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IN THE

Supreme Court of Virginia

RECORD NO. 160813

ROBERT F. HALE, JR.,

Appellant,

v.

TOWN OF WARRENTON,

Appellee.

OPENING BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 160813

Robert F. Hale, Jr.,

Plaintiff/Appellant

vs.

TOWN OF WARRENTON OF

FAUQUIER COUNTY, VIRGINIA

Defendant/Appellee

OPENING BRIEF OF APPELLANT

To the Honorable Justices of the Supreme Court of Virginia:

Robert F. Hale, Jr., appellant (plaintiff in the trial court) is aggrieved by a final order of the Circuit Court of Fauquier County, entered February 29, 2016, and order denying appellant's motion to reconsider entered March 3, 2016.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE TRIAL COURT

Robert F. Hale, Jr. instituted a suit in the Circuit Court of Fauquier County and amended his suit on November 3, 2015 seeking a writ of mandamus against the Town of Warrenton to restore him to the position of Building Official under the provisions of Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code, and specifically his right to not be removed until after having been afforded a full opportunity to be heard, and even then only for cause.

The Town of Warrenton filed a demurrer and the motion was heard on January 19, 2016, before the Honorable Jeffrey W. Parker, and on

February 29, 2016 a final order[1] was entered sustaining the demurrer, and, therefore, holding Robert F. Hale, Jr. was not entitled to relief, and dismissing his complaint. (Appendix 245-246)

Robert F. Hale, Jr. duly noted his exceptions in his motion to reconsider (Appendix Page 101-244), which was denied on March 3, 2016. (Appendix Pages 247-248) Robert F. Hale, Jr.'s Notice of Appeal from the final order was duly filed on March 21, 2016. (Appendix Pages 249-251)

ASSIGNMENTS OF ERROR

1. Because the First Amended Complaint articulates a valid cause of action for Writ of Mandamus and because the pleading seeks appropriate relief, the trial court erred in dismissing the litigation as a result of the demurrer filed by the respondent. (Appendix Page 252)

STATEMENT OF FACTS

Hale was hired as Building Official by the Town of Warrenton. Hale replaced the interim Building Official for the Town of Warrenton. (Appendix Page 19) Hale's responsibilities were to review and evaluate building plans

[1] The final order incorporated the parties' agreement regarding the motion craving oyer and made documents (Appendix Page 245-246) a part of the First Amended Complaint *nunc pro tunc*. However, the record from the trial court did not have the documents and have been added hereto (Appendix Page 268-295) as soon as counsel discovered the omission.

that were submitted under State and Town regulations, issue building permits, review staff, conduct field review, issue certificates of occupancy, as well as perform all of the standard administrative and field requirements of Building Officials. (Appendix Page 19) Hale's employment package placed him on a six-month probationary period. (Appendix Page 28) The Town of Warrenton never officially permanently appointed Hale to the Building Official position. (Appendix Page 28) However, Hale was the only Building Official for the Town of Warrenton for quite some time. (Appendix Page 19) Hale was the supervisor of the Building Division within the Department of Development for the Town of Warrenton and he had two inspectors under his direct supervision. (Appendix Page 30)

The Town of Warrenton received complaints from an individual of considerable influence in the Town of Warrenton. (Appendix Page 34) Hale was told by the Town Manager and his supervisor at the Department of Development to stay away from the complainant's properties. (Appendix Page 34) However, Hale continued to enforce the building code on the complainant's properties, which led to Hale receiving a reprimand. (Appendix Page 34)

On November 26, 2012 Hale met with his supervisor at the Department of Development and was told that he would be losing his ability to supervise. (Appendix Page 25) On November 27, 2012 Hale's supervisor sent a letter that switched Hale with an inspector that had been under his direct supervision. (Appendix Page 29) Furthermore, Hale was told that his replacement should sign all notices of violation. (Appendix Page 30)

Hale filed a grievance with the Town of Warrenton in June 2013. (Appendix Page 31) At the grievance hearing, testimony was given that Hale was removed from the "lead Building Official" position. (Appendix Page 18) Hale's grievance was held as not grievable as the Court reasoned that Hale was not demoted and did not receive a loss in pay. (Appendix Pages 41-42)

Hale filed a complaint against the Town of Warrenton in Circuit Court on June 5, 2015. Hale was granted leave to amend his complaint and filed his First Amended Complaint on November 3, 2015.

In his First Amended Complaint, Hale asserted in the detailed pleadings that the Town of Warrenton was liable to him pursuant to the theory of Writ of Mandamus based upon Title 13, Agency No. 5, Chapter 63, Part I,

Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code. (Appendix Pages 4-7)

In support of his claim, Hale stated in his First Amended Pleadings that he was hired by the Town of Warrenton in 2006. (Appendix Page 3) His position with the Town of Warrenton was the Building Official and Property Maintenance Official. (Appendix Page 3)

Moreover, Hale pled that he replaced the town's interim Building Official and was the only Building Official for the Town of Warrenton where he was in charge of the Building Division under the Department of Development. (Appendix Page 4) Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code mandate that each locality shall have a Building Official in charge of each local building department.

It was also pled that on November 26, 2012, Hale's supervisory responsibilities were removed without the benefit of a hearing. (Appendix Page 3) Furthermore, a letter dated November 27, 2012 stated that the supervisor role in the Building Department would be assumed by another employee. (Appendix Page 3) The First Amended Complaint incorporated Hale's grievance hearing.

The Town of Warrenton and named defendants demurred Hale's First Amended Complaint. (Appendix Pages 43-47) The Defendants, in their demurrer, argued that Hale did not plead sufficient facts for a Writ of Mandamus, that Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code do not support a Writ of Mandamus and that the exhibits to the grievance hearing evidence that Hale was hired as an at-will employee. (Appendix Pages 44-46)

Hale filed a Brief in Opposition to Defendants' Demurrer. (Appendix Pages 84-100) In his brief, Hale argued that the Writ of Mandamus is the proper remedy to restore a public officer who has been unlawfully removed or deprived of that office based upon Virginia case law. (Appendix Pages 85-86) Additionally, Hale argued that he pled sufficient facts to reasonably infer that he was the Building Official for the Town of Warrenton, or in the alternative that he was the *de facto* Building Official and should receive the same protections afforded to permanently-appointed Building Officials. (Appendix Pages 86-88)

The Court heard arguments from the Town of Warrenton and Hale. (Appendix Pages 253-267) At the hearing, the Town of Warrenton argued

that Hale was not the permanent Building Official because Hale was not permanently appointed, which was documented by Hale's employment package and grievance hearing testimony. (Appendix Pages 255-259) Hale argued that although he was initially hired as an at-will employee and not permanently-appointed that Hale was the *de facto* Building Official in accordance with Virginia case law and furthermore that the policy behind the code sections is to protect the Building Officials from political pressure, which occurred. (Appendix Pages 260-264) The Court held that sections 105.1 of the Virginia Administrative Code and the Virginia Construction Code did not apply to Hale because he was not the permanently-appointed Building Official. (Appendix Page 266)

Hale filed a motion to reconsider the demurrer decision and argued that the Court's interpretation was contrary to the legislative meaning and intent behind the statute. (Appendix Pages 101-244) Additionally, Hale provided documentation from the Town of Warrenton that listed Hale as the Building Official for the Town of Warrenton. (Appendix Pages 108-244)

One such document was a Historic District Design Guideline published and adopted by the Town of Warrenton on February 28, 2008. (Appendix Pages 108-237) The "Credits & Acknowledgments" page lists Robert F. Hale, Jr.

as the “Building Official.” (Appendix Page 110) There were no additional names under the heading “Building Official.” The publication further defines the term “Building Official” as “[t]he person appointed by the Town Manager as the individual who issues the permit for the construction, alteration, reconstruction, repair, restoration, relocation, demolition, or razing of all or part of any building.” (Appendix Page 221) Therefore, the documents evidence that Hale was appointed by the Town of Warrenton in accordance with the code sections and should be entitled to the protections afforded thereunder. Nevertheless, the Court denied the motion. (Appendix Page 247)

ARGUMENT AND STANDARD OF REVIEW

A. THE COURT ERRED IN DISMISSING THE LITIGATION AS THE PLEADING ARTICULATED A VALID CAUSE OF ACTION AND SOUGHT APPROPRIATE RELIEF. (Error preserved by Luckett v. Jennings, 246 Va. 303, 306, 435 S.E.2d 400, 401 (1993)).

STANDARD OF REVIEW: This is an appeal of a final order entered in the Circuit Court of the County of Fauquier dismissing Hale’s case on demurrer filed by appellees. Accordingly, it is important to keep in mind the appropriate standard of review:

Well-established principles guide our review of a trial court's judgment sustaining a demurrer.

> The purpose of a demurrer is to determine whether a [complaint] states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in the pleadings, not the strength of proof. Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts. Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo.
>
> Kurpiel v. Hicks, 284 Va. 347, 353 (2012) (quoting Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 356–57 (2010)).

ARGUMENT AND AUTHORITIES: "A trial court's decision sustaining a demurrer presents a question of law which we review *de novo*." Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 514 (2014) (internal citation omitted). "It is well-established that a demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." Id. (internal quotation marks and citation omitted). See also, Kurpiel v. Hicks, 284 Va. 347, 353 (2012); Sales v. Kecoughtan Hous. Co., 279 Va. 475, 478 (2010).

Although no formal objections were made, noting an objection on the trial court's final order without listing the specific grounds for that objection is sufficient to preserve an issue for appeal. Luckett v. Jennings, 246 Va. 303,

306, 435 S.E.2d 400, 401 (1993). Moreover, this appeal is a question of law of first impression.

Hale's objections stem from whether Hale was the Permanent Building Official for the Town of Warrenton as defined in Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code. The relevant part of Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code reads:

> **Appointment of Building Official.** 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. DHCD shall be notified by the appointing authority within 30 days or the appointment or release of a permanent or acting Building Official.

In this case, the First Amended Complaint stated that Hale was employed by the Town of Warrenton as the Building Official and Property Maintenance Official. Hale was the only Building Official for the Town of

Warrenton, which creates a reasonable inference that Hale was the permanently-appointed Building Official for the Town of Warrenton since the code sections require every local building department to have a Building Official in charge of each local building department.

The memorandum dated November 27, 2012 states that Hale's supervisory role in the Building Department was being taken over by another employee. The June 11, 2013 letter from the Town of Warrenton established the new employee as the new "Building Official and Property Maintenance Official."

In addition, the Historic District Design Guideline from the Town of Warrenton evidences that Hale was appointed by the Town Manager for the Town of Warrenton. The Historic District Design Guideline came out two years after his initial hiring and the Historic District Design Guideline defined Hale as the person appointed by the Town Manager.

Even 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, both of which entitle Hale to protections afforded under Title 13,

Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code.

While the Writ of Mandamus is regarded as "an extraordinary remedy," In re Commonwealth, 278 Va. 1, 8, 677 S.E.2d 236, 238 (2009), Virginia Courts have held that the Writ of Mandamus is a proper remedy to restore a public officer who has been unlawfully removed or deprived of that office. Compton v. Town of Pulaski, 88 Va. Cir. 41, 41–42, 2014 Va. Cir. LEXIS 4, at [2] (Vir. Cir. Ct. 2014) (quoting In re Hannett, 270 Va. 223, 233, 619 S.E.2d 465, 469 (2004); In re Joseph D. Morrissey, 246 Va. 333, 334, 433 S.E.2d 918, 918 (1993); Giles County Bd. Of Supervisors v. Carr, 222 Va. 379, 381-82, 282 S.E.2d 14, 16 (1981); Dew v. Judges of Sweet Springs, 13 Va. 1, 23 (1808); Sinclair v. Young, 100 Va. 284, 287, 40 S.E. 907, 908 (1902); Buntig v. Willis, 68 Va. 144, 161 (1876); Smith v. Dyer, 5 Va. 562, 562 (1799).

Hale as the building official was a public officeholder, but once he was removed, he had few remedies. Hale was not terminated or demoted, rather, he was removed. Hale tried to grieve his removal from the building official position, but the matter was held non-grievable. Consequently, Hale was only left with the writ of mandamus. The extraordinary remedy is

applicable to Hale because he was removed from position without any other remedy to restore himself to the building official position he was wrongfully removed from.

Additionally, the Trial Court's holding will destroy the legislative intent behind the code sections. If the statute's text is "clear and unambiguous, courts may not interpret them in a way that amounts to a holding that the legislature did not mean what it actually has expressed. In other words, courts are bound by the plain meaning of clear statutory language." Crawford v. Haddock, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005) (citing Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs., 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004)); Woods v. Mendez, 265 Va. 68, 74–75, 574 S.E.2d 263, 266–67 (2003); Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001) (quoting Watkins v. Hall, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)); see also Melanson v. Commonwealth, 261 Va. 178, 183, 539 S.E.2d 433, 435 (2001) ("The primary objective of statutory construction is to ascertain and give effect to legislative intent. The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.").

The legislative intent driving Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code is to protect the local Building Officials. Indeed, Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code are very necessary and important parts of the administration and enforcement of the building code. See Dodson v. Shenandoah County, 27 Va. Cir. 479, 483, 1983 Va. Cir. LEXIS 161, at [9] (Va. Cir. Ct. 1983). The code sections ensure fair and impartial administration and enforcement of the building code. Id. The essence of the code is to afford protection to the local Building Officials, who, because of the nature of their office, may be embroiled in frequent controversy in dealings with the public. Id.

The Trial Court's ruling may set a dangerous precedent where localities override the protections afforded by Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code through employment contracts. Localities will only need to hire Building Officials as at-will employees and/or never permanently appoint Building Officials in order to render Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code useless.

Furthermore, the Trial Court's ruling runs contrary to precedent set by sister courts in Virginia. In Dodson v. Shenandoah County, 27 Va. Cir. 479, the Court granted judgment to the employee, holding that the employee's transfer from the position of Building Official to that of chief building inspector when the employee's job responsibilities were reduced, but his salary was not reduced was a grievable matter and entitled the employee to the applicable protections afforded in the Virginia Uniform Statewide Building Code.

The Dodson precedent was affirmed in Compton v. Town of Pulaski, 88 Va. Cir. 41, 2014 Va. Cir. LEXIS 4 (Va. Cir. Ct. 2014), where the Court held that an employee was the *de facto* Building Official for the Town and should have been afforded the protection of Section 105.1 of Chapter 63, Title 13, Agency No. 5, of the Virginia Administrative Code even though he was not permanently appointed nor was he given the title of "Building Official." The Compton Court held that Mr. Compton's position as a code compliance officer evolved into a building inspector and the *de facto* permanently appointed building official for the Town based upon Mr. Compton's lengthy term of service, where he was in effect the only building official for the Town, examined permit applications, had the authority to issue permits, and signed on behalf of the Town's legal matters pertaining to the building

code. In effect, Virginia continued to recognize the theory of *de facto* officers as the Court held that Mr. Compton was "'the chief officer in charge of the enforcement of the State Building Code' for the Town of Pulaski." 88 Va. Cir. 41, 42 (2014).

Various courts throughout the country describe a *de facto* officer as "one who actually performs the duties of the office with apparent right, under claim or color of appointment or election." *Ex parte* Strang, 21 Ohio St. 610, 617 (1871); Brown v. Lunt, 37 Me. 423, 428 (1854); People *ex rel*. Phillips v. Lieb, 85 Ill. 484, 488 (1877).

This case is analogous to the Compton case as both Hale and Compton were not permanently appointed building officials for their Towns, but both Hale and Compton were in effect the only building official for the Town and were chief officers in charge of the enforcement of the State Building Code. Moreover, the Compton decision ensures the integrity of the Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code as the sections were meant to protect building officials and not give municipalities free reign to interchange building officials at a whim.

CONCLUSION

For the foregoing reasons the actions of the Town of Warrenton are invalid and cannot be sustained, and the decision of the Circuit Court sustaining such action should not be allowed to stand. Hale prays that the final order of the Circuit Court be reversed and that this case be remanded with instructions upholding the Compton Court's ruling in regards to its reading of Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1, *de facto* building officials, and that the writ of mandamus is a proper remedy in this case.

Respectfully submitted,
Richard J. Conrod, Sr.

By *__/s/ Richard J. Conrod, Sr.__*

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on November 1, 2016, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee and a paper copy by first class mail:

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