IN THE

Supreme Court of Virginia

RECORD NO. 160979

CITY OF DANVILLE, VIRGINIA,

Appellant,

v.

JACQUELINE GARRETT,

Appellee.

BRIEF OF APPELLEE

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V I R G I N I A:

IN THE SUPREME COURT

CITY OF DANVILLE, VIRGINIA	}	
Appellant	}	
	}	Record No.: 160979
v.	}	
	}	Case No.: CL13000208-00
JACQUELINE R. GARRETT	}	
Appellee	}	

BRIEF OF APPELLEE

In this case of first impression arising under §51.1-813, Code of Virginia (1950), as amended, Jacqueline R. Garrett, appellee (hereinafter "Garrett"), by counsel, pursuant to Rule 5:18, respectfully files this Brief of Appellee in response to the appeal awarded herein to the City of Danville, Virginia, appellant (hereinafter "Danville"), who seeks review of a Final Order entered by the Circuit Court of the City of Danville granting the requested relief sought by Garrett.

INTRODUCTION

Danville appeals a Final Order entered by the Circuit Court of the City of Danville which held that Garrett was entitled, pursuant

to §51.1-813, to a service incurred disability retirement benefit in the amount of sixty-six and two-thirds percent (66 2/3%), rather than the thirty percent (30%) of the average yearly wage calculation.

By way of Final Order, the Circuit Court found for Garrett and remanded the matter to the City of Danville for calculation and payment of the appropriate retirement benefit under §51.1-813.

STATEMENT OF THE CASE

Garrett concurs with, the statement of the case as set forth in the Brief of Appellant[1], except to the extent that the trial court ruling nullified the City's ordinances.

STATEMENT OF MATERIAL FACTS

This case arises out of an on-duty motor vehicle crash which occurred on February 24, 2008, when Garrett collided with another motor vehicle traveling the wrong way on a marked one-way street in the City of Danville (Joint Appendix at page 1 (hereinafter cited as J.A. with page number following)). Garrett sustained personal

[1]Garrett objected to the request of the City of Danville to file their untimely Petition for Appeal.

injuries and suffered a wage loss, memorialized in a workers' compensation award dated February 26, 2009 (J.A. at pages 20 and 21). Garrett returned back to her position as a police officer, but continued to suffer residual medical issues from the crash which culminated with a medical determination that she was no longer fit for unrestricted duty as a police officer (J.A. at page 2).

At the time of her hire as a police officer with the City of Danville, Garrett was enrolled in the retirement system established by the City of Danville promulgated pursuant to the City of Danville, Code of Ordinances, Part II, Chapter 32; Article I (J.A. at pages 23-81). The retirement system Garrett was enrolled in provided for a service-retirement based on age and number of years employed (J.A. at pages 28-41). Under normal circumstances, the employee provided law enforcement services to the City and the City proscribed by ordinance a payment to the employee in the form of a retirement benefit, assuming all preconditions were met.

In the event of an unfortunate career ending injury or illness, whether arising out of the employee's performance of duty

providing law enforcement services to the City or not, an alternative retirement benefit was proscribed by ordinance to the employee for the early separation of that employee from their employment otherwise subject to the service-retirement provisions providing that benefit (J.A. at pages 40-41).

On or about June 22, 2012, Garrett was directed to submit an application for disability retirement by the City of Danville Police Department as she was no longer fit for duty in an unrestricted capacity as a police officer. The application for disability retirement, based on a review of the medical records and an examination of Garrett by two (2) physicians, was approved and Garrett was retired effective October 1, 2012 (J.A. at pages 22, 89-94).

The parties at the hearing before the trial court on December 11, 2015 at Danville, Virginia stipulated to the following:

1. Ms. Garrett was injured on February 24, 2008 in a motor vehicle accident while employed as a police officer for the City of Danville.

2. She received a workers' compensation award as a result of the injuries she had in that accident.

3. She applied for and received what is called line of duty designation [disability], that her disability, her inability to work as a police officer, was the result of the injuries she had in that motor vehicle accident. And that application was approved on June 13, 2013.

4. The City is not part of the State retirement system.

5. The City's retirement system is governed by Chapter 32 of the City Code.

6. The City does not have a separate police retirement system.

(J.A. at pages 177-186).

ARGUMENT

1. STANDARD OF REVIEW

Garrett concurs with the standard of review as set forth in the Brief of Appellant.

2. APPELLATE JURISDICTION WAS LOST WITH THE UNTIMELY FILING OF THE PETITION FOR APPEAL.

The circuit court entered final judgment in this case on March 25, 2016. The three-month filing deadline for the petition for appeal expired on June 27, since June 25 was a Saturday. Code § 8.01-671(A)(i), § 1-210.

The City missed this filing deadline. It filed its petition on Tuesday, June 28.

When Garrett pointed out this missed deadline, the City moved for a retroactive extension of its time to file, blaming its lawyer and its printing consultant for a mis-communication. This Court granted the motion and accepted the untimely petition. The Court later awarded the City an appeal based on the defective filing.

But this Court did not have the authority to grant the extension, and the petition was fatally defective.

The General Assembly has "the power to determine the original and appellate jurisdiction of the courts of the Commonwealth". Const. of Virginia, Art. IV, § 1. It has expressly limited this Court's jurisdiction:

> In cases where an appeal is permitted from the trial court to the Supreme Court, no petition shall be presented for an appeal to the Supreme Court from any final judgment ... (i) which shall have been rendered more than three months before the petition is presented, provided, that **in criminal cases**, a thirty-day extension may be granted, in the discretion of the court, in order to attain the ends of justice ...

Code § 8.01-671(A) (emphasis supplied).

This statute allows extensions only in criminal cases, not civil appeals like this one. "If a statute expressly excepts a class which would otherwise fall within its terms, the exception negates the idea that any other class is to be excepted." *Reese v. Wampler Foods, Inc.*, 222 Va. 249, 278 S.E.2d 870, 871 (1981). This court may not rewrite the statute under the guise of interpreting it. *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 784 S.E.2d 280, 284 (2016). *See also* *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 608 S.E.2d 910, 906 (2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").

The only way to read the statute to apply to civil appeals is to erase the clause *in criminal cases*, so that the power to extend the deadline by 30 days applies to all appeals. This the Court may not do. Garrett accordingly moves the Court to dismiss this appeal as improvidently awarded.

3. §51.1-813, CODE OF VIRGINIA (1950), AS AMENDED, IS A CLEAR AND UNAMBIGUOUS COMMAND OF THE GENERAL ASSEMBLY THAT MEMBERS OF A POLICE DEPARTMENT OF A COUNTY, CITY OR TOWN WHICH HAS A PENSION PLAN SHALL RECEIVE THE SUM OF NOT LESS THAN SIXTY-SIX AND TWO-THIRDS PERCENT OF THE SALARY OF THE MEMBER AS A PENSION BENEFIT FOR ANY SERVICE-INCURRED DISABILITY (ASSIGNMENTS OF ERROR 1 AND 2).

As far back as 1916, "the General Assembly of Virginia authorized cities of the first class to establish a system of pensions for injured, retired or superannuated members of its police and fire departments... In 1930, it authorized cities, towns and counties to make appropriations for the relief of police officers disabled by injury received 'while actively in the performance' of their duties". *City of Norfolk v. Key*, 192 Va. 694, 66 S.E.2d 479 (1951).

Subject to a series of amendments over the years, the statutes evolved from 41.112, et. seq., Code of Virginia (1950), as amended, more specifically, 51-121 and 51-122, into its current form, 51.1-800, et. seq. Code of Virginia (1950), as amended. As the Court in *Key* observed in 1951, "the foregoing amendments have been cited as reflecting the growth and development of this character of legislation and the public policy of the state. The

legislation was for the beneficial purpose of providing relief in the nature of disability insurance to employees in public service. Having for its purpose a humanitarian end, it is to be liberally construed". *Key*, 192 Va. at 699-700; 66 S.E.2d at 481-481.[2]

Garrett contends that the "award" of monthly disability retirement benefits which began on or about October 1, 2012 should have been calculated in accordance with the requirements of §51.1-813, Code of Virginia (1950), as amended, a state code provision which states, in part, the following:

> **§51.1-813. Disability resulting from activities in discharge of official duties.**
>
> If any member of a police department of a county, city, or town, other than the City of Richmond, which has a pension plan becomes disabled as a result of activities in the discharge of the member's official duties, the member shall receive, as pension and benefits during such disability, the sum of not less than sixty-six and two-thirds percent of the member's salary until eligible to retire under age and service retirement. The member shall then be retired on the age and service pension as provided in §51.1-811. [Emphasis supplied]

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[2]As far back as 1942, the employees' retirement system for the City of Norfolk provided a disability retirement in the amount of 66 2/3 percent of the average final compensation for line of duty injuries to police officers. See *Key*.

Garrett contends that the aforementioned state code provision should have resulted in an initial monthly indemnity benefit in the amount of sixty-six and two-thirds percent (66 2/3%) of Garrett's average final compensation with the City of Danville.[3]

The City of Danville, instead, applying the provisions of the ordinances enacted by the City of Danville pertaining to the Employee's Retirement System of the City of Danville, Virginia (hereinafter cited as "ERS"), contends the provisions of the ERS apply and that Garrett has been approved and awarded a monthly retirement benefit in the amount of thirty percent (30%) of Garrett's average final compensation with the City of Danville. Danville contends that §51.1-813 does not apply as they do not have a "police retirement system".[4]

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[3]Garrett's average final compensation was calculated to be $35,503.92. In accordance with §51.1-813, the service connected disability benefit would have been $1,972.45. 66 2/3% of $35,503.92 equals $23,670.46. Dividing by 12 (number of payable months), the payable monthly benefits should have been $1,972.54. (J.A. at pages 14, 107-110; see supporting exhibits H and I.)

[4]Garrett's average final compensation was calculated to be $35,503.92. ERS contends, and so awarded Garrett, pursuant to

The authority for the establishment of a public employee retirement system by the City of Danville flows from a grant of authority from the General Assembly to the City of Danville. That authority does not have in its origin the general grant of power pursuant to §15.2-1102 nor does it emanate from the City charter for the City of Danville. Indeed, the general grant of power and city charter are silent with respect to the creation of pension systems. Therefore, Garrett contends that this Court need only look to the state code for its authority to determine what the retirement benefit ought to be.

It is worth noting that Article I of Chapter 8; "Title 51.1 Pensions, Benefits and Retirement" does not have a legislative preamble nor separate codified definitions.[5] Garrett did not

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the ordinances enacted by the City of Danville, a monthly disability benefit of $882.67. 30% of $35,503.92 equals $10,592.00. Dividing by 12 (number of payable months), the payable monthly benefit to Garrett, as of October 1, 2012, $882.67. (J.A. at pages 107-110; see supporting exhibits H and I.)

[5]Article 2, Members of Police Departments, and Article 3, Counties Having Urban County Executive Forum of Government, likewise have no preamble or separate codified definitions.

challenge nor request judicial review of the "Employees' Retirement System of the City of Danville, Virginia" with respect to the statutory provisions of §51.1-800 through 806, Code of Virginia (1950), as amended. Garrett only sought the proper payment of her pension benefit as set by state law.[6]

Danville cites to § 51.1-800 as a proposition that its retirement benefit should be exclusive of § 51.1-813 because the City of Richmond was carved out of the provisions of the aforementioned code section and that it was free to enact any minimum benefit level. This ignores the clear directive that every police officer be subject to the protection afforded under § 51.1-813 as long as the officer was a member of a county, city or town and covered under a pension plan. There is no evidence in this record what level of benefit the City of Richmond carries for line of duty injuries, but it was the only city granted an exemption pursuant to § 51.1-813.

What is clear is that the City of Danville carries no benefit for line of duty disability and, in fact, makes no distinction for

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[6]The trial court nullified nothing of the ERS in its Final Order.

disabilities, whether line of duty or otherwise. The trial court, through its final order, merely gave Garrett the legal right to enforce that which in plain language she was entitled to.

The City of Danville has completely mis-characterized the provisions of Article 2, Members of Police Departments, found under §51.1-807 through 820, Code of Virginia (1950), as amended. The enactment of a police officers' pension and retirement board is a completely voluntary undertaking, with no language from the General Assembly that its existence is a statutory precondition to the provisions of §51.1-813. In fact, each provision of Article 2 pertains to the express legislative purpose of providing for "Members of Police Departments", in a variety areas deemed to be of interest to the General Assembly. Not only is the position of the City of Danville with respect to this clear, unambiguous command of §51.1-813 completely unsupported by its language, their stated position that the remainder of the Code provisions within Article 2 are "not applicable to the City" is a direct challenge to the authority of the Commonwealth and the power of the General Assembly.

4. ENFORCEMENT OF THE PROVISIONS OF §51.1-813, CODE OF VIRGINIA (1950), AS AMENDED, DOES NOT IMPLICATE ANY OF THE PROVISIONS OF EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF DANVILLE AS THAT PENSION PLAN DOES NOT PROVIDE A RETIREMENT BENEFIT FOR A SERVICE-INCURRED DISABILITY OF ITS MEMBER POLICE OFFICER (ASSIGNMENT OF ERROR 3).

The retirement provisions of Chapter 32, Articles I, II and III establish and provide the following:

1. The Employees' Retirement System of the City of Danville, Virginia was established January 1, 1946. (Article I, Sec. 32-1)
2. Employee includes "policemen and firemen". (Article I, Sec. 32-2)
3. Garrett became a covered employee on the first day of the calendar month coincident with or next following [her] date of hire. (Article I, Sec. 32-4(b))
4. The Board of Trustees [of the Employees' Retirement System] is responsible for, among other duties, "making effective the provisions of this chapter...". (Article II, Sec. 32-21(a))
5. The service retirement allowance for "policemen and firemen" is as follows:
   (a) Normal retirement age is 60 for policemen and firemen.
   (b) Service retirement allowance for "policemen and firemen" consists of "an annuity which [is] the actuarial equivalent of the employee's accumulated contributions at the time of his retirement; and ... in the case of a policeman or fireman, one-fiftieth (1/50) of his average final compensation multiplied by the number of years of retirement allowance service". (Article III, Sec. 32-54 (a) and (b))

6. A member of the retirement system may receive a disability retirement allowance if the member has five (5) or more years of credible service and has not attained his normal service retirement age". (Article III, Sec. 32-56(a)(2))
7. The method of computation of the disability allowance of a member ... shall consist of an annuity shall be the actuarial equivalent of the accumulated contributions of service had the member remained uninjured and employed. (Article III, Sec. 32-56(b)(1))

Unless the City of Danville is relying upon a city ordinance outside of Chapter 32, there does not appear to be any definition of a "service related injury" in Chapter 32 and the only provision directly implicated in this dispute is Article III; Sec. 32-56(b)(1), which defines the calculation of the disability benefit.

The holding in *King v. County of Arlington*, 195 Va. 1084, 81 S.E. 2d 587 (1954) is not implicated in this case. The ERS has no corresponding benefit to § 51.1-813 which can be gleaned from the record. Garrett's benefit was calculated to be at thirty (30) percent due to her length of service, not the circumstances of her career ending injury. The General Assembly has dictated that such injuries be awarded a benefit of no less than sixty-six and two-thirds (66 2/3), regardless of length of service. As the local ordinance of the

ERS is silent as to this subject matter, the code section must prevail and the holding of *King* is not implicated nor violated.

As previously discussed in the preceding argument section, Garrett contends that §51.1-813 is a stand-alone code provision, not dependent on any other code provisions under Article I, Chapter 8. The language commands that in the event of a disability as a result of activities in the discharge of the member's official duties, the member shall receive the sum of not less than sixty-six and two-thirds percent of the member's salary until eligible to retire under age and service retirement.

Affirming the order of the trial court does not implicate the provisions of Article III, Sec. 32-56A(b)(1) since the City of Danville does not define the nature of the underlying disability nor does it address the distinctions between service incurred and non-service incurred disability for police and fire employees[7] (J.A. at pages 169-172). Affirming the order of the trial court means only that the

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[7]Service incurred disability retirements simply do not exist under the provisions of Chapter 32 of the ordinances of the City of Danville.

provisions of §51.1-813 control the amount of the benefit to be awarded in those circumstances, while the City of Danville is free to continue to award other disability benefits as they have pursuant to the provisions of Article III, Sec. 32-56(b)(1). This hardly constitutes rendering their retirement system a "nullity" as Danville contends.

CONCLUSION

Garrett contends that the underlying nature and origin of her injury compels rejection of the grounds for this appeal and enforcement of the provisions of §51.1-813 which command to the City of Danville that Garrett have her disability retirement benefit paid at a rate of no less than 66 2/3 percent.

This code section does not have the legal precondition which the City of Danville states must exist pursuant to the provisions of §51.1-807 and that they establish a "police officers' pension and retirement board" before the provisions of §51.1-813 apply. The plain language of §51.1-813 does not permit the City of Danville to ignore the expressed will of the General Assembly ; i.e., that all

service incurred disabilities of police officers who are members of a pension plan will be compensated at a retirement rate no less than 66 2/3 percent.

Respectfully submitted,

JACQUELINE GARRETT
By counsel

/s/ Michael A. Kernbach

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RULE 5:26 CERTIFICATE

I hereby certify the following, in compliance with Rule 5:26:

a. That Appellant is City of Danville, Virginia.

b. Appellant's counsel is James A. L. Daniel, Esquire (VSB No. 03881) and Maggy L. Gregory, Esquire (VSB No. 80418); Daniel Medley & Kirby, P.C., P.O. Box 720, Danville, Virginia 24543-0720; Telephone number is (434) 792-3911; Facsimile number is (434) 793-5724; and Email is jdaniel@dmklawfirm.com and mgregory@dmklawfirm.com.

c. The Appellee is Jacqueline Garrett.

d. Appellee's counsel is Michael A. Kernbach, Esquire (VSB No. 025722); Law Office of Michael A. Kernbach, P.C., 9161 Liberia Avenue, Suite 300, Manassas, Virginia 20110; Telephone number is (571) 292-9046; Facsimile number is (571) 292-9048; and Email is michael.kernbach@policeandfirelaw.com.

e. Ten (10) copies of this Brief of Appellee and one (1) electronic copy (via VACES) has been filed with the Office of the Clerk of the Supreme Court of Virginia, this 8th day of March, 2017. A copy of the Brief of Appellee was e-mailed to Appellant's counsel this 8th day of March, 2017.

f. I also certify compliance with the word count in that this brief contains 3,882 words.

/s/ Michael A. Kernbach
Michael A. Kernbach, Esquire