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IN THE

Supreme Court of Virginia

RECORD NO. 160979

CITY OF DANVILLE,

Appellant,

v.

JACQUELINE GARRETT,

Appellee.

REPLY BRIEF OF APPELLANT

James A. L. Daniel, Esq. (VSB 03881)
Maggy L. Gregory, Esq. (VSB 80418)
DANIEL, MEDLEY & KIRBY, P.C.
Post Office Box 720
Danville, Virginia 24543-0720
Telephone: (434) 792-3911
Facsimile: (434) 793-5724
jdaniel@dmklawfirm.com
mgregory@dmklawfirm.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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INTRODUCTION

Your Appellant, the City of Danville, Virginia (hereinafter "City") respectfully submits this Reply Brief of Appellant in accordance with Rule 5:29 of the Supreme Court of Virginia, providing a concise response to those issues raised in the Brief of Appellee, Jacqueline Garrett (hereinafter "Garrett") which merit further legal argument. Without restating the facts set forth in the Opening Brief, the City disputes any facts alleged in the Appellee's Response that are neither in the record nor are cited to the record, including those facts which were alleged and argued before the Workers' Compensation Commission or which are designed to engender sympathy for Garrett but were not stipulated to in the trial court below. The facts which are relevant to the questions of law presented on appeal were stipulated to in the trial court by the parties in this matter.

THE TRIAL COURT'S INTERPRETATION AND APPLICATION OF VIRGINIA CODE 51.1-813 CREATES A DIRECT CONFLICT WITH THE CITY OF DANVILLE'S ORDINANCES AND RENDERS THOSE ORDINANCES A NULLITY

Where "both a state statute and a local ordinance regulating the same subject matter can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance." King v. County of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954). Garrett's argument in response appears to be that there is no conflict between the City of Danville's Ordinances and those provisions of Article 2 of Chapter 8 of Title 51.1 of the Code of Virginia because the City of Danville's Employment and Retirement Ordinances are not intended to cover all of their employees. Garrett's argument fails for several reasons.

First, as the City's Opening Brief explained, the City is not and has never been required to provide an independent police officers' pension or retirement board. The Code of Virginia is explicitly clear that having separate provisions for the retirement and pension payments of police officers is an optional, not mandatory, municipal action. *See* Section 51.1-819 of the Code

of Virginia of 1950, as amended. Second, the language of Section 51.1-813, placed by the legislature in Article 2 (applying to municipalities that have adopted a police pension and retirement board) rather than in Article 1 (applying to municipalities with independent retirement systems) does not provide additional language that it somehow still applies even if all other provisions of Article 2 are not adopted. Rather, the language of other provisions of Article 2 provides that *none* of the provisions apply unless expressly adopted by a municipality.

The City of Danville's Ordinances apply to all of the City's employees. Those Ordinances do not specifically segregate police officers or any individual class of employees in determining retirement benefits because the City of Danville Ordinances are meant to cover all employees. The City of Danville was not required to provide additional provisions for the benefit of certain employees over other employees. Moreover, where, as here, the City of Danville's Ordinances apply, they apply without conflicting with Section 51.1-813 because the statute's applicability is subject to affirmative conditions which have not occurred in the

City's case. In contrast, the trial court's interpretation of the City Ordinances and state law is in error because it finds that the City's express retirement ordinances do not apply to its own employees.

THE TRIAL COURT'S INTERPRETATION AND APPLICATION OF VIRGINIA CODE 51.1-813 CREATES AN IRRECONCILABLE CONFLICT WITH MULTIPLE OTHER PROVISIONS OF THE VIRGINIA CODE

In support of her argument, Garrett relies heavily upon the case of Norfolk v. Key, 192 Va. 694, 66 S.E.2d 479 (1951). While the general facts of Norfolk are similar to the present case as they involve a police officer who was injured in the course of employment, the legal question presented in Norfolk is substantively dissimilar from the case before this Court. In Norfolk, a police officer had received an injury in the course of his employment in 1940. Norfolk at 696, 480. That officer then resigned his employment with the City of Norfolk to serve with the National Guard, returning to employment with the city in 1945 until he was retired on disability in 1948. Id. In 1942, the City of Norfolk enacted a new provision of their City Code

increasing the disability benefits payable. Id. The facts were undisputed that the disability resulting in retirement arose out of the injuries which occurred in 1940, prior to the enactment of the 1942 City Code section. Id. The question before the court did not involve any interplay of state regulations; rather, the question before the court was whether the applicable statute was determined by the time of retirement, or the time of the injury. Id. At 481, 698. Moreover, the "legislation" cited by Garrett as for a "beneficent purpose" actually related to three state law enactments: the enactment of the Workers' Compensation Act; the enactment of certain legislation protecting the positions of those state employees to serve in the military; and legislation which authorized, *but did not require,* localities to provide additional disability benefit provisions for municipalities with a population in excess of 100,000. Id. At 482, 699. To the limited extent that Norfolk is applicable to the case at hand, it supports the City's position that municipal ordinances, and not state law, are to be applied to resolve questions regarding municipal employee retirement and disability pay so long as "both a state

statute and a local ordinance regulating the same subject matter can stand together and be given effect." King, *supra,* at 1091, 591.

In her Response Brief, Garrett notes that the City of Richmond is specifically exempted from Section 51.1-813 of the Code of Virginia, but argues that the proper interpretation is, therefore, that the statute must apply to every other municipality within the Commonwealth except for the City of Richmond, which has no statutory directive. Appellee Brief at 12. Garrett's argument fails to note that a specific exemption of the City of Richmond is required from the requirements of Section 51.1-813 because the City of Richmond, unlike the City of Danville, has enacted a separate pension and retirement system for police officers, firefighters and emergency service personnel.[1] For a municipality such as the City of Danville, which has an independent retirement system and has also not affirmatively elected to adopt the provisions of Article 2, a specific named

[1] The retirement and benefit plans set forth for the City of Richmond's Sworn Police Officer and Firefighter Program are available, as of March 20, 2017, at http://www.richmondgov.com/Retirement/SwornIndex.aspx

exemption to Section 51.1-813 is not required because the City is already not subject to that statute.

The General Assembly has been clear that it is only "upon adoption of a resolution and establishment of the police officers' pension board [that] the board shall be vested with all the powers, authority and duties established under this Article." *See* Section 51.1-819 of the Code of Virginia of 1950, as amended. To hold that Section 51.1-813 applies to all municipalities, regardless, is to render Section 51.1-819 (as well as Section 51.1-820) illogical and without meaning.

The Supreme Court of Virginia Properly Accepted and Granted Appellant's Petition for Appeal

This Court had proper jurisdiction to consider the City's motion to have its petition retroactively deemed filed and properly exercised that jurisdiction through its August 25, 2016 Order accepting the City's Petition for Appeal as timely filed. Garrett attempts to re-argue this issue, which she previously submitted a brief addressing, in her reply to the City's brief on the merits of this case. Garrett's facts and legal argument are

without merit. Notably, Garrett states in her brief that City filed a Motion "when Garrett pointed out this missed deadline." Appellee's Brief at 6. Appellee's statement has material factual inaccuracies. In the present case, both the City and Garrett fully briefed arguments for and against the Petition before the Clerk of the Supreme Court determined a discrepancy between the entry of the trial court's order and the date on which that order was filed in the clerk's office of the trial court. Garrett had not expressed any concern or question regarding the briefing deadline until the City contacted Garrett's counsel to inform counsel, pursuant to the Rules, that the Motion to Retroactively deem the Petition Timely Submitted was being filed. Pursuant to the Rule 5:5 of the Supreme Court of Virginia, an extension "may be granted if at least two Justices of the Supreme Court of Virginia concur in a finding that an extension for papers to be filed is warranted by a showing of good cause sufficient to excuse the delay." Section 8.01-671 of the Code of Virginia of 1950, as amended, does not strip the Court of the ability to deem a Petition, already filed and responded to, as timely when good

cause exists for such retroactive application. In the present case, where the Petition had already been filed and the Response thereto had also been filed, and based upon the questions and legal arguments presented, the Court had the right and ability, pursuant to Rule 5:5, to determine that sufficient good cause existed to hold the Petition for Appeal timely filed.

CONCLUSION

Section 51.1-813 of the Code of Virginia of 1950, as amended, is a valid statutory provision that must be properly interpreted and applied in the context of Article 2 of Chapter 8 of Title 51.1, as the provisions of Article 2 involve self-limiting language which is explicitly applied to all statutes therein. The trial court's interpretation of 51.1-813 as applying to the disability retirement of Garrett directly overruled and nullified the City's own Ordinances regarding disability retirement. Moreover, the trial court's interpretation of Section 51.1-813 is inconsistent with the plain language of other statutes within Article 2 and is an interpretation which impermissibly renders those statutes illogical

and without function. The interpretation of Section 51.1-813 as set forth by the City of Danville properly reconciles both the City's Ordinances, the Section of 51.1-813, and all of the relevant statues of Title 51.1, Chapter 8, Title 2 of the Code of Virginia. For these reasons, your Appellant, the City of Danville, respectfully requests that this Court reverse the decision of the trial court and find that the City of Danville's Ordinances are valid and that the City of Danville's payments of benefits to Appellee Jacqueline Garrett have been correctly calculated as a matter of law.

CITY OF DANVILLE, VIRGINIA

By Counsel

Counsel:

/s/ James A.L. Daniel
James A.L. Daniel, Esq. (VSB #03881)
Maggy L. Gregory, Esq. (VSB (#80418)
Counsel for Appellant
Daniel, Medley & Kirby, P.C.
P.O. Box 720

Danville, Virginia 24543-0720
(434) 792-3911 telephone
(434) 793-5724 facsimile
jdaniel@dmklawfirm.com
mgregory@dmklawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, ten (10) copies of this Reply Brief of Appellant and one electronic copy (via VACES) have been filed with the Clerk of the Supreme Court of Virginia and one (1) copy was emailed and one paper copy has been mailed postage prepaid to Michael A. Kernbach, Esq., counsel for Appellee, on this 21st day of March, 2017.

I also certify compliance with the word count in that this brief contains 1,768 words, exclusive of those parts that by rule do not count toward the word limit.

Counsel:

/s/ James A.L. Daniel

James A.L. Daniel, Esq. (VSB #03881)
Maggy L. Gregory, Esq. (VSB (#80418)
Counsel for Appellant
Daniel, Medley & Kirby, P.C.
P.O. Box 720
Danville, Virginia 24543-0720
(434) 792-3911 telephone
(434) 793-5724 facsimile
jdaniel@dmklawfirm.com
mgregory@dmklawfirm.com