzer, 271 Va. 188, 195-96, 624 S.E.2d 24, 28 (2006) 5

In re Joseph D. Morrissey, 246 Va. 333, 433 S.E.2d 918 (1993) 8

Lee Cty. v. Town of St. Charles, 264 Va. 344, 348,
568 S.E.2d 680, 682 (2002) 7

Tisdale v. Commonwealth, 65 Va. App. 478, 483-484
(Va. Ct. App. 2015). 7

STATUTES AND OTHER SOURCES

Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia
Administrative Code 2, 3, 5, 7

Section 105.1 of the Virginia Construction Code 2, 3, 5, 7

Warrenton Town Code, sec. 2-127 2

To the Honorable Justices of the Supreme Court of Virginia:

STATEMENT OF FACTS

Robert F. Hale, Jr. ("Hale") filed a First Amended Complaint ("Complaint") in Fauquier Circuit Court on November 3, 2015. (App. pp. 1-40).[1] In his Complaint, Hale asserted that he was wrongfully removed from his position as a "Supervisory Building Official" by Defendant Town of Warrenton ("Town"). (App., p.2, ¶ 1). Appended to his Complaint was a transcript from a July 30, 2015 hearing before the Fauquier Circuit Court during which Hale sought a ruling that his removal was grievable. (App. pp. 14-40).[2] In response to a motion craving oyer filed by Respondents/Appellees in the instant case, Hale also appended to his Complaint the exhibits which were introduced at the July 30, 2015 hearing. (App. pp. 268-295).

In his Complaint, Hale requested that the court issue a Writ of Mandamus and direct the Town to "reappoint" him as the executive official in charge of the Warrenton building division within the Department of Development. (App. p. 7). He also requested nominal damages and an award of reasonable attorney's fees. *Id.*

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[1] References to "App." are to page numbers in the Joint Appendix.

[2] The court ruled against Hale.

In response to Hale's Complaint, the Respondents/Appellees filed a motion craving oyer and demurrer and a brief in support. (App. pp. 43-55). The primary argument raised in the demurrer was that there was no basis or authority granted to the circuit court under Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code or Section 105.1 of the Virginia Construction Code to issue a writ of mandamus given the facts alleged in Hale's case.

The cited code sections state, in relevant part:

> Every local building department shall have a building official as the executive official in charge of the department. The building official shall be appointed in a manner selected by the local governing body. After permanent appointment, the building official shall not be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority.

In Warrenton, all employees, except the town recorder and town attorney, are supervised and controlled by the Town Manager. *See* Warrenton Town Code, sec. 2-127. On April 10, 2006, C. Christopher Mothersead, then Director of Planning and Community Development, fell under the Town Manager's supervision and control. Mr. Mothersead, on behalf of the Town, sent a letter to Hale offering him employment. (App. P. 268-270). Admittedly, the letter *did not* extend to Hale an offer of a

"permanent appointment" as referenced in Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code or Section 105.1 of the Virginia Construction Code. (App. 28-29). In fact, Hale was hired as an at-will employee and never permanently appointed. Hale concedes as much in his Petition for Appeal (Petition for Appeal , p. 4) and in the Opening Brief of Appellant (Opening Brief, p. 4).

Notwithstanding that he was never permanently appointed as a building official, Hale maintains that he should have been "afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority" prior to having his supervisory authority stripped from him. This due process protection is a "benefit" statutorily reserved only for building officials who have been permanently appointed. Hale maintains that, although he does not fit that criteria, he was the *de facto* permanently appointed building official, and he should have had due process before his job duties were changed. The trial court considered, and correctly rejected, Hale's position.

Following the trial court's ruling on the demurrer, Hale filed a Motion to Reconsider. (App. pp. 101-244). Hale references that document and the attachments in his Opening Brief. Those materials, however, may not be

considered on appeal as they are not part of the Complaint or attachments thereto which the court considered when it ruled upon the demurrer.[3]

The sole question for this court is whether the trial court properly sustained the demurrer when the Complaint and attachments thereto made it clear that Hale was never permanently appointed as the Town's building official and, thus, was not entitled to the due process protection statutorily reserved for only such persons. Respondents/Appellees submit that the trial court properly ruled, and that this court should affirm the trial court.

STANDARD OF REVIEW

The standard of review applicable to a circuit court's sustaining of a demurrer is well established:

> A demurrer tests the legal sufficiency of a [complaint] and admits the truth of all material facts that are properly pleaded. The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged. The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [complaint], but only may determine whether the factual allegations of the [complaint] are sufficient to state a cause of action.

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[3]Furthermore, because the trial court's procedures do not permit the opponent to a motion to reconsider to respond unless invited to, Respondents/ Appellees never had an opportunity to respond to the new arguments and materials submitted as part of the motion to reconsider.

Harris v. Kreutzer, 271 Va. 188, 195-96, 624 S.E.2d 24, 28 (2006) (internal citations and quotation marks omitted). A demurrer does not admit the correctness of the pleader's conclusions of law. *Ames v. American National Bank*, 163 Va. 1, 37-38, 176 S.E. 204, 215-16 (1934).

"A trial court's decision sustaining a demurrer presents a question of law which this court reviews *de novo.* Furthermore, like the trial court, [a reviewing court] is confined to those facts that are expressly alleged, impliedly alleged, and which can be inferred from the facts alleged." *Harris,* 271 Va. at 195-96, 624 S.E.2d at 28.

ARGUMENT AND AUTHORITIES

Hale Was Never Permanently Appointed as the Town's Building Official,. Accordingly, He Was Not Entitled to Due Process Protection Statutorily Reserved Only for Permanently Appointed Officials, and the Trial Court Properly Sustained the Respondents/Appellees' Demurrer.

The provisions which Hale relies upon to assert that he was entitled to a hearing prior to being removed as a Supervisory Building Official are Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code. These sections state, in relevant part:

> Every local building department shall have a building official as the executive official in charge of the department. The building official shall be appointed in a manner selected by the local governing body. After permanent appointment, the building official shall not be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority.

Hale does not maintain that he was ever permanently appointed as a building official.[4] In fact, in his Opening Brief, he argues, "[e]ven though Hale was hired as an at-will employee, sufficient facts were alleged to reasonably infer that over the course of his career *he became* the permanent appointment Building Official for the Town of Warrenton or in the alternative that he was the *de facto* Building Official for the Town of Warrenton, ..." (Opening Brief, p. 12) (emphasis added). In support of his argument, Hale relies on *Compton v. Town of Pulaski*, 88 Va. Cir. 41, 2014 Va. Cir. LEXIS 4 (Va. Cir. Ct. 2014). That case has no binding effect, has never been relied

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[4]To be clear, in paragraph 7 of Hale's Complaint, he does state that he was the Building Official and Property Maintenance Official, "by permanent appointment." (App. p. 3). However, that allegation is defeated by the attachments to the Complaint, which reflect that no permanent appointment ever occurred. Hale conceded as much when the demurrer was argued to the trial court, and he has conceded as much in his filings with this court. If Hale was permanently appointed, there would be no need for him to argue that he was the *de facto* permanent building official. This court is not required to accept allegations in the Complaint which are contradicted by the documents appended thereto, especially when, as here, Hale concedes no permanent appointment ever occurred.

upon by another court, and is plainly wrong.[5] Further the statutes upon which Hale relies for his claim that he was entitled "not [to] be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges...," do not provide that someone can "become" a permanent employee. The statutes explicitly refer to an "appointment" to a permanent position.

When analyzing a statute, courts must apply its plain meaning "'unless the terms are ambiguous or applying the plain language would lead to an absurd result.'" *Baker v. Commonwealth*, 284 Va. 572, 576, 733 S.E.2d 642, 644 (2012) (*quoting Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006)). More fundamentally, courts are not at liberty to rewrite statutes. *Tisdale v. Commonwealth*, 65 Va. App. 478, 483-484 (Va. Ct. App. 2015). When the language of a statute is plain and unambiguous, courts are bound by the plain meaning of that statutory language. *Lee Cty. v. Town of St. Charles*, 264 Va. 344, 348, 568 S.E.2d 680, 682 (2002) (citations omitted). Thus, when the General Assembly has used words that have a

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[5]There is no binding authority which supports Hale's constrained reading of Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code.

plain meaning, courts cannot give those words a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed. *Id.*[6]

There is nothing ambiguous about the statutory provisions upon which Hale relies to attempt to argue that he had due process rights to a hearing prior to being stripped of his supervisory powers by the Town. The statutory provisions require local building departments to have a building official who is appointed in a manner selected by the local governing body. The statutory provisions do not specify how, when, or even if a local governing body has to make a permanent appointment. The statutes do not provide that someone hired at-will "becomes" a permanent appointee if the locality fails to act to appoint a permanent official. The statutes do, however, clearly contemplate two separate classes of persons: those permanently *appointed* and those who are not. Recognizing this distinction, the statutory provisions extend different treatment depending on the nature of a building official's appointment. ***If*** a building official has been permanently appointed, he

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[6]Interestingly, in finding that a trial court erred in not granting a writ of mandamus in *In re Joseph D. Morrissey*, 246 Va. 333, 433 S.E.2d 918 (1993), a case cited by Hale, this court took issue with the trial court's failure to apply a statute as plainly written.

receives a benefit which those who have not been permanently appointed do not enjoy. The permanently appointed official is entitled to be removed from office only for cause "after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority."

There is nothing in the statutes which allows a court to extend permanent appointment status to a person not permanently appointed by the local governing body. The statutes provide that the governing body selects how to make appointments. The statutes allow the governing body to determine whether to permanently appoint an official or not. The statues provide that officials are treated differently, as far as removal from office, depending on the status which the local body has conferred upon the official.

To adopt Hale's argument that, at some point, because there was no permanently appointed building official, he became the *de facto* permanently appointed building official, would create a very slippery slope and would add conditions to the statute which are nowhere contained therein. How would it be determined when the amorphous change from non-permanent to permanent *de facto* status occurred? Would it be sufficient to be non-permanent for a year before an official morphed into permanent status even though the governing body never changed the official's status? Or would it

require more time, such as five years?[7] Would the change in status be dependent on the nature of the official's duties? What would be the criteria that local governing bodies or courts would apply? Fortunately, it is not necessary to answer these questions because the statutes upon which Hale relies to argue that his due process rights were violated before he lost supervisory power clearly and unambiguously do not provide Hale with any due process rights prior to having his job duties modified. To find otherwise would require the court to completely disregard the plain and unambiguous language of the statutes. This is, unfortunately, what the *Compton* court did. Recognizing the flaw in that decision, the trial court in this case declined to follow *Compton.*

In this case, the trial court recognized that it was not its role to rewrite the statutes at issue. Its role was to apply the plain meaning of the statutes. In doing so, where the facts before the court, as conceded by Hale, were that he was hired as an at-will employee and never permanently appointed, it is beyond question that Hale was not entitled to the due process protections

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[7]Note that the plaintiff in *Compton* held his position for 27 years prior to being removed. The trial court did not express an opinion as to when he became, in the trial court's mind, the *de facto* permanent building official. In contrast, Hale was in his at-will, non-permanent status for only six years before he lost his supervisory responsibilities. (App. p. 3).

reserved only for permanently appointed officials. There is simply no merit to Hale's argument that he should be considered something he was not and provided protections which the General Assembly expressly extended only to permanently appointed building officials. The trial court, in this case, reached the right conclusion and ruled accordingly.

Conclusion

There is no issue presented by Hale which warrants this Court's intervention. Contrary to Hale's arguments, the trial court properly sustained the defendants' demurrer. Hale was never permanently appointed as a building official, and he was not entitled to any due process protection before his job duties were modified. As such, this Court should affirm the trial court's decision to sustain the demurrer and dismiss Hale's case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2016, Rule 5:26(e) was complied with and pursuant to that rule, a copy of the foregoing Appellees' Brief Of Appellee was mailed, first class, postage prepaid and emailed to:

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